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15
16 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
17 **SAN FRANCISCO DIVISION**

18
19 **ROGAN O’HANDLEY,**
20 **Plaintiff,**
21 **v.**
22 **ALEX PADILLA, et. al.,**
23 **Defendants.**

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

**DEFENDANT TWITTER, INC.’S
REPLY IN SUPPORT OF SPECIAL
MOTION TO STRIKE COUNT II OF
THE COMPLAINT**

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

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SUMMARY OF ARGUMENT

O’Handley’s opposition to Twitter’s motion to strike ignores the legion of precedent mandating that this motion should be granted. For example, his main threshold contention—that the anti-SLAPP statute is inapplicable because the acts of Twitter from which his state law claim arises were supposedly not “expressive”—flies in the face of numerous decisions recognizing that privately operated online platforms like Twitter engage in First-Amendment-protected expression when they develop and enforce policies about what types of content may be posted on their platforms. He similarly fails to grapple with the consistent authority that dooms his California constitutional free speech claim on the merits, including cases establishing that such a claim requires state action (something his opposition does not even attempt to demonstrate), as well as a mountain of decisions (many from this district and several affirmed by the Ninth Circuit) holding that Section 230 of the Communications Decency Act immunizes online platforms like Twitter from suits like this one that target their decisions to remove content that violates their rules. O’Handley’s procedural objection is similarly flawed, overlooking binding Ninth Circuit precedent holding that the anti-SLAPP statute’s timing provision does not apply in federal court. For these and the other reasons discussed below, this Court should reject O’Handley’s unsupported arguments, strike his state law claim, and award costs and fees to Twitter.

O’Handley’s assertion that the anti-SLAPP statute is somehow inapplicable because the acts of Twitter from which his suit arises were not in furtherance of Twitter’s free speech rights and not connected to a matter of public concern is wrong as a matter of law. In particular, his contention that Twitter’s actions relating to his Tweets and his account did not express a particularized, identifiable message fails both because no such message is required to make an activity expressive under Supreme Court precedent, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995), and because Twitter’s actions were both expressive and communicative. When Twitter adopted and announced its policy prohibiting election-related misinformation, it expressed its view that proliferation of such misinformation can harm society by undermining public faith in electoral systems, and in democracy itself. Twitter expressed that same view in enforcing this policy, including by labeling and/or removing content posted by O’Handley (and others) that it determined to violate the policy, and ultimately by permanently suspending the accounts of O’Handley (and others) who continued to post such

1 misinformation despite multiple warnings. These acts of editorial discretion were expressive and therefore
2 protected by, or at least “in furtherance of,” Twitter’s “right of ... free speech under the United States
3 Constitution [and] the California Constitution,” Cal. Civ. Proc. Code § 425.16(b)(1). *See infra* Part I.A.

4 Likewise groundless is O’Handley’s assertion that these expressive decisions and actions by
5 Twitter were not “in connection with a public issue,” Cal. Civ. Proc. Code § 425.16(b)(1). They all
6 pertained to public discourse regarding the election of a President of the United States at a time of great
7 public concern about election-related misinformation and disinformation. And all but one of Twitter’s
8 editorial decisions and actions that were directed specifically at O’Handley occurred in the immediate wake
9 of the insurrection at the U.S. Capitol, in which a violent mob sought to interrupt the peaceful transfer of
10 power. Against this backdrop, it is simply not tenable to suggest that Twitter’s activities relating to
11 O’Handley’s Tweets and account were not “in connection with a public issue.” *See infra* Part I.B.

12 O’Handley’s state law claim against Twitter fails for multiple independent reasons, to which
13 O’Handley offers no meaningful response. He erroneously argues that the California Constitution’s free
14 speech clause does not contain a state action requirement, contrary to the uniform views of California
15 courts, the Ninth Circuit, and courts in this District. *See, e.g., Guevarra v. Seton Med. Ctr.*, 642 F. App’x 683,
16 687 (9th Cir. 2016); *Golden Gateway Ctr. v. Golden Gateway Tenants, Ass’n*, 26 Cal. 4th. 1013, 1031 (2001)
17 (plurality). *See infra* Part II.A. And his invocation of *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899 (1979),
18 likewise fails. O’Handley does not and cannot explain why it would be appropriate for this Court to
19 radically expand the narrow exception recognized in that case to cover a privately operated online
20 platform—when no California court has done so and multiple federal courts, including several in this
21 District, have explicitly declined to do so. *See infra* Part II.B.

22 Nor does O’Handley offer any basis to overcome Twitter’s other defenses to this claim. Regarding
23 Twitter’s demonstration that its own First Amendment rights bar this claim, he merely rehashes his
24 meritless argument that Twitter’s adoption and enforcement of a policy prohibiting election-related
25 misinformation is insufficiently expressive to merit constitutional protection. But as already explained,
26 those editorial decisions and acts reflected Twitter’s editorial discretion and expressed Twitter’s own views
27 regarding the harmfulness of election-related misinformation, falling squarely within the ambit of the First
28 Amendment. *See infra* Part II.C. O’Handley’s attempt to evade Twitter’s Section 230 defense fares no

1 better. He argues that Twitter’s decisions to remove his Tweets and suspend him from its platform based
2 on the content of those Tweets are not protected by subsection 230(c)(1) because they supposedly were
3 not “publication” decisions, but he has no answer to the broad consensus of courts in this Circuit and
4 elsewhere holding precisely the opposite. *See, e.g., Fyke v. Facebook, Inc.*, 808 F. App’x 597 (9th Cir. 2020);
5 *Riggs v. MySpace, Inc.*, 444 F. App’x 986, 987 (9th Cir. 2011). He also argues that Section 230 does not
6 apply on the ground that Twitter is supposedly a state actor, but even if that were true (it is not), nothing
7 in Section 230 provides such an exception; rather, aside from the handful of narrow (and inapplicable)
8 express exceptions Congress created, the statute protects Twitter from *all* suits under state law that would
9 impose liability on it for decisions not to publish certain content. *See infra* Part II.D.

