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NATIONAL ASSOCIATION OF SECRETARIES OF STATE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

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not allege a deprivation of any civil rights.25

5 V. CONCLUSION26

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I. NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE THAT on December 16, 2021, at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 6 on the 17th Floor of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue in San Francisco, California 94102, before the Honorable Charles R. Breyer, Defendant National Association of Secretaries of State (“NASS”), Inc. will, and hereby does, move to dismiss the Complaint of Plaintiff Rogan O’Handley pursuant Rule 12(b)(2) of the Federal Rules of Civil Procedure for lack of personal jurisdiction. Further, Defendant NASS will, and hereby does, move to dismiss the Complaint of Plaintiff Janet Snyder pursuant Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim.

This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum in support of the Motion, the anticipated Reply in support of this motion, and on such other written and oral argument as may be presented to the Court.

This motion is made following conferences of counsel pursuant to L.R. 7-3, which took place on July 22, 2021.

1 **II. SUMMARY OF ARGUMENT AND STATEMENT OF ISSUES**

2 This Court should dismiss Defendant National Association of Secretaries of
3 State (“NASS”) from this action for two reasons.

4 First, the Court should dismiss because it lacks personal jurisdiction over
5 NASS. Fed. R. Civ. Proc. 12(b)(2). NASS is incorporated in Kentucky with its
6 principal place of business in Washington, D.C. (Declaration of Leslie Reynolds
7 (“Reynolds Dec.”) ¶ 7.) NASS does not and did not have a presence in California
8 rendering it “at home” here. It never had any subsidiaries, offices, bank accounts,
9 employees, or agents in California. NASS does not target California residents and it
10 has never been registered to do business in California. (Reynolds Dec. ¶ 8.) Thus,
11 the Court has neither general nor specific jurisdiction over NASS. *Daimler AG v.*
12 *Bauman*, 571 U.S. 117, 138 (2014) (requirements for general jurisdiction); *World-*
13 *Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (specific
14 jurisdiction).

15 Second, the Court should dismiss NASS from this action for “failure to state
16 a claim upon which relief can be granted.” Fed. R. Civ. Proc. 12(b)(6). NASS is a
17 private corporation, not a government or state actor. Plaintiff alleges violation of
18 rights allegedly protected by the federal and California constitutions, but both protect
19 only against government action, not the actions of private entities, like NASS, or
20 like Twitter. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999); *Caviness*
21 *v. Horizon Community Learning Center, Inc.*, 590 F.3d 806, 812 (9th Cir. 2010);
22 *Golden Gateway Center v. Golden Gateway Tenants Assn.*, 26 Cal. 4th 1013, 1031
23 (2001). The gravamen of Plaintiff’s complaint is that he was “suspended” from
24 Twitter, and the other defendants contributed in some way. With no Constitutional
25 right to appear on any particular social media site, and no possible Constitutional
26 violation by a private actor, Plaintiff’s claims against NASS are meritless on their
27 face, and this Court should dismiss.

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III. FACTS

A. NASS is a non-profit, non-governmental, non-resident organization without a California presence.

NASS is non-profit, nonpartisan professional organization for public officials. It serves as a medium for the exchange of information between states and fosters cooperation in the development of public policy. The association has key initiatives in the areas of elections and voting, state business services, and state heritage/archive. NASS is not a government agency but is a private concern. NASS is not a creature of any statute, rule, or regulation, nor does NASS have the power to enact any statute, rule, or regulation. (Reynolds Dec. ¶¶ 3-5.)

NASS is incorporated in Kentucky and its principal place of business is in Washington, D.C. (Reynolds Dec. ¶ 7.) NASS has no presence in California.

- NASS has no subsidiaries incorporated or qualified to do business in California;
- NASS is not and never has been registered to do business in the state of California;
- NASS does not have now and never previously had any offices in the state of California;
- NASS does not have now and never previously had any employees in the state of California;
- NASS does not have now and never previously had any bank accounts in the state of California;
- NASS does not have now and never previously had a registered agent in the state of California;
- None of NASS’s current officers or directors reside or are domiciled in California;

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- 1 • NASS does not and has not directed any of its advertising specifically
- 2 toward California residents, nor does it advertise in any publications
- 3 that are directed primarily toward California residents; and
- 4 • NASS does not and has not contracted with persons residing in
- 5 California to act on its behalf with respect to marketing or advertising
- 6 NASS’s services. (Reynolds Dec. ¶¶ 2 and 8.)

7
8 **B. Plaintiff’s complaint admits NASS is headquartered in D.C., and**
9 **alleges deprivation of his Constitutional rights.**

10 Plaintiff Rogan O’Handley filed this lawsuit seeking declaratory judgment,
11 monetary damages, and injunctive relief for the alleged suppression of Plaintiff’s
12 speech on social media platforms; namely, Twitter.

