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14  
15 **UNITED STATES DISTRICT COURT**  
16 **NORTHERN DISTRICT OF CALIFORNIA**  
17 **SAN FRANCISCO DIVISION**

18 ROGAN O’HANDLEY

19 Plaintiff,

20 v.

21 ALEX PADILLA, et. al.,

22 Defendants.

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

**DEFENDANT TWITTER, INC.’S  
NOTICE OF MOTION AND MOTION  
TO DISMISS; MEMORANDUM AND  
POINTS OF AUTHORITIES IN  
SUPPORT THEREOF**

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

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**NOTICE OF MOTION AND MOTION TO DISMISS**

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 of the U.S. District Court for the Northern District of California, this Motion to Dismiss will be heard. Defendant Twitter, Inc. (“Twitter”) moves to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). This Motion to Dismiss is based on this Notice of Motion, the Memorandum of Points and Authorities, and the supporting Declaration of Thomas G. Sprankling.

**STATEMENT OF REQUESTED RELIEF**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Twitter requests that the Court dismiss all of O’Handley’s claims against Twitter (Counts I-IV, VI of the Complaint) with prejudice.

**SUMMARY OF ARGUMENT**

Plaintiff Rogan O’Handley’s claims against Defendant Twitter, Inc. (“Twitter”) are breathtaking. The federal and California Constitutions establish rights to free speech, equal protection, and due process as bulwarks against *government* overreach. In this case, however, O’Handley attempts to wield those rights against Twitter—a *private company*—to countermand decisions Twitter made to restrict content on its platform that Twitter deemed to be harmful and misleading. Specifically, O’Handley’s suit contends that these constitutional limits on governmental action barred Twitter from appending labels to several of O’Handley’s online posts (“Tweets”) and then, eventually, permanently suspending his Twitter account for repeated and persistent violations of Twitter’s Rules. All of O’Handley’s claims fail as a matter of law because Twitter is not a state actor. What’s more, if accepted, O’Handley’s claims would invert the operative First Amendment protections, as Twitter’s exercise of editorial discretion by labeling or excluding content from its privately owned platform is *itself* speech protected by the First Amendment that may not be curtailed, penalized, or overridden by court-imposed liability. Whatever rights O’Handley might have against the government do not entitle him to compel Twitter to disseminate his messages.

In an effort to combat misinformation on its platform, Twitter adopted a policy—the Civic Integrity Policy—that expressly prohibits posting misleading information about elections on the Twitter platform. *See* Twitter, Civic Integrity Policy (January 12, 2021); Twitter, Civic Integrity Policy (November 12, 2020); Twitter, Civic Integrity Policy (May 27, 2020). Twitter enforces this policy by labeling or



1 removing Tweets, and in some instances suspending persons who have repeatedly violated Twitter’s  
2 Rules. *See id.* As Twitter explains in the preamble to the Civic Integrity Policy: “The public conversation  
3 occurring on Twitter is never more important than during elections and other civic events” and Twitter  
4 therefore firmly believes it has an affirmative responsibility to try to protect the integrity of those  
5 conversations. *See id.*

6         Shortly after the deadly insurrection at the Capitol on January 6, 2021, O’Handley tweeted that the  
7 “country [wa]s stolen,” Compl. ¶ 84, and that the American people were “captives under a government  
8 we didn’t elect,” Compl. ¶ 85. Twitter determined that these Tweets violated its policies, and—consistent  
9 with those policies—appended a label to these Tweets stating that “[t]his claim of election fraud is  
10 disputed.” O’Handley, however, was undeterred and continued to Tweet about alleged election fraud.  
11 After multiple subsequent violations of Twitter’s Civic Integrity Policy, Twitter eventually permanently  
12 suspended O’Handley’s account.

13         O’Handley now argues that Twitter’s enforcement of its own Rules is unconstitutional. This  
14 argument runs headlong into an unbroken series of precedents—including the Ninth Circuit’s recent  
15 decision in *Prager University v. Google LLC*, 951 F.3d 991 (9th Cir. 2020)—holding that private online  
16 platforms are not state actors and so are not subject to constitutional constraints. Trying to evade this  
17 authority, O’Handley argues that a single communication from a California election official to Twitter,  
18 which allegedly flagged one of O’Handley’s Tweets as potentially violating Twitter’s Civic Integrity Policy,  
19 transformed all of Twitter’s subsequent content-moderation decisions regarding O’Handley’s account—  
20 including those taken months later and without any contact from government—into state action.

21         That is not the law. A private-sector company is not transformed into a state actor, and thus  
22 constitutionally compelled to disseminate content that the company considers to be harmful, merely  
23 because a government official tells that company, even just once, that someone is potentially violating one  
24 of the company’s own, independently formulated rules. Were that the law, huge swaths of private activity  
25 would be rendered unconstitutional simply because a private actor chooses to solicit or receive  
26 information from a government official and then acts, in part, based on that information. Disabling  
27 websites like Twitter from even communicating with government officials regarding potentially harmful  
28 content would hamper their efforts to prevent the spread of misinformation and violence on their

1 platforms—particularly when the need to do so is at its most acute: during elections, disease outbreaks,  
2 national security breaches, and other such public emergencies. Adopting Plaintiff’s state action theory  
3 would thus not only “restrict[] individual liberty and private enterprise,” it would make the Internet—and  
4 society—less safe. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1934 (2019).

5 O’Handley’s theory not only fails to convert Twitter into a state actor, but also is barred by both  
6 the First Amendment and Section 230 of the Communications Decency Act, 47 U.S.C. § 230. The First  
7 Amendment protects the right of privately operated online platforms to decide not to publish content  
8 they consider to be harmful (such as election misinformation) and bars lawsuits that seek to override a  
9 platform’s exercise of editorial discretion over the content that it disseminates. *See Miami Herald Pub. Co.*  
10 *v. Tornillo*, 418 U.S. 241, 258 (1974). Likewise, Section 230 broadly “immunizes [] webhost[s],” like Twitter,  
11 against claims arising from “exercis[ing] a publisher’s ‘traditional editorial functions—such as deciding  
12 whether to publish, *withdraw*, postpone, or alter content.’” *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th  
13 Cir. 2009), *as amended* (Sept. 28, 2009) (emphasis added).