10 O’Handley’s attempts to evade Twitter’s anti-SLAPP motion on procedural grounds are equally
11 meritless. The extendable 60-day period that would have applied if he had filed this case in California
12 state court is a matter of *state-court* procedure that both conflicts with the timing rules prescribed in the
13 Federal Rules of Civil Procedure and that the Ninth Circuit has held—in a controlling decision that
14 O’Handley entirely ignores—does not apply in federal court. *See Sarver v. Chartier*, 813 F.3d 891, 900 (9th
15 Cir. 2016). And even if the 60-day period did somehow apply in this Court, the anti-SLAPP statute broadly
16 permits such motions to be filed, “in the court’s discretion, at any later time upon terms it deems proper,”
17 Cal. Civ. Proc. Code § 425.16(f), and Twitter filed the motion within the time set by the Court for initial
18 responses to the Complaint. *See infra* Part III.

19 Finally, O’Handley’s request for attorney’s fees and costs should be rejected out of hand. Twitter’s
20 motion to strike is grounded in solid precedent and O’Handley’s suggestion that it was filed for purposes
21 of delay is meritless. *See infra* Part IV.

ARGUMENT

I. O’HANDLEY’S STATE LAW CLAIM ARISES FROM TWITTER’S PROTECTED SPEECH IN CONNECTION WITH A PUBLIC ISSUE

A. Twitter’s Editorial Decisions Were Protected Free Speech Activity

O’Handley’s principal argument—that the anti-SLAPP statute does not apply because the acts of Twitter described in the Complaint were not expressive (Opp. 5-8)—is incorrect. O’Handley concedes both that the statute’s applicability turns on whether “the plaintiff’s suit arises from an act in furtherance of the defendant’s rights of petition or free speech” and that the acts that this suit “arises from” are Twitter’s “strikes and eventual removal of Mr. O’Handley from its platform.” Opp. 5-6 (quoting *Jordan-Benel v. Universal City Studios, Inc.*, 859 F.3d 1184, 1188 (9th Cir. 2017)). Yet he asserts without explanation that, in performing these acts, Twitter did not “engag[e] in expressive activity of any sort.” Opp. 6.

As Twitter’s motion established (Mot. 4-5), however, Twitter expressed its negative opinions about the content of O’Handley’s Tweets by labeling them as disputed and/or likely to cause violence. *See* Compl. ¶¶ 72, 84-86. And Twitter’s decisions to remove some of O’Handley’s Tweets from its platform because it determined they contained election-related misinformation, and ultimately to suspend his account to prevent him from spreading more of the same, were also inherently expressive. These specific decisions conveyed Twitter’s view that O’Handley’s particular Tweets were not appropriate for sharing on its platform. And they operated together with numerous decisions regarding other Tweets and users to more broadly shape and develop the nature, tone, and substance of the ongoing dialogue that Twitter seeks to foster and present on its platform. These decisions are of a piece with those that the editors of *Readers’ Digest* make to distinguish their publication from *Rolling Stone*, *The Atlantic*, or *Penthouse*; or that a bookstore owner makes to target an audience of families and children, rather than an exclusively adult audience.

O’Handley erroneously suggests (Opp. 6) that his suit arises only from Twitter’s “retaliatory strikes and eventual removal of [him] from its platform,” which by his lights were not expressive, rather than from Twitter’s adoption of “policies” regarding what types of content it bars from its platform, which he apparently concedes is expressive. In applying strikes to O’Handley’s Tweets and permanently suspending his account, however, Twitter was enforcing one of those policies, namely its Civic Integrity Policy. The

1 strikes and removal were therefore acts of expression in much the same manner that adopting the policy
2 was: Twitter was saying to O’Handley—and its community of account holders and the public more
3 broadly—that it does not support the type of speech aimed at undermining faith in the electoral process
4 that O’Handley repeatedly attempted to spread through Twitter’s platform. For the same reason,
5 O’Handley’s reliance (Opp. 6) on *Jordan-Benel v. Universal City Studios, Inc.*, is misplaced. In that case, the
6 defendant’s “specific act of wrongdoing” was a “plain old failure to pay” that was only tangentially related
7 to the defendant’s expressive activity. 859 F.3d at 1191-93. Here, in contrast, Twitter’s interrelated
8 expressive acts—including the imposition of strikes and permanent suspension that O’Handley concedes
9 are “the [allegedly] wrongful conduct giving rise to [his] injury” (Opp. 6)—easily trigger application of the
10 anti-SLAPP statute.

11 Likewise unavailing is O’Handley’s argument that the Court should ignore Twitter’s labeling of
12 his Tweets in evaluating the expressive nature of the conduct from which his suit arises. He seeks to
13 defend that position by arguing that his claims do not specifically target Twitter’s decisions to label his
14 Tweets. *See* Opp. 6, 2 n.1. But O’Handley cannot escape the fact that his Complaint repeatedly faults
15 Twitter for “append[ing] commentary [to his Tweets] asserting that [his] claim about election fraud was
16 disputed.” Compl. ¶ 77; *see also id.* ¶ 86. Indeed, O’Handley repeats precisely that argument in responding
17 to other Defendants’ motions to dismiss—contending, for example, that Twitter “retaliated against Mr.
18 O’Handley ... by appending a public label” on his Tweets. Dkt. No. 68 at 2; *see also* Dkt. No. 66 at 2
19 (“Twitter punished ... by appending commentary” to his Tweets). And even he concedes (Opp. 5-6) that
20 his suit “arises from” Twitter’s “strikes”—which Twitter administered by labeling his offending Tweets.
21 In any event, the precise contours of O’Handley’s claims and requests for relief cannot change the facts
22 that Twitter engaged in a series of interrelated expressive acts; that Twitter’s decisions to act against
23 O’Handley’s Tweets and account, including but not limited to appending labels to some of his Tweets,
24 were part of Twitter’s expression; and that O’Handley’s suit arises from, and directly targets, those acts of
25 expression. *See NetChoice, LLC v. Paxton*, No. 1:21-CV-840-RP at *12 (W.D. Tex. Dec. 1, 2021) (“Social
26 media platforms have a First Amendment right to moderate content disseminated on their platforms.”).