13 Plaintiff’s complaint alleges six claims for relief. Four are alleged against
14 NASS.

15 (1) First claim for relief, entitled First Amendment – Free Speech (42 U.S.C.
16 § 1983). (Docket Nos. 1-2, p. 24.)

17 (2) Second claim for relief, entitled California Constitution art. I § 2 – Free
18 Speech. (Docket Nos. 1-2, p. 26.)

19 (3) Third claim for relief, entitled Fourteenth Amendment –Equal Protection
20 Discrimination (42 U.S.C. § 1983). (Docket Nos. 1-2, p. 27.)

21 (4) Sixth claim for relief, entitled claim for Civil Conspiracy to Interfere with
22 Civil Rights (42 U.S.C. § 1985). (Docket Nos. 1-2, p. 30.)¹

23 Plaintiff admits NASS’s headquarters are located in Washington, D.C., and
24 alleges that NASS “does business in California, and the California Secretary of State
25 is an association member.” (Docket Nos. 1-2, p. 6, ¶ 18.)

26 Plaintiff then makes the following allegations against NASS:

27 ¹ The fourth and fifth claims, for alleged violation of the Fourteenth Amendment -
28 Due Process Clause (42 U.S.C. § 1983) and Void for Vagueness (42 U.S.C. §
1983), are not alleged against NASS. (Docket Nos. 1-2.)

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1 26. The National Association of Secretaries (“NASS”) spearheaded efforts
2 to censor disfavored election speech.

3 27. NASS created direct channels of communication between Secretaries
4 of States’ staff and social media companies to facilitate the quick take-
5 down of speech deemed “misinformation.”

6 28. For instance, NASS Director of Communications Maria Benson stated
7 in email that Twitter asked her to let Secretaries of States’ offices know
8 that it had created a separate dedicated way for election officials to “flag
9 concerns directly to Twitter.” A true and correct copy of Maria
10 Benson's October 1, 2020, email, as obtained through a public records
11 request, is attached to this complaint as Exhibit 2.

12 29. NASS’s dedicated reporting channel to Twitter, according to Maria
13 Benson, would get Secretaries of States’ employees’ censorship
14 requests “bumped to the head of the queue.” A true and correct copy of
15 Maria Benson’s August 8, 2020, email, as obtained through a public
16 record request, is attached to this complaint as Exhibit 3.

17 30. NASS asked its members to give it a “heads up” when officials saw
18 mis-or disinformation on social platforms to help NASS “create a more
19 national narrative.” A true and correct copy of Maria Benson's August
20 8, 2020, email, as obtained through a public record request, is attached
21 to this complaint as Exhibit 4.

22 31. NASS wanted election officials to have NASS’s email guidance
23 regarding how to report “mis/disinformation” directly to social media
24 companies “handy” directly prior to election day as election officials
25 “prepare[d] for battle.” A true and correct copy of Maria Benson's

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1 November 2, 2020, email, as obtained through a public record request,
2 is attached to this complaint as Exhibit 4². (Docket Nos. 1-2, pp. 7-8.)

3 **C. NASS is not a state actor.**

4 There are no allegations that NASS participated in any alleged state action
5 that caused the claimed harm to Plaintiff. NASS did not create the Twitter or
6 Facebook portals but merely passed on information about the portals to its members.
7 There is no allegation that any of NASS’s members in California actually used these
8 portals to report issues with Plaintiff’s political speech. In fact, NASS is not even
9 copied on any the reports regarding Plaintiff’s speech set forth in the Complaint.

10 **IV. ARGUMENT**

11 **A. This Court has no personal jurisdiction over out-of-state NASS.**

12 “When a defendant challenges the sufficiency of personal jurisdiction, the
13 plaintiff bears the burden of establishing personal jurisdiction over the defendant.”
14 *Sinatra v. Nat’l Enquirer, Inc.*, 854 F.2d 1191, 1194 (9th Cir. 1988). Plaintiff cannot
15 meet that burden. There are two types of personal jurisdiction, general and specific.
16 Neither applies to NASS, which has almost no connection to California.

17 **1. NASS is not subject to general jurisdiction in California**
18 **because it is not “essentially at home” here.**

19 General jurisdiction arises when the defendant’s “‘continuous corporate
20 operations within a state [are] so substantial and of such a nature as to justify suit
21 against it on causes of action arising from dealings entirely distinct from those
22 activities’.” *Daimler AG v. Bauman*, 571 U.S. 117, 138 (2014) (citation omitted).
23 Only in an exceptional case will a corporation’s operations in a forum other than its
24 state of incorporation or principal place of business be “so ‘continuous and
25 systematic’ as to render [it] essentially at home” in the forum state. *Id.* at 139 n.19,
26 quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

27 _____
28 ² Nothing in Exhibit 4 attached to the Complaint states anything about election
officials getting “prepar[ed] for battle.”