14 This Court should dismiss all claims against Twitter with prejudice.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**BACKGROUND**

**A. The Twitter Platform And Its Content-Moderation Policies**

Twitter operates an Internet communications platform that allows hundreds of millions of people around the world to share views and follow current events. Twitter is committed to protecting the health and safety of the people who use its platform. To achieve this goal, it has content-moderation policies called the Twitter Rules that, among other things, are designed to minimize the reach of harmful and misleading information. *See* Twitter, The Twitter Rules, <https://help.twitter.com/en/rules-and-policies/twitter-rules>.<sup>1</sup> Twitter makes the Twitter Rules publicly available to all on its website. *Id.* Twitter reserves the right to remove content that violates the Twitter Rules in the User Agreement to which individuals agree as a condition of using the Twitter platform. *See* Twitter, Twitter Terms of Service, [https://twitter.com/en/tos/previous/version\\_15](https://twitter.com/en/tos/previous/version_15) (cited hereafter as “Twitter’s Terms of Service”) (“We reserve the right to remove Content that violates the User Agreement.”).

One such policy is Twitter’s Civic Integrity Policy. Under this Policy, Twitter prohibits posting false and misleading information regarding elections and other civic processes, including “false or misleading information intended to undermine public confidence in an election or other civic process.” *See* Civic Integrity Policy (January 12, 2021); Civic Integrity Policy (November 12, 2020); Civic Integrity Policy (May 27, 2020). Twitter’s approach to enforcing its Civic Integrity Policy has evolved

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<sup>1</sup> “Courts may take into account documents that are not physically attached to the complaint if the contents of the document are referred to in the complaint and the authenticity of the documents is not questioned.” *Finkelstein v. AXA Equitable Life Ins. Co.*, 325 F. Supp. 3d 1061, 1066 (N.D. Cal. 2018). The Complaint references the Terms of Service and Twitter’s Rules, such as the Civic Integrity Policy; they therefore may be considered in deciding Twitter’s motion to dismiss. *See Knievel v. ESPN*, 393 F.3d 1068, 1076-77 (9th Cir. 2005) (considering website under “‘incorporation by reference’ doctrine”). The Court may also take judicial notice of the content of these Terms and Rules, whether currently available on Twitter’s website or as historical snapshots of web pages that are publicly available on the Wayback Machine (an internet archive of webpages). *See, e.g., Erickson v. Nebraska Mach. Co.*, No. 15-CV-01147-JD, 2015 WL 4089849, at \*1 (N.D. Cal. July 6, 2015) (“Courts have taken judicial notice of the contents of web pages available through the Wayback Machine as facts that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”); *Brown v. Google LLC*, No. 20-CV-03664-LHK, 2021 WL 949372, at \*5 (N.D. Cal. Mar. 12, 2021) (granting Google’s request for judicial notice of its terms of service and “15 versions” of its privacy policy, as they appear on the Wayback Machine, in adjudicating a motion to dismiss). For the Court’s convenience, Twitter is supplying, through the declaration of Thomas G. Sprankling, PDFs of the relevant web pages as they appear on October 5, 2021.

1 over time in response to, for example, evidence of platform manipulation and abuse, including  
 2 coordinated misinformation campaigns. In an effort to ensure that Twitter not be weaponized in this  
 3 way, Twitter modified its Civic Integrity Policy in May 2020, ahead of the November election, and as a  
 4 result began to “label or remove false or misleading information about how to participate in an election  
 5 or other civic process.” *See* Twitter, Civic Integrity Policy (May 27, 2020). The updated policy provides  
 6 that Twitter may apply “labels” to Tweets that, in its judgment, make false or misleading claims about  
 7 elections or other civic processes in violation of the policy. *Id.* Such labels add context to violative Tweets  
 8 by flagging that they may contain false or misleading information and directing viewers to other sources  
 9 that contain what Twitter considers to be credible and authoritative information about the topic. *Id.*

10 On January 12, 2021, in the wake of the deadly Capitol insurrection, Twitter publicly announced  
 11 that it had again updated its Civic Integrity Policy to “aggressively increase ... enforcement action” on  
 12 “misleading and false information surrounding the 2020 US presidential election.” Twitter Safety, *An*  
 13 *update following the riots in Washington, DC*, [https://blog.twitter.com/en\\_us/topics/company/2021](https://blog.twitter.com/en_us/topics/company/2021/protecting--the-conversation-following-the-riots-in-washington--)  
 14 [/protecting--the-conversation-following-the-riots-in-washington--](https://blog.twitter.com/en_us/topics/company/2021/protecting--the-conversation-following-the-riots-in-washington--) (cited hereafter as “January 2021 Civic  
 15 Integrity Policy Update”). Twitter explained, “Now that the results of the election have been officially  
 16 certified by Congress, we updated our Civic Integrity Policy on Friday to aggressively increase our  
 17 enforcement action on these claims,” and noted that it would “continue to monitor the situation” ahead  
 18 of the Presidential inauguration scheduled for January 20. *Id.*

19 As part of its early January 2021 update, Twitter instituted a five-strike enforcement protocol for  
 20 responding to violations of the Civic Integrity Policy. *See* Civic Integrity Policy (January 12, 2021). Under  
 21 this protocol, enforcement actions become progressively more severe as an account holder continues to  
 22 post Tweets that violate the policy. *Id.* Specifically, in addition to labeling violative Tweets, Twitter began  
 23 to take the following progressive “account-level” measures for each new violation of the policy (or  
 24 “strike”) that it identified from any particular account:

- 25 1 strike: No account-level action;
- 26 2 strikes: 12-hour account lock;
- 27 3 strikes: 12-hour account lock;
- 28 4 strikes: 7-day account lock; and
- 5 or more strikes: Permanent suspension.

*Id.*; *see also* Compl. ¶ 78.

1 Twitter account holders post hundreds of millions of Tweets daily. And because Twitter  
 2 understands that misinformation and online abuse can spread incredibly fast and are difficult to correct  
 3 once disseminated, Twitter invites the public—including individuals, civil society organizations, and  
 4 government actors, among others—to help it quickly identify this content by reporting suspected  
 5 violations of the Twitter Rules. Twitter has established various mechanisms for receiving such reports,  
 6 one of which it calls the Partner Support Portal (“Portal”). The Portal provides a priority pathway for  
 7 persons and entities whom Twitter believes have an interest or expertise in protecting and promoting civic  
 8 processes—including local and state election officials and various private organizations—“to flag  
 9 concerns directly to Twitter,” including “technical issues with your account and content on the platform  
 10 that may violate [Twitter’s] policies.” Compl. Exs. 2, 3. Twitter has granted access to the Portal to election  
 11 officials from at least 37 states, including the office of the California Secretary of State. Compl. ¶ 32; Ex.  
 12 3.