27 O’Handley further errs in criticizing Twitter for not “submit[ing] testimony or other evidence”
28 regarding a “particularized message” conveyed by its actions relating to his Tweets and account. Opp. 7.

1 But whether an act is expressive is a legal question, not a factual one. *Ruff v. Long*, 111 F. Supp. 3d 639,
2 645 (E.D. Pa. 2015) (whether behavior is “expressive conduct” is a “threshold question of law”); *Knight v.*
3 *Montgomery Cnty.*, 470 F. Supp. 3d 760, 768 (M.D. Tenn. 2020) (“Whether activity qualifies as expressive
4 conduct is a question of law.”); *see also Planned Parenthood Fed’n of Am. v. Ctr. for Med. Progress*, 890 F.3d 828,
5 834 n.5 (9th Cir. 2018) (anti-SLAPP motion challenging legal sufficiency of claims evaluated under
6 12(b)(6) standard). More importantly, to suggest that Twitter’s labeling of O’Handley’s Tweets, imposition
7 of strikes against him, and permanent suspension of his account carried no expressive messages is to blink
8 reality. *See supra* 1. Even the basic premise of O’Handley’s criticism—that an activity constitutes protected
9 expression only when it “convey[s] a particularized message” (Opp. 7) is unfounded. As the Supreme
10 Court stated in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, communication of “a narrow,
11 succinctly articulable message is not a condition of constitutional protection.” 515 U.S. at 569.

12 O’Handley’s efforts to distinguish the numerous cases Twitter cited holding that social media
13 platforms’ decisions to exclude certain content are expressive and covered by the anti-SLAPP statute (Mot.
14 5-6) all fall flat. For instance, he contends that *Kronemyer v. Internet Movie Database Inc.*, 150 Cal. App. 4th
15 941, 947 (2007), which held that a website’s exclusion of a movie producer from movie credits on its
16 website was expressive, is inapposite because that decision “concern[ed] the defendant’s publication of
17 movie credits,” Opp. 8. But he does not (and cannot) explain why a website’s omission of someone from
18 a list of contributors to a particular movie is somehow more expressive than labelling as “disputed,” and
19 then removing altogether, particular Tweets stating that the U.S. electoral system is rife with fraud. Equally
20 unsuccessful is O’Handley’s attempt to distinguish *Greater Los Angeles Agency on Deafness, Inc. v. Cable News*
21 *Network, Inc.*, which held that “where ... an action directly targets the way a content provider chooses to
22 deliver, present, or publish news content ... that action is based on conduct in furtherance of free speech
23 rights.” 742 F.3d 414, 424-25 (9th Cir. 2014). O’Handley contends that case is different because it dealt
24 with presentation of “news videos” (Opp. 8), but again he never explains why that difference should
25 matter. It does not. Just as the courts in each of those cases recognized, an online platform’s decision to
26 omit particular content is itself expressive and therefore at least “in furtherance of” the platform’s free
27 speech rights. Cal. Civ. Proc. Code § 425.16(b)(1).

28

1 Even less persuasive are O’Handley’s efforts to distinguish the multiple precedents holding that
 2 removal decisions by more generalist online platforms (including one case involving Twitter itself) qualify
 3 as expressive activity in furtherance of the platforms’ free speech rights. As to *LaTiejira v. Facebook, Inc.*,
 4 272 F. Supp. 3d 981, 989 (S.D. Tex. 2017), and *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 196 (2017),
 5 O’Handley’s lone point seems to be that they were suits against *Facebook* rather than *Twitter*. Opp. 8. But
 6 he offers no rationale for treating Facebook’s content-moderation decisions as expressive but Twitter’s as
 7 not, and there obviously is none. As for *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629 (D. Del. 2007),
 8 O’Handley relies solely on the fact that it dealt with “prominent placement of ads” (Opp. 8) but provides
 9 no basis to suggest that one platform’s rejection of ads is more expressive than another’s rejection of posts
 10 spreading election misinformation. And his attempts to distinguish *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d
 11 433, 439 (S.D.N.Y. 2014), because it addressed “search results” (Opp. 8), and *Isaac v. Twitter, Inc.*, 2021
 12 WL 3860654, at *11 (S.D. Fla. Aug. 30, 2021), because the Tweets at issue were allegedly defamatory
 13 rather than violative of the Civic Integrity Policy Twitter enforced here, are likewise so feeble as to prove
 14 Twitter’s point.

15 **B. Twitter’s Expression Aimed At Limiting The Spread Of Election-Related**
 16 **Misinformation And Protecting Democracy Was Connected To A Public Issue**

17 There can also be no doubt that the expressive acts of Twitter from which O’Handley’s suit arises
 18 were in “connection with a public issue.” Cal. Civ. Proc. Code § 425.16(b)(1). As Twitter’s motion to
 19 strike explained, speech related to elections and political matters is at the heart of what the First
 20 Amendment protects—and thereby, at the heart of what California’s anti-SLAPP statute was intended to
 21 protect. Mot. 6-7. Myriad federal and California courts have expressly recognized as much. *See, e.g., Snyder*
 22 *v. Phelps*, 562 U.S. 443, 453 (2011); *Browne v. McCain*, 611 F. Supp. 2d 1062, 1068 (C.D. Cal. 2009) (speech
 23 connected to presidential campaign and candidate positions was covered by anti-SLAPP statute); *Uriarte*
 24 *v. Bostic*, 2017 WL 2312084, at *12 (S.D. Cal. May 26, 2017) (speech related to allegations of government
 25 wrongdoing was covered by anti-SLAPP statute); *Rosenaaur v. Scherer*, 88 Cal. App. 4th 260, 273-274 (2001)
 26 (anti-SLAPP “applies to actions arising from statements made in political campaigns”).

27 O’Handley’s main response is to again fight the premise that Twitter’s decisions not to amplify his
 28 policy-violating Tweets—which Twitter saw as attempts to undermine confidence in the electoral

1 system—were expressive. Opp. 8-10 (“Because Twitter’s conduct is not in-and-of-itself communicative,
2 it is incapable of implicating any issue[.]”). That is plainly wrong for the reasons already stated. *Supra* 1-
3 3.