1 “[F]or general jurisdiction purposes, a foreign corporation’s [California] contacts
2 must be ‘comparable to a domestic enterprise’ in California.” *Young v. Daimler AG*,
3 175 Cal. Rptr. 3d 811, 817 (2014), quoting *Daimler AG, supra*, fn. 11.

4 NASS is incorporated in Kentucky and its principal place of business is in
5 Washington, D.C. (Reynolds Dec. ¶ 7.) NASS has no operations in California, and
6 certainly not any operations that make California “essentially” NASS’s home.
7 (Reynolds Dec. ¶ 8.) Plaintiff concedes the lack of general jurisdiction in his
8 complaint by admitting that NASS is headquartered in Washington D.C. (Docket
9 Nos. 1-2 ¶ 18.) There is no basis for general jurisdiction.

10 **2. NASS is not subject to specific jurisdiction in California**
11 **because it never “purposefully availed” itself of the forum.**

12 A defendant “may be subject to the specific jurisdiction of the forum, if the
13 defendant has purposefully availed himself or herself of forum benefits, and the
14 controversy is related to or arises out of a defendant’s contacts with the forum.” *Vons*
15 *Cos., Inc. v. Seabest Foods, Inc.* 14 Cal. 4th 434, 446 (Cal. 1996), quoting
16 *Helicopteros Nacionales de Columbia v. Hall*, 446 U.S. 408, 414-415 (1984)
17 (citations omitted). Here, Plaintiff cannot show that NASS purposely availed itself
18 to the benefits of California.

19 The “purposeful availment” requirement severely restricts jurisdiction over
20 nonresidents. Jurisdiction exists only where there is “some act by which the
21 defendant purposefully avails itself of the privilege of conducting activities within
22 the forum State, thus invoking the benefits and protections of its laws.” *Hanson v.*
23 *Denckla*, 357 U.S. 235, 253 (1958). It is essential that “the defendant’s conduct and
24 connection with the forum State are such that he should reasonably anticipate being
25 haled into court there.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286,
26 297 (1980). Stated another way, it does not allow jurisdiction “solely as the result of
27 ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts ... or of the ‘unilateral activity of
28 another party or third person.’” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475

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1 (1985) (citations omitted); accord *Walden v. Fiore* (2013) 571 U.S. 277 (no Nevada
2 jurisdiction over Georgia resident where acts complained of took place in Georgia
3 to a Nevada plaintiff).

4 For example, in *Asahi Metal Industries Co. v. Superior Court of California*,
5 480 U.S. 102 (1987), the United States Supreme Court ruled that even if a company
6 is aware that its products might be used in California that is insufficient to establish
7 jurisdiction in California. “Purposeful availment” requires more than that one’s
8 product, or in this case one’s service, shows up in the jurisdiction. The respondents
9 in *Asahi* established the company’s awareness that some of its products (valve stems)
10 would be incorporated into tire tubes sold in California, however, it was not
11 demonstrated that Asahi purposefully availed itself of the California market. Asahi
12 did not do business in California. It had no office, agents, employees, or property in
13 California. It did not advertise or otherwise solicit business in California. It did not
14 create, control, or employ the distribution system that brought its valves to
15 California. “On the basis of these facts, the exertion of personal jurisdiction over
16 Asahi by the Superior Court of California exceeds the limits of due process.” *Asahi*,
17 *supra*, at 480 U.S. 112-113.

18 The factors identified in *Asahi* are also true for NASS. NASS does not have
19 and never did have any offices, agent, or employees in California. It does not have
20 any bank accounts in California and it has never registered to do business in
21 California. Further, NASS has not directed any of its advertising specifically toward
22 California residents, or contracted with any persons in California to market or
23 advertise on behalf of NASS. (Reynolds Decl. ¶ 8.) NASS does not “conduct[]
24 activities within the forum State,” and had not “invoke[d] the benefits and
25 protections” of California.

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a. NASS’s emails do not establish a substantial connection between NASS and California.

NASS’s only alleged activity in California consists of sending emails to its member, the California Secretary of State. That does not establish a substantial connection between NASS and California.