13 Some of the reports Twitter receives through the Portal identify Tweets that Twitter later  
 14 determines to violate its Rules, while others do not. *See* Compl. Ex. 9. Sometimes Twitter decides to  
 15 label or remove the content or take other action, sometimes it does not. *See id.*

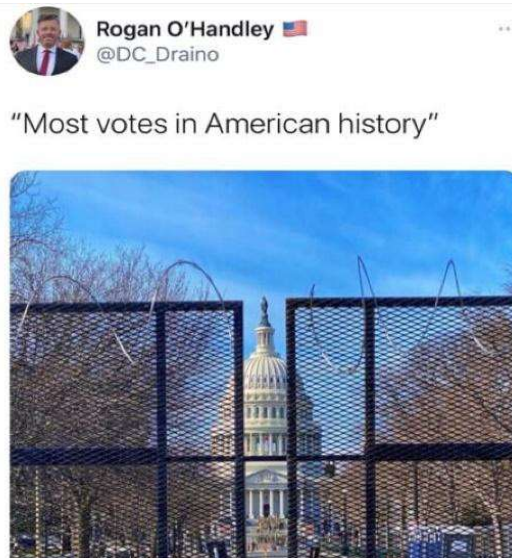
#### 16 **B. Twitter Enforcement Actions Regarding Certain Of O’Handley’s Tweets**

17 Plaintiff O’Handley is an attorney and political commentator. Compl. ¶ 9. According to the  
 18 Complaint, he frequently used Twitter’s platform to disseminate information relating to elections, under  
 19 the Twitter handle @DC\_Draino. Compl. ¶ 69. Over the course of several months following the  
 20 November 2020 federal election, he posted Tweets regarding the election that Twitter deemed to violate  
 21 its Civic Integrity Policy. Compl. ¶¶ 72-86.

22 On November 12, 2020, shortly after the November 2020 election, O’Handley tweeted: “Audit  
 23 every California ballot[.] Election fraud is rampant nationwide and we all know California is one of the  
 24 culprits[.] Do it to protect the integrity of that state’s elections[.]” Compl. ¶ 72. Twitter subsequently  
 25 applied a label to this Tweet, adding text immediately below it that stated: “This claim about election fraud  
 26 is disputed.” Compl. ¶¶ 72, 77. The Complaint alleges that Twitter treated this Tweet as a first “strike”  
 27 against O’Handley’s account. Compl. ¶ 78.  
 28

1 O’Handley posted the remainder of his Tweets identified in the Complaint more than two months  
 2 later, shortly after the insurrection at the U.S. Capitol that prompted Twitter to “aggressively increase ...  
 3 enforcement action” on “misleading and false information surrounding the 2020 US presidential  
 4 election.” *See* January 2021 Civic Integrity Policy Update. The first of these, posted on January 18, two  
 5 days before the inauguration, stated: “When your country is stolen and you aren’t even allowed to talk  
 6 about it, that’s not freedom[.] It’s fascism[.]” Compl. ¶ 84. On January 21, he tweeted: “We are captives  
 7 under a government we didn’t elect[.] It was forced upon us[.] That is by definition a  
 8 dictatorship[.]” Compl. ¶ 85. And on January 22, he tweeted: “How about a 9/11 commission-style  
 9 report on what the hell just happened this past election?! When half our country stops believing in the  
 10 integrity of our vote, that’s an \*emergency\* issue[.]” Compl. ¶ 86. Twitter allegedly applied the following  
 11 label to each of these Tweets: “This claim of election fraud is disputed, and this Tweet can’t be replied  
 12 to, Retweeted, or liked due to a risk of violence.” Compl. ¶¶ 84-86. The Complaint alleges that Twitter  
 13 treated these three Tweets as second, third, and fourth strikes against O’Handley’s account, and locked  
 14 his account for seven days following the fourth strike. *Id.*

15 Finally, the Complaint identifies a fifth Tweet that O’Handley allegedly posted on February 22,  
 16 2021:



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 26 Compl. ¶ 87. O’Handley alleges that, in response to this Tweet, Twitter permanently suspended his  
 27 account. Compl. ¶ 88. The Complaint further alleges that Twitter sent him a message stating that the  
 28



1 suspension was for violating “the Twitter Rules,” and specifically, for “[v]iolating our rules about election  
2 integrity.” Compl. ¶ 88.

### 3 **C. O’Handley’s Allegations About California Officials**

4 In his Complaint, O’Handley attempts to connect the Twitter content-moderation decisions  
5 described above to the California Office of Election Cybersecurity (“OEC”), which is a sub-division  
6 within the California Secretary of State’s Office that “monitor[s] and counteract[s] false or misleading  
7 information regarding the electoral process that is published online or on other platforms.” Compl. ¶ 20  
8 (quoting Cal. Elec. Code § 10.5(b)(2)). Apparently hoping to establish such a connection before filing this  
9 lawsuit, O’Handley used public record requests to obtain various internal documents and communications  
10 from OEC, which are referenced in and attached to the Complaint. *E.g.*, Compl. ¶¶ 24, 28-31, 77; *id.* Exs.  
11 1-4, 9.

12 Notwithstanding this public records investigation, the Complaint identifies only a single  
13 communication from OEC to Twitter regarding O’Handley. Nearly three months before Twitter  
14 suspended O’Handley’s account, OEC allegedly sent Twitter through the Portal the following flag  
15 regarding his November 2020 Tweet:

16 Hi, We wanted to flag this Twitter post:  
17 [https://twitter.com/DC\\_Draino/status/1237073866578096129](https://twitter.com/DC_Draino/status/1237073866578096129) from user  
18 @DC\_Draino. In this post user claims California [*sic*] of being a culprit of voter fraud,  
and ignores the fact that we do audit votes. This is a blatant disregard to how our voting  
process works and creates disinformation and distrust among the general public.

19 Compl. ¶¶ 74-76. The Complaint does not allege that Twitter ever responded to OEC. Nor does it allege  
20 that OEC ever communicated with Twitter about any of O’Handley’s other Tweets (posted months later)  
21 that allegedly led to his second to fifth strikes and eventual permanent suspension.