4 O’Handley’s fall-back arguments also fail. He contends, for example, that the relationship
5 between Twitter’s expression and a “public issue” is too attenuated, asking the Court to evaluate the
6 “functional relationship ... between [Twitter’s expression] and the public conversation about [election
7 integrity].” Opp. 9 (quoting *FilmOn.com In. v. DoubleVerify Inc.*, 7 Cal. 5th 133, 149-150 (2019)). But that
8 relationship could not be closer here. Twitter’s expressive actions—including labeling O’Handley’s
9 Tweets alleging election fraud and eventually removing them and their source from its platform—directly
10 pertained to a number of important public issues, including the integrity of the presidential election and
11 the problem of election misinformation. And not only was the expression itself directly related to these
12 public issues, it also directly affected the public conversation on those issues by refuting and refusing to
13 propagate and disseminate O’Handley’s unsupported allegations to millions of Twitter users. As cases on
14 which O’Handley himself relies (Opp. 9) make clear, this “attempt to participate in a larger public
15 discussion” is the very type of expression the anti-SLAPP statute aims to protect, *FilmOn.com Inc.*, 7 Cal.
16 5th at 140.

17 Likewise unavailing are O’Handley’s self-contradictory assertions that Twitter’s expression was
18 not connected to a public issue both (1) because “a person cannot turn otherwise private information into
19 a matter of public interest simply by communicating it to a large number of people” and (2) because “there
20 is no evidence that Twitter did in fact communicate” publicly about its actions against O’Handley’s
21 account. Opp. 9-10. To start, it is nonsensical to simultaneously fault Twitter *both* for making its views
22 regarding the harmfulness of O’Handley Tweets public, and for not making them public *enough*. And in
23 any event, Twitter *did* communicate those views publicly by labeling O’Handley’s Tweets: “This claim
24 about election fraud is disputed.” Compl. ¶ 72; *see also id.* ¶¶ 84-86 (similar labels); Dkt. No. 68 at 2
25 (complaining about Twitter’s “public” label). Further, Twitter’s editorial decisions not to disseminate
26 unsupported assertions of election fraud are not “private information.” Twitter need not publicize every
27 granular instance in which it acts to prevent the spread of such assertions in order for its actions to bear
28 on public discourse connected to the subject matter of the Tweets it blocks. That is especially so given

1 its highly public acts of adopting and explaining its policies, such as the Civic Integrity Policy. *See* Decl.
 2 of Thomas Sprankling, Exs. C-F (public Twitter posts regarding the Civil Integrity Policy); Mot. to Dismiss
 3 1-2.

4 In sum, Twitter’s own expression was “in connection with” the public debate on election integrity,
 5 a matter of immense importance to a “large number of people beyond the direct participants” and a “topic
 6 of widespread, public interest.” *Balla v. Hall*, 59 Cal. App. 5th 652, 673 (2021), *review denied* (Apr. 14, 2021).
 7 That is determinative of the anti-SLAPP statute’s application to this case.

8 **II. O’HANDLEY FAILS TO SUFFICIENTLY PLEAD HIS CALIFORNIA STATE LAW CLAIM**

9 **A. O’Handley Does Not Even Attempt To Establish State Action, As Required By 10 The California Constitution’s Free Speech Clause**

11 O’Handley’s oppositions to Twitter’s motions to strike and to dismiss make no serious effort to
 12 respond to Twitter’s showing (Mot. 7-12; Mot. to Dismiss 16-17) that his state law claim must be dismissed
 13 because it fails to satisfy the element of state action. Instead, his opposition to Twitter’s motion to dismiss
 14 merely notes in passing (at 12-13 n.6) that the California Constitution’s free speech clause may not require
 15 state action. But O’Handley points to no controlling California Supreme Court opinion that dispenses
 16 with the state action requirement. Nor does he come to grips with the California Supreme Court’s decision
 17 in *Golden Gateway Center v. Golden Gateway Tenants, Association*, in which a plurality of the justices stated that
 18 neither the text of “California’s free speech clause nor [California] case law reveals an intent to depart
 19 from the[] bedrock principle[]” of requiring state action. 26 Cal. 4th. at 1031. And beyond *Pruneyard*’s
 20 narrow exception for the common areas of a large outdoor shopping center, the California Supreme Court
 21 has never extended the protections of Article I, Section 2 to private actors. *See Guevarra*, 642 F. App’x at
 22 687 (surveying California law); *Bolbol v. Feld Ent., Inc.*, 613 F. App’x 623, 624 (9th Cir. 2015) (concluding
 23 same based on analysis of California law).

24 In the absence of controlling law from the California Supreme Court, the Ninth Circuit, as well as
 25 many courts in this District, has followed the California Court of Appeal in concluding that “the California
 26 Supreme Court would impose a state action requirement on Article I, section 2(a), along the lines
 27 suggested in the *Golden Gateway* plurality opinion,” *Bolbol*, 613 F. App’x at 625; *see also, e.g., Zimmerman v.*
 28 *Facebook, Inc.*, 2020 WL 5877863, at *1-2 (N.D. Cal. Oct. 2, 2020); *Campbell v. Feld Ent. Inc.*, 2014 WL

1 1366581, at *7 (N.D. Cal. Apr. 7, 2014) (collecting cases); *Ennis v. City of Daly City*, 2011 WL 672655, at *6
2 (N.D. Cal. Feb. 16, 2011).

3 O’Handley offers no reason to depart from this uniform consensus among state and federal courts.
4 His sole argument is that the California Supreme Court’s opinion in *Gerawan Farming, Inc. v. Lyons*, 24 Cal.
5 4th 468 (Cal. 2000), held that Article I, section 2 contains no state action requirement. Opp. viii, 10; MTD
6 Opp. 12-13 n.6. But in *Gerawan* there was no doubt that the defendant—the state Secretary of
7 Agriculture—was a state actor, and thus any commentary on the state action issue was pure dicta. 24 Cal.
8 4th at 480. And in any event, O’Handley’s interpretation of *Gerawan* is squarely foreclosed by *Golden*
9 *Gateway*, where a majority of justices concluded that *Gerawan*’s analysis of state action is not a binding
10 statement of California law. See *Golden Gateway*, 26 Cal. 4th at 1028-1029 (plurality op.); *id.* at 1047
11 (Werdegar, J., dissenting); accord *Bolbol*, 613 F. App’x at 625. *Gerawan* thus does not support O’Handley’s
12 argument that the free speech clause contains no state action requirement.