Such remote digital contact was at issue in in *PREP Tours, Inc. v American Youth Soccer Organization*, 913 F.3d 11 (1st Cir. 2019). A Puerto Rico tour company sued a California youth soccer organization in Puerto Rico district court alleging breach of contract related to a potential group soccer trip to Puerto Rico. 913 F.3d at 23. The tour company’s contact with the soccer group in California consisted of emails and telephone communications. The District Court dismissed the action for lack of personal jurisdiction and First Circuit Court of Appeals affirmed the dismissal holding that the contacts did not amount to “purposeful availment.” *Ibid*. The soccer group’s “in-forum” activities consisted exclusively of remote communications concerning a possible trip, and it could not be inferred from the communications alone that defendants contemplated “the kind of ongoing and close-working relationship with [plaintiff] that could establish the requisite substantial connection between the defendants and the forum.” *Ibid*. The preliminary nature of the communications diminished foreseeability of extensive in-forum activities. *Ibid*.

Secretaries of State from any state in the country can become members of NASS. The California Secretary of State is a member and therefore receives communications from NASS. (Reynolds Decl. ¶ 3.) These communications are not extensive in-forum activities sufficient to subject NASS to the jurisdiction of this Court. They are similar to emails received when one subscribes to an on-line magazine or newspaper. The receipt of these emails in California does not subject the nonresident sender of the emails to jurisdiction in California.

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1 No state has jurisdiction over every out-of-state organization in which its
 2 residents are members (or shareholders, or partners.)³ No case has ever held that an
 3 association is subject to jurisdiction in a state because one of its members is subject
 4 to jurisdiction there. This Court should not be the first.

5 **b. Plaintiff’s claimed injuries are not the result of**
 6 **NASS’s limited activity in California.**

7 Even if NASS’s emails to California Secretary of State’s office were
 8 somehow sufficient to establish minimum contacts with California (an argument
 9 NASS does not concede), Plaintiff’s claims do not arise out of or relate to that
 10 activity. Rather, Plaintiff’s claims stem from unilateral activity by others over whom
 11 NASS has no control. This is insufficient to satisfy the “purposeful availment”
 12 requirement. The “unilateral activity of another party or a third person is not an
 13 appropriate consideration when determining whether a defendant has sufficient
 14 contacts with a forum State to justify an assertion of jurisdiction.” *Helicopteros*
 15 *Nacionales de Colombia, S.A., supra*, 466 U.S. at 416-417.

16 In the seminal case of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S.
 17 286 (1980), the Supreme Court found no Oklahoma jurisdiction over New York-
 18 area companies that distributed an allegedly defective car in New York that was later
 19 involved in an Oklahoma accident.

20
 21 _____
 22 ³ Federal courts have as broad powers of personal jurisdiction as the courts of the
 23 state in which they sit, but no broader. *Omni Capital Int’l, Ltd. V, Rudolph Wolff &*
 24 *Co., Ltd*, 484 U.S. 97, 104-105 (1987).

25 This Court may exercise personal jurisdiction over a non-resident defendant, such
 26 as NASS, only to the extent permitted by the Due Process Clause of the Fourteenth
 27 Amendment to the United States Constitution. *See Goodyear Dunlop Tires*
 28 *Operations, S.A. v. Brown*, 564 U.S. 915 (2011) (“The Due Process Clause of the
 Fourteenth Amendment sets the outer boundaries of a state tribunal’s authority to
 proceed against a defendant”); *see also Bristol-Myers Squibb v. Superior Court*,
 137 S. Ct. 1773, 1779 (2017) (“It has long been established that the Fourteenth
 Amendment limits the personal jurisdiction of state courts.”)

1 There is no evidence of record that any automobiles distributed by World-
 2 Wide are sold to retail customers outside this tristate area. It is foreseeable
 3 that the purchasers of automobiles sold by World-Wide and Seaway may
 4 take them to Oklahoma. But the mere “unilateral activity of those who claim
 5 some relationship with a nonresident defendant cannot satisfy the
 6 requirement of contact with the forum State.”

6 *Id.* at 298, citing *Hanson v. Denckla, supra*, at 253.

7 Here too, even if NASS’s email providing portals for reporting election
 8 dis/misinformation is deemed a minimum contact with California, it was not because
 9 of any of these emails that Plaintiff sustained his alleged injuries. Instead, Plaintiff’s
 10 claims stem from the alleged suppression of speech by others. NASS has no control
 11 over what is done once its members utilize the portals provided in its email. NASS
 12 could not foresee that simply sending such an email would result in the “unilateral
 13 activity” of others who may claim to have some relationship with NASS, which in
 14 turn results in Plaintiff’s alleged injuries. This is too tenuous a basis on which to find
 15 NASS subject to the jurisdiction of this Court.