### 22 **D. This Litigation**

23 On June 17, 2021, O’Handley filed this lawsuit challenging Twitter’s decision to enforce its own  
24 Rules and permanently suspend his account. His Complaint does not dispute that Twitter has Rules  
25 governing content on its platform and that he agreed to follow them as a condition of using the  
26 platform. *See* Compl. ¶ 70, 99. Instead, pointing to the single communication that OEC sent Twitter  
27 almost three months before the permanent suspension, O’Handley claims that Twitter acted jointly with  
28 the government in suspending his account and thereby became a state actor subject to constitutional

1 constraints. Compl. ¶¶ 81, 99, 109. Based on this theory, he claims that Twitter violated his First  
 2 Amendment, California free speech, and Equal Protection rights when it labelled his Tweets and then  
 3 permanently suspended his account, Compl. ¶¶ 102-110, 139-143, and violated his Due Process rights by  
 4 not holding a hearing before depriving him of his “occupation as a Twitter influencer” and the “business  
 5 goodwill” he garnered through his account, Compl. ¶¶ 150-154.

### 6 STANDARD OF REVIEW

7 To survive a motion to dismiss under Rule 12(b)(6), a complaint’s factual allegations must  
 8 “plausibly (not merely conceivably) entitle plaintiff to relief.” *Maya v. Centex Corp.*, 658 F.3d 1060, 1067–  
 9 68 (9th Cir. 2011). A claim is plausible only “when the plaintiff pleads factual content that allows the  
 10 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*  
 11 *Iqbal*, 556 U.S. 662, 678 (2009). Rule 12(b)(6) serves to weed out cases that do not warrant subjecting the  
 12 defendant to the expensive and laborious discovery process when, even taking the allegations in the  
 13 complaint as true, the plaintiff would not be entitled to relief. *Maya*, 658 F.3d at 1068. “Threadbare  
 14 recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice” to  
 15 survive dismissal. *Iqbal*, 556 U.S. at 678; see *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

### 16 ARGUMENT

#### 17 **II. O’HANDLEY’S FEDERAL CONSTITUTIONAL CLAIMS FAIL BECAUSE TWITTER IS NOT A 18 STATE ACTOR (COUNTS I, III-IV)**

19 The fundamental defect in O’Handley’s federal free speech, equal protection, and due process  
 20 constitutional claims is that Twitter is a private entity, not a state actor, and is therefore not subject to  
 21 these constitutional constraints.

22 The “First and Fourteenth Amendments safeguard the rights of free speech and assembly by  
 23 limitations on *State* action,” *Hudgens v. N.L.R.B.*, 424 U.S. 507, 519 (1976) (emphasis added), “not [by]  
 24 prohibit[ing] *private* abridgment of speech,” *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928  
 25 (2019). Distinguishing private from state actors is no mere technicality; it is essential to protecting  
 26 Twitter’s own First Amendment right to “exercise editorial control over speech and speakers on their  
 27 properties or platforms.” *Halleck*, 139 S. Ct. at 1932.

28 O’Handley recognizes that Twitter is a private company. Compl. ¶ 17. Under settled law,  
 Twitter’s content-moderation decisions are therefore not subject to constitutional constraints and are in



1 fact affirmatively protected by the First Amendment. The Ninth Circuit made that clear in *Prager*, holding  
 2 that YouTube is not a state actor and cannot be sued for its editorial decisions about what content to  
 3 display on its private platform. *See* 951 F.3d at 997-999. A legion of other cases—before and after  
 4 *Prager*—have similarly rejected constitutional claims challenging the content-moderation decisions of  
 5 private online service providers. *See, e.g., Howard v. AOL*, 208 F.3d 741, 754 (9th Cir. 2000); *Fed. Agency of*  
 6 *News, LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1308-1314 (N.D. Cal. 2019); *Kim v. Apple, Inc.*, 2014 WL  
 7 3056136, at \*2 (D.D.C. July 7, 2014), *aff'd*, 582 F. App'x 3 (D.C. Cir. 2014).<sup>2</sup>

8 In an attempt to circumvent these precedents, O'Handley seeks to transform Twitter's private  
 9 content-moderation decisions into state action under a "joint action" theory, but that gambit fails. Compl.  
 10 ¶¶ 99, 110. The joint action test is one of a handful of narrow exceptions that the Supreme Court has  
 11 recognized under which a private actor's conduct may be "fairly attributable" to the government. *Lugar*  
 12 *v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). The Complaint does not come close to satisfying the  
 13 exacting test for establishing joint action. As the Ninth Circuit has explained, joint action "require[s] a  
 14 substantial degree of cooperation" *Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir. 2002), with respect to the  
 15 "particular decision challenged," *Mathis v. Pac. Gas & Elec. Co.*, 75 F.3d 498, 503-504 n.4 (9th Cir. 1996). It  
 16 is not enough that private and state actors had a "shared goal." *Fox*, 312 F.3d at 445. Rather, the  
 17 government must have "so far insinuated itself into a position of interdependence with [the private entity]  
 18 that [the government] must be recognized as a joint participant in the challenged activity." *Gorenc v. Salt*  
 19 *River Project Agric. Improvement & Power Dist.*, 869 F.2d 503, 507 (9th Cir. 1989). And the bar is equally  
 20 demanding for a plaintiff who seeks to establish joint action on a conspiracy theory. *See Adickes v. S. H.*  
 21 *Kress & Co.*, 398 U.S. 144, 152 (1970). "Mere passive acquiescence in the direction of state officials  
 22 generally is not sufficient," nor even is an agreement to take some particular action. *Taylor v. List*, 880  
 23 F.2d 1040, 1048 (9th Cir. 1989). Rather, the private and government actors must have specifically agreed  
 24 to "violate constitutional rights." *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983).

25  
 26  
 27 <sup>2</sup> *See also Wilson v. Twitter*, 2020 WL 3410349, at \*2 (S.D.W. Va. May 1, 2020), *report and rec'n adopted*, 2020  
 28 WL 3256820 (S.D.W. Va. June 16, 2020); *Freedom Watch, Inc. v. Google, Inc.*, 368 F. Supp.3d 30, 40 (D.D.C.  
 2019) (subsequent history omitted); *Davison v. Facebook, Inc.*, 370 F. Supp. 3d 621, 629 (E.D. Va. 2019),  
*aff'd*, 774 F. App'x 162 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1111 (2020).