13 O’Handley’s opposition makes no attempt whatsoever to argue that his Complaint satisfies the
14 state action requirement attendant to the California Constitution’s free speech clause. Nor could any such
15 attempt be successful. As Twitter has explained (Mot. 8-9; Mot. to Dismiss 8-12), the Complaint falls far
16 short of alleging substantial cooperation between Twitter and OEC officials to enforce its Civic Integrity
17 Policy against O’Handley’s account. And it certainly does not plausibly allege that Twitter agreed with
18 government officials to act “deliberately” to retaliate against O’Handley for criticizing Mr. Padilla and
19 other Democratic California election officials, or to block supposedly conservative voices. Mot. to
20 Dismiss 10.

21 **B. *Pruneyard* Is Inapplicable To O’Handley’s Claim**

22 Similarly unavailing is O’Handley’s attempt (Opp. 10-11; MTD Opp. 12-14) to evade the state
23 action requirement by having this Court radically expand the California Supreme Court’s narrow,
24 idiosyncratic *Pruneyard* case to include privately operated social media platforms like Twitter. O’Handley
25 offers no response to Twitter’s argument that many courts—including several in this District—have
26 explicitly rejected attempts to extend *Pruneyard* to websites and online platforms. Mot. 11 (collecting
27 cases). Although he argues that “no court has held that *Pruneyard* ... does not apply to Twitter,” MTD
28

1 Opp. 14, he offers no basis to distinguish Twitter’s platform from Vimeo, LinkedIn, and other online
2 platforms to which courts have declined to extend *Pruneyard*. Nor can O’Handley’s effort to greatly expand
3 *Pruneyard*’s scope (Opp. 11-12) be squared with how California courts have subsequently applied the case.
4 In the decades since *Pruneyard*, California courts have been loathe to extend its reach beyond its original
5 application to the common areas of large outdoor shopping centers, only once finding that the external,
6 unticketed areas of a large amusement park also qualify, *Park Mgmt. Corp. v. In Def. of Animals*, 36 Cal. App.
7 5th 649, 664 (2019). The dramatic extension O’Handley urges, therefore, runs contrary to the clear
8 consensus of both federal and California courts.
9

10 O’Handley further errs in arguing that Twitter functions as a “traditional public forum” because
11 it allegedly opens its platform to the public. Opp. 10-11; MTD Opp. 13-14. As Twitter has already
12 explained (Mot. 10-11; Mot. to Dismiss 16), Twitter has not opened its platform to all members of the
13 public as a general forum for unlimited speech dissemination. According to the California Supreme Court,
14 key to *Pruneyard*’s finding that the outdoor common areas of a shopping center were a “public forum” was
15 the shopping center owner’s “open and unrestricted invitation to the public to congregate freely.” *Golden*
16 *Gateway*, 26 Cal. 4th at 1032. Twitter, by contrast, has a panoply of Rules regarding what content account
17 holders may post, Compl. ¶¶ 3, 79, 88; requires account holders to explicitly agree to these restrictions as
18 a condition for access, Twitter Terms of Service at 1; and expressly “reserve[s] the right to remove Content
19 that violates the User Agreement,” *id.* at 7. No such restrictive terms or conditions bind citizens who
20 speak on a public sidewalk, in a shopping center’s outdoor common areas, or outside an amusement park.

21 While O’Handley asserts (Opp. 11) that Twitter’s Terms of Service do not restrict public access
22 to its platform in the same manner as “the privately owned medical centers, apartment complexes, or
23 individual homes that courts have found not to be sufficiently accessible to the public” to warrant an
24 extension of *Pruneyard*, he fails to elaborate on why that is so. Nor do individual homes or medical centers
25 constitute the outer bounds of the *Pruneyard* doctrine, such that any property with fewer restrictions
26 automatically falls within the exception. Otherwise, any large business would fall within *Pruneyard*’s ambit
27 so long as it is “open to the public,” an interpretation of *Pruneyard* that California courts have dismissed
28 as “wishful thinking,” *Albertson’s, Inc. v. Young*, 107 Cal. App. 4th 106, 117-118 (2003).

1 Finally, O’Handley grossly errs in arguing (Opp. 11) that Twitter’s Rules do not meaningfully
2 distinguish this case from *Pruneyard* because the shopping center owner in that case purported to have a
3 blanket ban on expressive activities on the grounds of the shopping center. First and foremost, unlike a
4 shopping center owner, Twitter operates a communications platform, the central function of which is to
5 gather, curate, and disseminate news and other information. And unlike the blanket ban in *Pruneyard*,
6 Twitter has established and enforces extensive *content-based* rules to govern its platform, such as its Civic
7 Integrity Policy, that prohibit account holders from posting various categories of content, and Twitter
8 routinely exercises its editorial judgment to remove content that it believes violates those rules. *See, e.g.*,
9 Twitter Rules, Sprankling Decl. Ex. B; Twitter, Civic Integrity Policy, Sprankling Decl. Exs. C-F.
10 Conversely, as the U.S. Supreme Court later explained, “[n]otably absent from *Pruneyard* was any concern
11 that access to [the shopping center’s outdoor common areas] might affect the shopping center owner’s
12 exercise of his own right to speak: the owner did not even allege that he objected to the content of the
13 pamphlets; nor was the access right content based.” *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475
14 U.S. 1, 12 (1986). For all these reasons, O’Handley’s *Pruneyard* gambit cannot save his claim.

15 **C. The First Amendment Forecloses O’Handley’s State Law Claim**

16 As Twitter’s motion demonstrated, even if O’Handley’s state law claim were otherwise valid under
17 California law, it still fails as a matter of law—and must be struck pursuant to the California anti-SLAPP
18 statute—because it is barred by the First Amendment to the U.S. Constitution. Mot. at 13-14.