16 **B. Plaintiff’s first (First Amendment) and third (Fourteenth**
 17 **Amendment) claims fail to state a claim upon which relief can be**
 18 **granted against NASS.**

19 Federal Rule of Civil Procedure 12(b)(6) requires dismissal if a plaintiff fails
 20 “to state a claim upon which relief can be granted.” For the plaintiff to survive a
 21 motion to dismiss, the complaint must contain “enough facts to state a claim to relief
 22 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
 23 Mere “labels and conclusions” are insufficient. *Id.* at 555. “A claim has facial
 24 plausibility when the plaintiff pleads factual content that allows the court to draw
 25 the reasonable inference that the defendant is liable for the misconduct alleged.”
 26 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), citing *Bell Atl. Corp., supra*, 550 U.S.
 27 at 556. “Plausibility” requires more than a “sheer possibility that a defendant has
 28 acted unlawfully” or the “mere possibility of misconduct,” and a complaint that

1 alleges facts that are “merely consistent with” liability “stops short of the line
2 between possibility and plausibility of ‘entitlement to relief.’” *Ashcroft, supra*, 556
3 U.S. at 678–79 citing *Bell Atl. Corp., supra*, 550 U.S. at 557. The well-pled
4 allegations in a complaint must “nudge [] [a party’s] claims across the line from
5 conceivable to plausible.” *Bell Atl. Corp., supra*, 555 U.S. at 570.

6 The Supreme Court has decreed that a plaintiff’s complaint must contain facts
7 with enough specificity “to raise a right to relief above the speculative level.” *Bell*
8 *Atl. Corp.*, 550 U.S. at 555. On a motion to dismiss under Rule 12(b)(6), factual
9 matter in the complaint is taken as true, but the court need not accept legal
10 conclusions. *Ibid.*; *Ashcroft, supra*, 556 U.S. at 678. “Threadbare recitals of the
11 elements of a cause of action, supported by mere conclusory statements,” will not
12 pass muster. *Ashcroft, supra*, 556 U.S. at 678.

13 **1. Plaintiff’s Constitutional claims do not state a claim against**
14 **private actor NASS, and are only applicable to actions by**
15 **the state or those acting in concert with the state.**

16 All of Plaintiff’s claims under 42 U.S.C. § 1983 (the First, Third, and Sixth
17 claims) require that “the conduct at issue must have occurred ‘under color of’ state
18 law; thus, liability attaches only to those wrongdoers ‘who carry a badge of authority
19 of a State and represent it in some capacity, whether they act in accordance with their
20 authority or misuse it.’” *National Collegiate Athletic Assn. v. Tarkanian* (1988) 488
21 U.S. 179, 191 (“*Tarkanian*”) (citations omitted). “[C]onstitutional standards are
22 invoked only when it can be said that the State is responsible for the specific conduct
23 of which the plaintiff complains.” *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

24 For example, Plaintiff’s first claim for relief is for violation of his First
25 Amendment rights. However, there is no such claim against non-governmental
26 parties such as NASS, or Twitter. “[A] private actor, not a state actor ... is not subject
27 to First Amendment constraints on its editorial discretion.” *Manhattan Community*
28 *Access Corporation v. Halleck*, 139 S.Ct. 1921, 1926 (2019) (operator of public
access cable TV channels not subject to First Amendment).

1 Embedded in our Fourteenth Amendment jurisprudence is a dichotomy
2 between state action, which is subject to scrutiny ... and private conduct,
3 against which the Amendment affords no shield, no matter how unfair that
4 conduct may be. (Citations omitted.) As a general matter the protections of
5 the Fourteenth Amendment do not extend to “private conduct abridging
6 individual rights.”

6 *Tarkanian, supra*, 488 U.S. 179, 191 (citations omitted).

7 “To state a claim for relief in an action brought under Section 1983, [a
8 plaintiff] must establish that [he] w[as] deprived of a right secured by the
9 Constitution or laws of the United States, and that the alleged deprivation was
10 committed under color of state law.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S.
11 40, 49-50 (1999). “Like the state-action requirement of the Fourteenth Amendment,
12 the under-color-of-state-law element of Section 1983 excludes from its reach
13 ‘merely private conduct, no matter how discriminatory or wrongful.’” *Id.* at 50,
14 quoting *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982). Thus, “[i]n order to recover
15 under Section 1983 for conduct by the defendant, a plaintiff must show ‘that the
16 conduct allegedly causing the deprivation of a federal right must be fairly
17 attributable to the State.’” *Caviness v. Horizon Community Learning Center, Inc.*,
18 590 F.3d 806, 812 (9th Cir. 2010), quoting *Lugar v. Edmondson Oil Co.*, 457 U.S.
19 922, 937 (1982)).