1 Because O’Handley has not, and cannot, allege either substantial cooperation between Twitter and  
2 the government defendants, or any conspiracy between Twitter and the government defendants to deprive  
3 O’Handley of his constitutional rights, *Adickes*, 398 U.S. at 152, the necessary element of state action is  
4 missing from all of his federal constitutional claims against Twitter.

5 **A. The Complaint Fails To Allege Substantial Cooperation**

6 The Complaint falls far short of alleging substantial cooperation between Twitter and OEC  
7 officials to suspend O’Handley’s account. It merely alleges that an OEC official sent a single  
8 communication to Twitter “flag[ging] concerns” about one of O’Handley’s Tweets through the Portal  
9 that Twitter had created to receive, and enable quick review of, reports from government officials and  
10 others regarding election misinformation. Compl. ¶¶ 28-29, 32-33, 77-78. O’Handley does not allege any  
11 other communication between the OEC and Twitter regarding O’Handley’s account or his Tweets. And  
12 he does not allege that the OEC reported any of the four subsequent Tweets that, according to the  
13 Complaint, Twitter determined also violated its Civic Integrity Policy and ultimately led Twitter to  
14 permanently suspend O’Handley’s account. In sum, the Complaint contends that a *single* report by a  
15 governmental actor to Twitter regarding a *single* Tweet somehow transformed all subsequent content  
16 moderation by Twitter with respect to O’Handley’s account into “joint action” with the OEC. Under  
17 well-established law, this falls far short of the kind of “substantial cooperation” required to establish state  
18 action based on joint action.

19 Courts have repeatedly rejected claims that mere exchanges of information between private and  
20 governmental entities amount to joint action. *See, e.g., Lockhead v. Weinstein*, 24 F. App’x 805, 806 (9th Cir.  
21 2001); *see also Moldowan v. City of Warren*, 578 F.3d 351, 399 (6th Cir. 2009); *Ginsberg v. Healey Car & Truck*  
22 *Leasing, Inc.*, 189 F.3d 268, 272 (2d Cir. 1999); *Butler v. Goldblatt Bros., Inc.*, 589 F.2d 323, 327 (7th Cir.  
23 1978).

24 In *Fed. Agency of News LLC (“FAN”) v. Facebook, Inc.*, 432 F. Supp. 3d 1107 (N.D. Cal. 2020), for  
25 example, a Russian news-disseminating company argued that Facebook’s suspension of its account was  
26 joint action because Facebook searched for advertisements that “might have originated in Russia,” and  
27 “shared these findings with United States authorities.” *Id.* at 1126. The court disagreed, reasoning that  
28

1 “the case law is unequivocal that “supplying information to the government alone does not amount to  
2 joint action.” *Id.*

3 Similarly, in *Deeths v. Lucile Slater Packard Children's Hospital at Stanford*, 2013 WL 6185175, at \*10-  
4 11 (E.D. Cal. Nov. 26, 2013), a plaintiff sought to hold a private doctor responsible for his involvement  
5 in a county’s investigation into suspected child abuse by the plaintiff, which culminated in the removal of  
6 the plaintiff’s child from the care of the plaintiff. County workers conferred with the doctor throughout  
7 their investigation, including at a “Decision Meeting” during which the doctor was alleged to have supplied  
8 false information and recommended that the child be removed from the plaintiff’s care. *Id.* at 10. These  
9 facts, the court held, were insufficient to amount to “joint action”:

10 Even if Dr. Stirling made false statements to Kern County social workers regarding the  
11 need to remove R.D. from Plaintiff’s care, supplying information alone does not  
12 amount to conspiracy or joint action under color of state law. . . . Plaintiff alleges no  
13 facts to show that Dr. Stirling exerted control over how the social workers used the  
14 information they obtained to reach a decision to remove Plaintiff’s children or to falsify  
15 evidence at the juvenile dependency proceeding.

14 *Id.*

15 O’Handley’s allegations of “cooperation” are even less extensive than those found wanting in  
16 *FAN*, *Deeths*, and the legion of other cases rejecting attempts to transform private behavior into state  
17 action. *See supra* n.2. *FAN* and *Deeths*, for example, involved allegations of repeated interactions between  
18 the governmental actor and the private party. In contrast, the only allegation here of any interaction  
19 between any government actor and Twitter regarding O’Handley is that an employee in the Secretary of  
20 State’s office sent one message to Twitter “flag[ging]” a single post in November 2020. Compl. ¶  
21 76. This single communication to Twitter did not direct or even request that Twitter take any action  
22 whatsoever in connection with the November 2020 Tweet. *See id.* And there is no allegation that Twitter  
23 ever communicated back. Such a one-off, one-way communication in no way raises a plausible inference  
24 of “substantial cooperation.” And the Complaint’s conclusory assertions that “Defendants jointly acted  
25 in concert” to “willfully and cooperatively . . . censor [O’Handley’s] speech (Compl. ¶¶ 108-110) are exactly  
26 the sort of “bare allegation[s] that “[t]he defendants acted in concert” that courts routinely deem  
27 “insufficient to establish joint action.” *Dietrich v. John Ascuaga’s Nugget*, 548 F.3d 892, 900 (9th Cir. 2008).

1 To the extent the Complaint’s allegations relating to the existence of Twitter’s Partner Support  
2 Portal are intended to show joint action, that theory is unavailing as well. In *Mathis v. Pacific Gas & Electric*  
3 *Company*, 75 F.3d 498 (9th Cir. 1996), the Ninth Circuit held that a government and private actor’s joint  
4 participation in a Task Force was insufficient to demonstrate joint action. Specifically, the court held that  
5 PG&E’s decision to bar a contractor from entering its plant was not joint action with the government,  
6 even where the employer conducted an investigation leading up to that decision in “close cooperation”  
7 with a state task force. The key to the court’s decision was that the task force was not specifically  
8 “involved in the decision to exclude [the contractor] from the plant.” *Id.* at 503-504. The plaintiff in  
9 *Mathis* had argued that but-for the investigation, he would not have been excluded from the plant and,  
10 thus, his exclusion was a part of a “joint ‘course of conduct’” between the state and PG&E. *Id.* But the  
11 Ninth Circuit rejected that argument, reasoning that the plaintiff had not presented sufficient evidence  
12 that the task force had any involvement with “internal PG&E ... decisions” and that “consultation and  
13 information sharing ceased” prior to the disciplinary decision. *Id.*

14 *Mathis* thus makes clear that even general “consultation and information sharing” are not enough  
15 (and there was much more consultation and information sharing in *Mathis* than here). And in this case,  
16 like the plaintiff in *Mathis*, O’Handley fails to allege that any government actor played any role in Twitter’s  
17 “internal ... decisions” regarding O’Handley’s account. He does not allege that OEC and Twitter even  
18 communicated about O’Handley after OEC flagged one of O’Handley’s Tweets—much less that OEC  
19 actually participated in Twitter’s internal decisionmaking regarding even that one Tweet. And he does not  
20 allege that OEC communicated at all with Twitter about O’Handley over the ensuing months, as Twitter  
21 took action against four additional Tweets and eventually permanently suspended his account.