19 O’Handley erroneously argues that his claims do not infringe Twitter’s own First Amendment
20 rights because his suit does not seek an injunction requiring Twitter to restore him as a speaker on its
21 platform. Opp. 11. But imposing *any form of liability* upon Twitter for the protected acts of expression
22 that O’Handley’s suit targets would violate Twitter’s First Amendment rights. It is a basic premise of
23 constitutional law that protected activity cannot be subject to civil liability. *See N.A.A.C.P. v. Claiborne*
24 *Hardware Co.*, 458 U.S. 886, 918 (1982). Thus, in a case like this, the First Amendment bars imposition of
25 not only injunctive relief, but monetary damages as well.¹

26 _____
27 ¹ O’Handley also errs in suggesting that “an order requiring Twitter to reinstate [him] ... would not violate
28 the First Amendment.” Opp. 12. Requiring Twitter to host and disseminate O’Handley’s speech against
its objection would constitute compelled speech in direct violation of Twitter’s First Amendment rights

1 O’Handley further errs in arguing (Opp. 11) that Twitter’s First Amendment rights should be
 2 disregarded because he has alleged that Twitter is a state actor. As explained in Twitter’s motion-to-
 3 dismiss reply (at 11), “[e]ven if state action were present, ... there is still the freedom to exercise subjective
 4 editorial discretion” over the speech that Twitter chooses to disseminate. *Associates & Aldrich Co. v. Times*
 5 *Mirror Co.*, 440 F.2d 133, 135 (9th Cir. 1971). Moreover, the Supreme Court has made clear that Twitter’s
 6 rights as a private speaker bear heavily on whether to treat it as a state actor in the first place, as doing so
 7 would result in infringement of the Twitter’s own First Amendment rights. *Manhattan Cmty. Access Corp.*
 8 *v. Halleck*, 139 S. Ct. 1921, 1932 (2019). That principle applies with special force here, as O’Handley’s
 9 theory of the case would “eviscerate [a] private entit[y]’s rights to exercise editorial control over speech
 10 and speakers on [its] properties or platforms.” *Id.* In any event, whether or not Twitter qualifies as a state
 11 actor for purposes of O’Handley’s *federal* constitutional claims is irrelevant to Twitter’s First Amendment
 12 defense to O’Handley’s *state* constitutional claim—which cannot trump Twitter’s rights under federal law.

13 O’Handley likewise fails in attempting (Opp. 12) to characterize as mere “conduct” Twitter’s
 14 decisions to impose strikes on his Tweets and ultimately permanently suspend him from its platform. He
 15 does not identify a single case where any court has held the operator of any medium of communication
 16 liable for declining to publish content to which the operator objected or for excluding from the medium
 17 a speaker who repeatedly posted content of a type the operator prohibited. That is because imposing such
 18 liability would directly interfere with the editorial decisions of the medium’s operator, inevitably
 19 associating the medium’s operator with the speaker and his message and preventing the medium operator
 20 from influencing the character and substance of the content that the operator wants to convey.

21 To be sure, O’Handley cites two cases (Op. 11-12) in which requiring a property owner to allow
 22 a particular speaker on its property in a manner that only tangentially involved the owner’s expression was
 23 deemed not to violate the owner’s First Amendment rights. See *Rumsfeld v. Forum for Acad. & Inst. Rights,*
 24 *Inc.*, 547 U.S. 47, 70 (2006) (law that forced law schools to permit military recruiters to recruit on campus);
 25 *Robins v. Pruneyard Shopping Ctr.*, 447 U.S. 74, 87 (1980) (law requiring shopping center owner to permit
 26 protesters on its outdoor common area). In each of those cases, the property owner’s efforts to keep such

27
 28 and would not be justified under any of O’Handley’s claims. See MTD Reply 11-12; *Sindi v. El-Moslimany*,
 896 F.3d 1, 30-32 (1st Cir. 2018); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 764–66 (1994).

1 activity from occurring on its property were deemed to be non-expressive, and compelling the property
 2 owner to permit such activity was found to be unlikely to cause members of the public to attribute to the
 3 owner the messages of the visitors. But that could not be further from the situation here.² Twitter is a
 4 *communications platform* set up and operated for the *core purpose* of gathering, curating, and disseminating
 5 information and commentary. In that capacity, Twitter adopts and enforces detailed policies about what
 6 types of content it will not disseminate. And Twitter’s decisions about what types of speech to prohibit,
 7 as reflected in both its formulation of those policies and in its case-by-case enforcement decisions, directly
 8 influences the nature and substance of the discourse it fosters on its platform, as well the understanding
 9 that Twitter’s online community (and the public more generally) have regarding Twitter’s views and values.
 10 *See also* MTD Reply 11-12.

11 In sum, O’Handley’s state law claim cannot withstand the First Amendment.

12 **D. O’Handley’s State Law Claim Is Barred By Section 230**

13 As Twitter explained, subsection 230(c)(1) of the Communications Decency Act provides yet
 14 another independent basis to strike O’Handley’s state law claim. Mot. 14-15; *see also* Mot. to Dismiss 18-
 15 21. O’Handley’s arguments to the contrary are all unavailing.

16 O’Handley is wrong that subsection 230(c)(1) is inapplicable to his California state law claim
 17 because Twitter did not act as a “publisher or speaker” when it removed his content and suspended his
 18 account. Opp. 13. As the Ninth Circuit has held in construing subsection 230(c)(1), “publication involves
 19 reviewing, editing, and deciding whether to publish or *to withdraw* from publication third-party content,”
 20

21 ² The only other case O’Handley cites on this point, *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022
 22 (N.D. Cal. 2007), is even further afield. While that case did involve defendants who had operated a
 23 website, what the plaintiffs challenged there was a business operator’s decision not to offer any of its
 24 services (i.e., facilitation of adoptions of children) to a particular class of people—same-sex couples—
 25 based solely on that status. *See id.* at 1059-1060. Nothing in *Butler* suggests that the defendants’
 26 discrimination against the plaintiffs in that case turned on the *content* of anything the plaintiffs said or
 27 proposed to say in any posting on the defendants’ website. For these reasons, *Butler*’s conclusion that
 28 such purely *status-based* discrimination was neither expressive nor protected by the First Amendment, *id.*,
 has no bearing here. Equally misguided is O’Handley’s related assertion (MTD Opp. 20) that crediting
 Twitter’s positions in this case would, by extension, license it to exclude people from speaking on its
 platform based solely on their race. The present case involves decisions by Twitter concerning only what
content it allows on its platform, as well as its exclusion of a speaker based on his repeated posting of
 prohibited *content*. None of the positions Twitter advocates here would authorize it to refuse to offer
 services to anyone based on their status within some protected class.