20 The same is true for Plaintiff’s second claim for relief alleging violation of his
21 California constitutional claims. “[W]e hold that article I, section 2, subdivision (a)
22 only protects against state action.” *Golden Gateway Center v. Golden Gateway*
23 *Tenants Assn.*, 26 Cal. 4th 1013, 1031 (2001). *Golden Gateway* ruled that a landlord
24 could prohibit dissemination of leaflets by residents in areas not “freely and openly
25 accessible to the public.” *Id.* at 1033. The state action requirement means that the
26 California free speech guarantee will not “constitutionalize a private dispute,” like
27 Plaintiff’s with NASS or Twitter.

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2. It is presumed NASS’s conduct is not governmental action and Plaintiff cannot establish otherwise.

“When addressing whether a private party acted under color of law, [the Court] [] start[s] with the presumption that private conduct does not constitute governmental action.” *Sutton v. Providence St. Joseph Med. Center*, 192 F.3d 826, 835 (9th Cir. 1999).

“Whether a private party engaged in state action is a highly factual question. ‘Only by sifting facts and weighing circumstances’ can we hope to ferret out obvious as well as non-obvious State involvement in private conduct.” *Brunette v. Humane Soc’y of Ventura Cty.*, 294 F.3d 1205, 1209–10 (9th Cir. 2002) (citations omitted).

“Courts have used four different factors or tests to identify” when the presumption of private action is overcome and the private action can be attributed to the state: “(1) public function, (2) joint action, (3) governmental compulsion or coercion, and (4) governmental nexus.” *Sutton, supra*, 192 F.3d at 835-36. Although the Ninth Circuit “recognized several tests to determine where state action lies, the central question remains whether the alleged infringement of federal rights is fairly attributable to the government.” *Kirtley v. Rainey*, 326 F.3d 1088, 1096 (9th Cir. 2003) (citations and quotations omitted).

a. NASS is not a joint actor with the State.

Based on Plaintiff’s allegations set forth above, it appears Plaintiff is claiming NASS is a joint actor with the state in allegedly suppressing Plaintiff’s speech.

The court in *Polk v. Yee*, 481 F. Supp. 3d 1060, 1066 (E.D. Cal. 2020) rejected similar arguments:

‘Joint action’ exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party, or otherwise has so far insinuated itself into a position of interdependence with the non-governmental party that it must be recognized as a joint participant in the challenged

1 activity.” (Citations omitted). “A plaintiff may demonstrate joint action
2 by proving that there was a conspiracy or by showing a private party
3 was a willful participant in the joint action.” (Citations omitted.) A joint
4 action theory requires “a substantial degree of cooperation,” (citation
5 omitted), and is supported “when the state knowingly accepts the
6 benefits derived from unconstitutional behavior.” (Citation omitted.)

6 *Polk* involved a suit filed by personal care providers under § 1983 against
7 State Controller of California and union, alleging deprivation of their First
8 Amendment right to refrain from subsidizing union's speech through dues.
9 Controller and union filed motions to dismiss. 481 F. Supp. 3d 1060 (E.D. Cal.
10 2020). The union moved to dismiss on the basis that it was not subject to § 1983
11 liability. The court agreed stating that although there was a “connection between the
12 alleged constitutional violation and the state action, plaintiffs have not pled facts to
13 show that the Union acted in concert with the state to cause the deduction of Union
14 dues without a “valid waiver,” especially given the state's lack of involvement in the
15 drafting and executing of the Union agreements.” *Id.* at 1067.

16 Here, there is nothing to tie the state to NASS. NASS sent to its members, 48
17 Secretaries of State, an email with the portals for lodging complaints about election
18 mis/disinformation as provided to NASS by various non-governmental social media
19 companies. (Docket Nos. 1-2, Exs. 2 and 3.) There is no allegation that the California
20 Secretary of State used these portals to allegedly suppress Plaintiff’s speech. Even
21 if that were the case, NASS did not tell the California Secretary of State to report
22 Plaintiff’s tweets. Further, NASS has no control over the actions of a non-
23 governmental agency such as Twitter when such reports are made; actions, which
24 according to the law, Twitter is well-within its right to take⁴. NASS did nothing to

25 _____
26 ⁴ “[T]he courts have long held that the right to control the content of a privately
27 published newspaper rests entirely with the newspaper's publisher. The First
28 Amendment protects the newspaper itself, and grants *it* a virtually unfettered right
to choose what to print and what not to.” *Eisenberg v. Alameda Newspapers, Inc.*,
74 Cal. App. 4th 1359, 1391 (1991); see also *Miami Herald Publishing Co. v.*
Tornillo, 418 U.S. 241, 258 (1974) (“The choice of material to go into a
newspaper, ... and treatment of public issues and public officials—whether fair or

1 facilitate any alleged unconstitutional conduct. Providing members with an avenue
 2 for reporting election mis/disinformation is certainly not unconstitutional. There was
 3 no joint action of “substantial degree of cooperation” on the part of NASS to
 4 suppress any speech, much less Plaintiff’s speech. Plaintiff has not and cannot
 5 establish otherwise. NASS is not a joint actor with the state.