22 Nor does any allegation in the Complaint raise a plausible inference that in reviewing reports  
23 received through the Portal, Twitter did not independently assess the reported content according to its  
24 own Rules and independent judgment. Exhibit 9, which is an OEC spreadsheet purportedly tracking the  
25 outcome of the reports OEC made to Twitter and other social media companies, only underscores this  
26 point: It indicates that in each instance in which Twitter responded to OEC regarding one of its reports,  
27 Twitter described its decision as to whether to take any enforcement action by referencing its own  
28 independent review of its Rules. *Compare* Compl. Ex. 9 at 2 (“After our review, we’ve locked the account

1 for breaking our rules regarding civic integrity.”) *with* Compl. Ex. 9 at 3 (“We’re writing to let you know  
2 that after a review, we didn’t find a violation of our civic integrity policy in the content you  
3 reported.”). Indeed, Exhibit 9 indicates that Twitter refused to take any action on OEC-reported content  
4 in nearly one third of the instances reflected in that exhibit. *See id.* And, as Exhibit 9 shows, Twitter did  
5 not consult, confer, or otherwise discuss its review of the content or decision-making process with OEC;  
6 it merely conveyed, in some cases, the final outcome of its review. *Id.*

7 At bottom, Twitter’s Partner Support Portal allows government officials (and others) to report  
8 potential violations of *Twitter’s* own rules; it does not deputize or co-opt Twitter into enforcing any  
9 governmental law or regulation. *See Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1132 (9th Cir. 2012) (finding  
10 joint action where a state statute authorized private actors to make citizen’s arrests to enforce the state’s  
11 criminal trespassing statute). Nor do reports that Twitter receives through the Portal somehow imbue  
12 Twitter’s content-moderation decisions with governmental authority. *See Howerton v. Gabica*, 708 F.2d 380,  
13 384 n.9 (9th Cir. 1983) (finding joint action where the landlord “invoked the authority of specific state  
14 officials, the ... police, to put the weight of the state behind their private decision” to carry out an illegal  
15 eviction).

16 These distinctions are fatal to O’Handley’s joint action claim: Whether or not OEC’s report  
17 facilitated or prompted Twitter’s decisions to label any of O’Handley’s Tweets or suspend his account, it  
18 is plain that the “mantle of [OEC’s] authority didn’t.” *See Mathis*, 75 F.3d at 504 (finding no joint action  
19 despite a joint investigation by the state and private employer when the employer did not rely on the state’s  
20 authority to make personnel decision). Twitter’s Terms of Service gave Twitter unlimited authority to  
21 remove and otherwise sanction O’Handley’s account (*see* Twitter Terms of Service), and Twitter  
22 referenced its own policies—not OEC’s—to do so, *see, e.g.*, Compl. ¶ 88. O’Handley’s focus on Twitter’s  
23 Portal thus does not advance his state action theory.

24 Finally, the Complaint fares no better in seeking to manufacture joint action based on general  
25 statements by OEC about working with social media companies to combat election misinformation (*e.g.*,  
26 *id.* ¶ 65), and on interactions between Twitter and OEC officials regarding *another*, altogether separate,  
27 account (*see* Compl. ¶¶ 34-35). Just this year, a court in the Northern District of California dismissed a  
28 complaint alleging joint action based on similarly “general statements by the CDC and [Facebook CEO

1 Mark] Zuckerberg about ‘working together’ to reduce the spread of health or vaccine misinformation, or  
 2 to promote universal vaccination.” *Children’s Health Def. v. Facebook Inc.*, 2021 WL 2662064, at \*11 (N.D.  
 3 Cal. June 29, 2021), *appeal filed*, No. 21-16210 (9th Cir. July 21, 2021). And actions taken regarding a  
 4 *different* Twitter account holder are irrelevant. As the Ninth Circuit has explained, generalized allegations  
 5 of cooperation between government officials and private actors do not suffice to establish joint action;  
 6 rather, O’Handley must show that there was substantial cooperation with respect to Twitter’s adverse  
 7 actions against O’Handley’s content or account in particular. *See Mathis*, 75 F.3d at 503. On that critical  
 8 front, and despite O’Handley’s access to public records, the Complaint fails to allege that the OEC and  
 9 Twitter communicated with each other *regarding O’Handley* beyond the single, one-way report discussed  
 10 above. *See* Compl. ¶¶ 75-81. That lone report is a far cry from the type of “substantial cooperation” that  
 11 the Ninth Circuit has been careful to require before finding state action on the basis of joint action.

#### 12 **B. The Complaint Fails To Allege Conspiracy**

13 To the extent that the Complaint seeks to establish joint action by alleging the existence of a  
 14 conspiracy, the Complaint falls far short of alleging facts that could meet the high standard governing  
 15 such a theory. *See Adickes*, 398 U.S. at 152. As explained, a plaintiff cannot cry conspiracy merely by  
 16 pointing to a private actor’s “acquiescence in the direction of state officials,” *Taylor*, 880 F.2d at 1048. To  
 17 be deemed part of an actionable governmental conspiracy, the private defendant must have agreed with  
 18 state actors specifically to “violate constitutional rights”—applied here, that Twitter have agreed with  
 19 government officials to act “deliberately” to retaliate against O’Handley for criticizing Mr. Padilla and  
 20 other Democratic California election officials. *See Fonda*, 707 F.2d at 438; *see also Cunningham v. Southlake*  
 21 *Ctr. for Mental Health, Inc.*, 924 F.2d 106, 107-108 (7th Cir. 1991) (noting that for conspiracy based on  
 22 retaliation against speech, the plaintiff must allege that both the state and private actor possessed a shared  
 23 retaliatory motive).