1 and that, “removing content is something publishers do.” *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102-1103
2 (9th Cir. 2009) (emphasis added). Accordingly, courts have routinely held that deciding whether or how
3 to block or remove user-generated content is a paradigmatic kind of publishing conduct that subsection
4 230(c)(1) protects. *See Riggs*, 444 F. App’x at 987 (affirming district court’s dismissal on Section 230
5 grounds of a claim based on MySpace’s refusal to remove content); *Fed. Agency of News LLC (“FAN”) v.*
6 *Facebook, Inc.*, 432 F. Supp. 3d 1107, 1119-1120 (N.D. Cal. 2020) (holding that claims “predicated on
7 Facebook’s decision to remove content ... treat[ed] Facebook as a publisher”); *Sikhs for Just., Inc. v.*
8 *Facebook, Inc.*, 144 F. Supp. 3d 1088, 1095 (N.D. Cal. 2015) (same), *aff’d*, 697 F. App’x 526 (9th Cir. 2017);
9 *Fyk v. Facebook, Inc.*, 2019 WL 11288576, at *2 (N.D. Cal. June 18, 2019) (same), *aff’d*, 808 F. App’x 597
10 (9th Cir. 2020). This principle is equally applicable to Twitter’s suspension of O’Handley’s account. *See*
11 *FAN*, 432 F. Supp. 3d at 1119-20 (suit challenging removal of plaintiff’s Facebook account was barred by
12 Section 230); *Murphy v. Twitter, Inc.*, 247 Cal. Rptr. 3d 360, 376-77 (Cal. App. 2021) (suit challenging
13 enforcement of platform’s rules was barred by Section 230); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116,
14 1124 (N.D. Cal. 2016) (“Despite being aimed at blocking Twitter accounts instead of particular tweets,
15 plaintiffs’ provision of accounts theory is still based on Twitter’s alleged violation of a ‘duty . . . derive[d]
16 from [its] status or conduct as a publisher.’”), *aff’d on other grounds*, 881 F.3d 739 (9th Cir. 2018); *Mezey v.*
17 *Twitter, Inc.*, 2018 WL 5306769, at *1 (S.D. Fla. July 19, 2018). O’Handley offers no reasons for this Court
18 to depart from this overwhelming consensus.

19 O’Handley likewise errs in arguing that Section 230 “is of no effect” simply because O’Handley
20 has alleged that Twitter is a state actor for purposes of his federal First Amendment claim. Opp. 13.
21 Twitter’s motion to strike does not concern O’Handley’s First Amendment claim; it seeks to apply Section
22 230(c)(1) to only his California state law claim.

23 O’Handley fails to offer any other reason why subsection 230(c)(1) does not mandate striking his
24 California constitutional claim. The plain language of Section 230 prohibits liability from being imposed
25 “under any State or local law that is inconsistent” with subsection 230(c)(1), and California’s constitution
26 obviously constitutes “State ... law.” (emphasis added). Courts in this District and elsewhere have thus
27 held that subsection 230(c)(1) bars claims brought against online platforms, including Twitter, under the
28 California Constitution’s free speech clause. *See Doe v. Twitter, Inc.*, 2021 WL 3675207, at *33 (N.D. Cal.

1 Aug. 19, 2021) (holding that Section 230(c)(1) immunized Twitter from liability arising out of California
 2 Constitutional claim “based on Twitter’s role as a ‘republisher’ of third-party content”); *Domen v. Vimeo,*
 3 *Inc.*, 433 F. Supp. 3d 592, 603 (S.D.N.Y. 2020), *aff’d on other grounds*, 2021 WL 4352312 (2d Cir. Sept. 24,
 4 2021). The same reasoning mandates striking O’Handley’s state law claim here.

5 **III. O’HANDLEY’S SUGGESTION THAT TWITTER’S MOTION IS UNTIMELY IS MERITLESS**

6 Binding precedent forecloses O’Handley’s argument that Twitter’s anti-SLAPP motion is
 7 untimely. In *Sarver v. Chartier*, the Ninth Circuit specifically held that the extendable 60-day period
 8 prescribed in the anti-SLAPP statute is a state procedural rule that conflicts with federal rules of procedure
 9 and therefore does not apply in federal court. 813 F.3d at 900. Under Ninth Circuit precedent, an anti-
 10 SLAPP motion like Twitter’s, which is presented at the threshold of the case and challenges the legal
 11 sufficiency of the complaint, is a form of responsive pleading governed by the procedure set forth in Fed.
 12 R. Civ. P. 12(b)(6). *Planned Parenthood*, 890 F.3d at 834.³ Because the California statutory 60-day deadline
 13 “directly colli[des]” with Rule 12’s deadline for responding to the complaint, courts in this District have
 14 interpreted *Sarver* to hold “that the 60-day time limit in § 425.16(f) does not apply in federal court”—
 15 including to anti-SLAPP motions, like Twitter’s, that challenge only the legal sufficiency of the complaint.
 16 *NSS Labs, Inc. v. Symantec Corp.*, 2020 WL 1929338, at *2 n.1 (N.D. Cal. Apr. 21, 2020) (legal sufficiency
 17 anti-SLAPP motion).⁴

18 Remarkably, O’Handley’s opposition neither acknowledges nor references *Sarver*, and relegates to
 19 a single footnote (Opp. 3 n.4) his *entire* discussion of *federal* case law relating to the timing of anti-SLAPP
 20 motions in federal court. That footnote cites three district court decisions that he claims applied the 60-
 21 day requirement to bar anti-SLAPP motions that “challeng[ed] only the legal sufficiency of the plaintiff’s
 22

23 ³ See also Fed. R. Civ. P. 12(a) (“Unless another time is specified by this rule or a *federal* statute, the time for
 24 serving a responsive pleading is”); Civil L.R. 6 (permitting extension of response deadline based on
 consent, stipulation, or court order).