6 The closest the complaint comes to alleging that NASS is a state actor are
 7 allegations that the Office of Electric Cybersecurity (“OEC”) “reported
 8 ‘misinformation’ to social media companies through NASS” (Docket Nos. 1-2, p.
 9 13 ¶ 61), and that the California Secretary of State won an award from NASS for the
 10 OEC work. (Docket Nos. 1-2 pp. 13-14 ¶¶ 63-65.) Throughout the complaint, NASS
 11 is simply lumped in with what Plaintiff refers to as “Defendants’ government
 12 censorship of speech,” “state action,” and claims that NASS “joined with the state
 13 agents.” (Docket Nos. 1-2, pp. 24-25 ¶¶ 100, 107, 109, 112; p. 30 ¶ 170.) These
 14 allegations fall far short of demonstrating that NASS was a “state actor.” NASS is
 15 not a joint actor, nor does its actions fit within any of the other three tests that are
 16 used to overcome the presumption of private action.

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 20 unfair—constitute the exercise of editorial control and judgment. It has yet to be
 21 demonstrated how governmental regulation of this crucial process can be exercised
 22 consistent with First Amendment guarantees of a free press”); *Ampersand*
 23 *Publishing, LLC v. NLRB*, 702 F.3d 51, 56 (D.C. Cir. 2012) (“The First
 24 Amendment affords a *publisher*—not a reporter—absolute authority to shape a
 25 newspaper’s content.”); *Manhattan Community Access Corp.*, supra, 139 S.Ct. at
 26 1930-1931 (“If the rule were otherwise, all private property owners and private
 27 lessees who open their property for speech would be subject to First Amendment
 28 constraints and would lose the ability to exercise what they deem to be appropriate
 editorial discretion within that open forum. Private property owners and private
 lessees would face the unappetizing choice of allowing all comers or closing the
 platform altogether.”) This same rule of law applies to a private social media
 platform such a Twitter in deciding what posts to allow on its platform. There is no
 Constitutional violation by any of the private actor defendants in this case.

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b. NASS is not engaging in a “public function.”

A private party’s conduct can constitute state action when that private party exercises powers that are “traditionally the exclusive prerogative of the State.” *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, supra, 590 F.3d at 814. “[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.” *Julian v. Mission Cmty. Hosp.*, 218 Cal. Rptr. 3d 38, 71 (2017) (citations omitted).

Here, there is no allegation that NASS is exercising powers that are “traditionally the exclusive prerogative of the State.” NASS’s involvement in this case is limited to sending emails to its members with information about how to report election dis/misinformation seen on various non-governmental social media sites. Accordingly, there should be no dispute that NASS was not engaging in a public function based on the allegations in the Complaint.

c. NASS was not compelled nor coerced by the State.

In assessing the compulsion/coercion test, the court considers “whether the coercive influence or ‘significant encouragement’ of the state effectively converts a private action into a government action.” *Kirtley v. Rainey*, supra, 326 F.3d at 1094. “The mere fact that a private business is subject to state regulation does not by itself convert its action into that of the State.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 41 (1999). Indeed, “[e]ven extensive government regulation of a private business is insufficient to make that business a state actor if the challenged conduct was ‘not compelled or even influenced by any state regulation.’” *Caviness*, supra, 590 F.3d at 816 (citation omitted).

As was the case with the public function test, there are no allegations that California, or any other state for that matter, coerced, influenced, or significantly encouraged NASS to do anything. Thus, this test is also inapplicable here.

1 **d. There is no close nexus between the State and NASS.**

2 State action can only be found pursuant to the governmental nexus test where
3 “there is a sufficiently close nexus between the State and the challenged action of
4 the [] entity so that the action of the latter may be fairly treated as that of the State
5 itself.” *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974). “It is similar to the
6 joint action test in that both tests require that the state is ‘so far insinuated into a
7 position of interdependence with the [private party] that it was a joint participant in
8 the enterprise.’ ” *Julian, supra*, 218 Cal. Rptr. 3d at 72 (citations omitted).

9 In *Sutton, supra*, the Ninth Circuit explained that “[i]n the typical case raising
10 a state-action issue, a private party has taken the decisive step that caused the harm
11 to the plaintiff, and the question is whether the State was sufficiently involved to
12 treat that decisive conduct as state action.” 192 F.3d at 838 (quoting *Tarkanian*, 488
13 U.S. at 192). The Ninth Circuit concluded that “in each of the Supreme Court’s
14 private-defendant cases, there was some additional nexus [beyond the application of
15 a general statute] that made it fair to deem the private entity a governmental actor in
16 the circumstances.” *Id.* at 839 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922,
17 941-42 (1982); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972); *Adickes v.*
18 *S.H. Kress & Co.*, 398 U.S. 144, 149 (1970)). “Typically, the nexus has consisted of
19 participation by the state in an action ostensibly taken by the private entity, through
20 conspiratorial agreement (*Adickes*), official cooperation with the private entity to
21 achieve the private entity’s goal (*Lugar*), or enforcement and ratification of the
22 private entity’s chosen action (*Moose Lodge*.” *Id.* at 841.