24 Not only does the Complaint fail to plausibly allege the existence of a conspiracy, it contains  
 25 several allegations and exhibits that *undermine* any plausible inference that Twitter harbored a shared  
 26 retaliatory motive with OEC in labeling, temporarily locking, and eventually suspending O’Handley’s  
 27 account. The Complaint’s single conclusory allegation that Twitter agreed with OEC to suspend  
 28 O’Handley’s account in retaliation for his tweeting of concerns “related to the work of then-California



1 Secretary of State Alex Padilla,” Compl. ¶ 99, is not sufficient because none of the factual allegations of  
 2 the Complaint conceivably (let alone plausibly) supports that assertion. And other allegations throughout  
 3 the Complaint demonstrate that Twitter took enforcement action against accounts, including O’Handley’s,  
 4 for violating Twitter’s own Civic Integrity Policy and other Twitter Rules—not because the holders of  
 5 those accounts had criticized candidates or officials of a certain political party. For example, in  
 6 communicating the purpose of its Portal to the National Association of Secretaries of State, Twitter stated  
 7 that the Portal is a way for stakeholders to flag concerns regarding “technical issues” and “content on the  
 8 platform that may violate *[Twitter’s] policies.*” Compl. Ex. 2 (emphasis added); *see also* Ex. 3 (“If your state  
 9 is onboarded into the partner support portal, it provides a mechanism to report election issues ....”). And  
 10 OEC’s own records indicate that when Twitter communicated with OEC regarding OEC’s Portal reports,  
 11 Twitter consistently tied its subsequent content-moderation decisions to its own rules. Compl. Ex. 9.

12 Nothing in the Complaint raises a plausible inference that Twitter’s actions with respect to  
 13 O’Handley’s Tweets or account did not follow this routine course. OEC officials’ lone report to Twitter  
 14 pertaining to O’Handley did not even state a request that his November 2020 Tweet be taken down—let  
 15 alone that it be taken down *because* it criticized election officials. Compl. ¶ 76. And the Complaint reflects  
 16 that all of the other Tweets from O’Handley that allegedly led to Twitter’s temporary and permanent  
 17 suspensions of his account did not criticize—or even mention—California or the OEC. Compl. ¶¶ 84-  
 18 87. At most, the Complaint alleges that Twitter’s actions were consistent with the alleged desires of the  
 19 OEC officials. But that is wholly insufficient to establish a shared conspiratorial objective between OEC  
 20 and Twitter to violate O’Handley’s constitutional rights. *See Cruz v. Donnelly*, 727 F.2d 79, 81 (3d Cir.  
 21 1984) (finding no shared conspiratorial objective when the plaintiff “depict[ed] only a police investigation  
 22 that happen[ed] to follow the course suggested by comments from a complainant”).

23 \* \* \*

24 A theory of state action that would allow a single government report to a private actor to transform  
 25 that actor’s conduct into state action would have disastrous consequences. Under such a theory, any time  
 26 a government official seeks to persuade private actors to take action in accordance with the private actor’s  
 27 own rules or policies, the private actor’s conduct would become that of the state. And any time a  
 28 government actor seeks to provide official information to the public—whether it be on health, safety, civil

1 participation, or environmental standards—private actors would be loath to receive that information, let  
 2 alone rely on it, for fear of being deemed arms of the government subject to constitutional  
 3 constraints. This would limit newspapers’ ability to rely on government sources; employers’ ability to rely  
 4 on government records for background checks; and hospitals’ ability to mandate that affiliated doctors  
 5 follow CDC recommendations, just to name a few. And it would greatly diminish the government’s ability  
 6 to protect and promote public health and safety, including online safety. That type of expansive state  
 7 action theory would inhibit liberty far more than it would protect it. It is not the law.<sup>3</sup>

### 8 **III. O’HANDLEY’S REMAINING CLAIMS FAIL ON THE MERITS**

9 The two remaining claims O’Handley asserts against Twitter—under the Ku Klux Klan Act, 42  
 10 U.S.C. § 1985 (Count VI), and the free speech provision of the California Constitution (Count II)—  
 11 likewise fail as a matter of law.

#### 12 **A. O’Handley Fails to State A Claim Under Section 1985 (Count VI)**

13 The Complaint alleges that Twitter conspired with state election officials and the remaining  
 14 Defendants to deprive him of his First and Fourteenth Amendment rights, Compl. ¶¶ 170, 172, but this  
 15 claim fails for multiple independent reasons.

16 The Supreme Court has made clear that Section 1985 is not a “general federal tort law.” *Bray v.*  
 17 *Alexandria Women’s Health Clinic*, 506 U.S. 263, 267–68 (1993). Rather, to state a claim under 42 U.S.C.

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18  
 19 <sup>3</sup> While the absence of state action is what most obviously dooms all of O’Handley’s federal constitutional  
 20 claims, these claims also have a host of other fatal defects. His due process claim (Count IV) fails because  
 21 neither federal nor state law gives him a protected property interest in pursuing a career as a social-media  
 22 influencer or in using Twitter for his business. *See* Compl. ¶¶ 150-151; *Hufford v. McEnaney*, 249 F.3d 1142,  
 23 1150 (9th Cir. 2001); *WMX Techs., Inc. v. Miller*, 197 F.3d 367, 376 (9th Cir. 1999). As for the equal  
 24 protection claim, the Complaint concedes that rational basis review applies to Twitter’s decisions to label  
 25 his Tweets and suspend his account, Compl. ¶¶ 140-141. O’Handley thus bears the burden “to negative  
 26 *any reasonably conceivable state of facts* that could provide a rational basis” for those decisions. *Bd. of Trs. of*  
 27 *Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (emphasis added). And because the Complaint also  
 28 concedes that Twitter applied its own platform rules on civic integrity to suspend O’Handley’s account,  
 Compl. ¶¶ 79, 88, O’Handley’s vague allegations of pretext are wholly insufficient to establish that  
 Twitter’s decision lacked a rational basis, Compl. ¶ 141. Further, the equal protection claim independently  
 fails because it is entirely duplicative of his First Amendment claim. *See* Compl. ¶¶ 139-145. “Although  
 the Ninth Circuit has not considered the issue, the First, Second, Fourth, Seventh, and Eleventh Circuits  
 have all concluded that allegations that a plaintiff was treated differently in retaliation for the exercise of  
 First Amendment rights do not implicate the Equal Protection Clause,” and courts in the Ninth Circuit  
 have dismissed equal protection claims on that basis alone, *see AIDS Healthcare Found. v. Los Angeles Cnty.*,  
 2013 WL 12134048, at \*8 (C.D. Cal. Mar. 18, 2013).