25 ⁴ See also, e.g., *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 402 F. Supp. 3d 615, 716 n.127
 26 (N.D. Cal. 2019) (“[T]he Ninth Circuit has held that the strict timeframe under [the anti-SLAPP statute]
 27 for filing a special motion to strike does not apply in the Ninth Circuit.” (citing *Sarver*)); *Gamble v. Kaiser*
 28 *Found. Health Plan, Inc.*, 348 F. Supp. 3d 1003, n.12 (N.D. Cal. 2018) (applying *Sarver* to an anti-SLAPP
 motion at the motion-to-dismiss stage and noting that “[a]n anti-SLAPP motion brought in federal court
 is not subject to the time limitations in the California statute”).

1 claims.” (Opp. 3 n.4). But the only one of those decisions to come from this District pre-dated *Sarver*.
2 And the two other decisions erroneously failed to abide by *Sarver*’s controlling holding.

3 Even if (contrary to *Sarver* and other federal precedent) the California 60-day procedural rule were
4 applicable, Twitter’s motion to strike would still be timely because that rule is flexible, because the courts
5 handling this case issued orders extending the time for initial responses to the Complaint, and because
6 Twitter filed the motion within the time prescribed by those orders. The anti-SLAPP statute provides
7 that motions to strike “may be filed within 60 days of the service of the complaint *or, in the court’s discretion,*
8 *at any later time upon terms it deems proper.*” Cal. Civ. Proc. Code § 425.16(e) (emphasis added). Here, Judge
9 Marshall of the Central District of California, where O’Handley improperly commenced this case, twice
10 extended Twitter’s deadline to respond to the Complaint, first to align the deadlines for the various
11 defendants,⁵ and then—simultaneously with transferring the case—to vacate all deadlines for “initial
12 responsive pleadings and/or dispositive motions” and to direct the parties to “seek to establish a new
13 schedule for filing and briefing motions to dismiss *or other responses to the complaint* in accordance with the
14 rules, orders, and practices of the transferee court.” Dkt. No. 36 (emphasis added). This Court then
15 accepted the parties’ stipulated schedule and stipulated briefing format for initial responses to the
16 Complaint, setting Twitter’s deadline to respond as October 5, 2021, Dkt. No. 51, and establishing page
17 limits for both Twitter’s motion to dismiss *and its anti-SLAPP motion*, Dkt. No. 54. Twitter then filed its
18 motion to strike within the court-ordered time period. Dkt. No. 61.

19 If more were needed, the delays resulting from O’Handley’s improper filing of this case in the
20 wrong venue—in violation of his agreement to a forum selection clause that required all claims against
21 Twitter to be litigated solely in state or federal court located in San Francisco county, *see* Dkt. No. 33 at
22 2— would provide more than enough reason for the Court to exercise its discretion to entertain Twitter’s
23 motion to strike, even if it were somehow otherwise deemed to be untimely. Twitter’s motion to strike
24 was filed within 21 days of the entry of the transfer order, *see* Dkt. Nos. 36 & 61, and before any other
25 substantive action in the case. *See Clifford v. Trump*, 339 F. Supp. 3d 915, 923-924 (C.D. Cal. 2018)

26
27
28 ⁵ *See* Dkt. No. 31 (setting September 10 deadline for “[a]ll Defendants ... to file their initial responsive
pleadings and/or dispositive motions”).

1 (accepting anti-SLAPP motion brought under Texas law where the motion was filed promptly after
2 transfer).

3 Finally, O’Handley’s suggestion that consideration of Twitter’s motion will undermine the anti-
4 SLAPP statute’s aim of “examining the merits of covered lawsuits in the early stages of the proceedings”
5 (Opp. 4) is nonsense. This *is* the early stages of the proceedings. Twitter’s motion to strike was among
6 the first substantive filings in this case, and its timing cannot have delayed the proceedings or prejudiced
7 O’Handley in any way.

8 **IV. O’HANDLEY IS NOT ENTITLED TO COSTS AND FEES**

9 O’Handley’s assertions that Twitter’s motion is “frivolous,” “solely intended to cause unnecessary
10 delay,” and filed “as a result of bad-faith,” Opp. 14, are groundless. Twitter’s anti-SLAPP motion is on
11 the same track as all pending dispositive motions, and, therefore, cannot possibly function to “delay
12 resolution of the issues in this case” as O’Handley suggests. *Id.* And the fact that the same standard of
13 review applies to both Twitter’s motion to strike and its motion to dismiss is of no moment; Twitter is
14 entitled to invoke all defenses and procedural mechanisms available to it and has done so in a timely
15 manner.

16 O’Handley’s assertion that Twitter “failed to mount a genuine attempt to establish the applicability
17 of the anti-SLAPP statute,” Opp. 14, is likewise meritless. Multiple courts have granted anti-SLAPP
18 motions in analogous contexts, finding that Twitter and other social media platforms engage in expression
19 when they remove users like O’Handley from their platforms. *See supra* 3. Twitter’s invocation of
20 substantial case law supporting its motion to strike cannot be characterized as ingenuine. And
21 O’Handley’s criticism of Twitter’s failure to submit evidence or testimony is misplaced: an anti-SLAPP
22 motion is reviewed on the standard that applies to a Rule 12(b)(6) motion to dismiss, *see Planned Parenthood*,
23 890 F.3d at 834. Twitter was therefore not entitled to introduce evidence. Nor is evidence necessary to
24 grant the motion to strike; as explained, “[w]hether activity qualifies as expressive conduct is a question
25 of law.” *Knight*, 470 F. Supp. 3d at 768; *see also supra* 2-3.

26 **CONCLUSION**

27 For all of the foregoing reasons, and those set forth in Twitter’s opening memorandum, the Court
28 should grant Twitter’s Motion to Strike.

1 Dated: December 1, 2021

Respectfully submitted,

2
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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