23 While its members are public officials, NASS is not a government agency.
24 California did not take action through NASS via a conspiratorial agreement or
25 otherwise. NASS sent an email to its members with established portals for
26 reporting election mid/disinformation and that is all NASS did. There is no
27 additional nexus that would make it fair or appropriate to deem NASS a
28 governmental actor in this case. NASS’s actions fail to satisfy this test for the same

1 reasons they fail to satisfy the joint action test. There simply is no interdependence
2 between the state of California and NASS.

3 **C. Plaintiff’s second claim, alleged violation of California free speech**
4 **rights, fails to state a claim upon which relief can be granted**
5 **against NASS because NASS is not a state actor.**

6 The same is true for Plaintiff’s second claim for relief alleging violation of his
7 California constitutional claims. “[W]e hold that article I, section 2, subdivision (a)
8 only protects against state action.” *Golden Gateway Center v. Golden Gateway*
9 *Tenants Assn.*, supra, 26 Cal. 4th at 1031. *Golden Gateway* ruled that a landlord
10 could prohibit dissemination of leaflets by residents in areas not “freely and openly
11 accessible to the public.” *Id.* at 1033. “A person’s free speech rights under the federal
12 and state constitutions are not infringed unless there is state action.” *Yu v. Univ. of*
13 *La Verne*, 126 Cal. Rptr. 3d 763, 771 (2011) . The state action requirement means
14 that the California free speech guarantee will not “constitutionalize a private
15 dispute,” like Plaintiff’s dispute with NASS about being on Twitter.

16 Further, this state law claim is pendent to Plaintiff’s federal claims, and this
17 Court has only supplemental jurisdiction. 28 U.S.C. § 1367. Thus, should this Court
18 dismiss the federal claims against NASS, it should dismiss this as well, irrespective
19 of the adequacy of its allegations. *Id.*, subd. (c)(3) (dismissal over supplemental
20 jurisdiction claim proper if “the district court has dismissed all claims over which it
21 has original jurisdiction”).

22 **D. Plaintiff’s sixth claim, for conspiracy to interfere with civil rights,**
23 **fails to state a claim upon which relief can be granted because he**
24 **does not allege a deprivation of any civil rights.**

25 “Section 1985(3) provides no substantive rights itself; it merely provides a
26 remedy for violation of the rights it designates.” *Great American Fed. S & L Ass’n*
27 *v. Novotny*, 442 U.S. 366, 372 (1979). Thus, if a plaintiff’s “allegations are
28 insufficient to support a claim based on a violation of his constitutional rights,”
then “his allegations of a conspiracy to violate these constitutional rights do not
state a claim.” *Pelozza v. Capistrano Unified School Dist.*, 37 F.3d 517, 523-24 (9th

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1 Cir. 1994). In *Peloza*, as in this case, plaintiff asserted claims for violation of his
2 civil rights and for civil conspiracy to interfere with those rights under 42 U.S.C.
3 section 1985. The court found he had not alleged a Constitutional violation, and so
4 could not pursue a conspiracy claim. “Because *Peloza* failed to allege a conspiracy
5 to do something that would violate his [Constitutional] rights ... his section 1985(3)
6 claim predicated on a violation of these rights fails.” *Id.* at 524.

7 **V. CONCLUSION**

8 NASS should be dismissed pursuant to Rule 12(b)(2) because the Court lacks
9 both general and specific personal jurisdiction over NASS. NASS is incorporated in
10 Kentucky with its principal place of business in Washington, D.C. NASS does not
11 and did not have a presence in California rendering it “at home” or establishing it
12 “purposefully availed” itself here.

13 The Court should also dismiss NASS pursuant to Rule 12(b)(6) for “failure to
14 state a claim upon which relief can be granted” because NASS is a private
15 corporation, not a government or state actor. Plaintiff’s allegations concern the
16 alleged suppression of constitutionally protected free speech rights, and such claims
17 only apply against the government and those “acting under color of state law.” NASS
18 is neither. Therefore, NASS is not responsible for the conduct of which the Plaintiff
19 complains, and Plaintiff’s complaint should be dismissed as against NASS.

20 Respectfully submitted,

21 Dated: October 5, 2021

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24 Don Willenburg
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