1 § 1985(3), a plaintiff must show: (1) a conspiracy; (2) an act in furtherance of the conspiracy; (3) an intent  
2 to deprive any person of the equal protection of, or equal privileges and immunities under the law; and  
3 (4) a resulting injury to a legal right or privilege. *See Great Am. Fed. Savings & Loan Ass'n v. Novotny*, 442  
4 U.S. 366, 373 (1979). And because the “purpose[] of the Ku Klux Klan Act ... [is] only to protect against  
5 deprivations of equal protection,” *Hickman v. Block*, 81 F.3d 168 (9th Cir. 1996) (unpub. table dec.), a  
6 plaintiff must also show (5) that “some racial, or perhaps otherwise class-based, invidiously discriminatory  
7 animus [lay] behind the conspirators’ action” and (6) that the conspiracy “aimed at interfering with rights”  
8 that are “protected against private, as well as official, encroachment.” *Bray*, 506 U.S. at 267–268. The  
9 Complaint fails to plausibly allege at least the first, third, and fifth of these six essential elements.

10 *First*, with respect to the first and third element, as discussed, *supra* pp. 12-13, the Complaint falls  
11 far short of alleging that Twitter conspired to violate O’Handley’s constitutional rights. A single report  
12 from an OEC official to Twitter regarding a single Tweet cannot demonstrate that Twitter entered into  
13 an agreement with OEC officials specifically to retaliate against O’Handley for speaking out about  
14 Democratic election officials. *See supra* pp. 12-13. O’Handley can no more establish a conspiracy under  
15 42 U.S.C. § 1985(3) than he can establish one for purposes of establishing state action based on joint  
16 action.

17 *Second*, the Complaint also fails to satisfy the fifth element because nowhere does it allege that  
18 Twitter (or any other Defendant) was motivated by “some racial, or ... class-based” animus. *See Bray*, 506  
19 U.S. at 267. The term “class” in the statute “connotes something more than a group of individuals who  
20 share a desire to engage in conduct that the § 1985(3) defendant disfavors.” *Id.* at 269. Rather, to allege  
21 “class-based animus” under Section 1985, the Ninth Circuit requires that courts or Congress have  
22 “designated the class in question a suspect or quasi-suspect classification requiring more exacting scrutiny  
23 or that Congress has indicated through legislation that the class required special protection.” *Schultz v.*  
24 *Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985).

25 The Complaint does not even clearly identify any “class” at which animus was allegedly directed—  
26 let alone demonstrate that any such class is a group that courts or Congress have identified as requiring  
27 special protection. The Complaint vaguely alleges that “Defendants focused their speech censorship  
28 efforts on conservative requests for transparency in election processes rather than the same calls from

1 self-identified political liberals,” Compl. ¶ 83. To the extent this is meant to suggest that Twitter was  
 2 motivated by “political” animus against “conservative[s],” *id.*, that is far from enough. The Supreme Court  
 3 has indicated that “political, non-racial conspiracies” are likely not actionable under Section 1985. *United*  
 4 *Bhd. of Carpenters & Joiners of Am. v. Scott*, 463 U.S. 825, 834-836 (1983). And in any event, the Complaint  
 5 fails to identify a court ruling or a law designating political conservatives as a class requiring special  
 6 protection. *See Schultz*, 759 F.2d at 718 (holding that animus against a class of “state representatives” was  
 7 not actionable under Section 1985 because “there has not been any governmental determination that such  
 8 a class merits special protection”); *Dodge v. Evergreen Sch. Dist. No. 114*, 2020 WL 4366054, at \*5 (W.D.  
 9 Wash. July 30, 2020) (“[I]his Court is unpersuaded that MAGA supporters are a protected class for  
 10 purposes of § 1985. Dodge identifies no congressional statutes or court decisions extending federal  
 11 protection to this group.”). O’Handley’s failure to allege any racial- or class-based animus independently  
 12 requires dismissing his Section 1985 claim.

### 13 **B. O’Handley Fails to Allege Twitter Violated The California Constitution (Count II)**

14 Like his federal constitutional claims, Plaintiff’s claim under the free speech clause of the California  
 15 Constitution must be dismissed because Twitter is a private entity, not a state actor. As explained, “[t]he  
 16 constitutional guarantee of free speech is a guarantee only against abridgment by *government*, federal or  
 17 state,” *Hudgens*, 424 U.S. at 513 (emphasis added); *see also supra* pp. 6-13. The California Constitution  
 18 largely tracks this rule. *See Golden Gateway Ctr. v. Golden Gateway Tenants, Ass’n*, 26 Cal.4th. 1013, 1031  
 19 (2001) (plurality op.) (“Neither the text of California’s free speech clause nor [California] case law reveals  
 20 an intent to depart from the[] bedrock principle[]” of requiring state action.). O’Handley’s failure to  
 21 establish state action, *see supra* at pp. 6-13, is thus also fatal to his claim under the California  
 22 Constitution.

23 O’Handley cannot circumvent this state action requirement based on the one narrow and  
 24 idiosyncratic exception—for the common areas of a shopping mall—that the California Supreme Court  
 25 identified more than four decades ago in *Robins v. Pruneyard Shopping Ctr.*, 23 Cal.3d 899 (1979); *see also*  
 26 Compl. ¶ 129 (claiming right to override editorial judgments of “privately owned” “venue[s]”). Although  
 27 *Pruneyard* extended the reach of California’s constitutional protection of free speech to some privately  
 28 owned, physical spaces in certain shopping malls, courts have repeatedly recognized that this exception is

1 an exceedingly limited one. *See, e.g., Van v. Target Corp.*, 155 Cal. App. 4th 1375, 1384 (2007); *Albertson's,*  
2 *Inc. v. Young*, 107 Cal. App. 4th 106, 117-118 (2003) (rejecting “wishful thinking” that *Pruneyard* applies to  
3 “any large business . . . simply because it is ‘freely and openly accessible to the public’”).

4 No court has extended California’s *Pruneyard* exception to a social media or any other kind of  
5 Internet company. Indeed, recognizing the “reach and sweeping consequences” of such a ruling, several  
6 courts have soundly rejected California constitutional free speech claims as applied to similar online  
7 platforms. *See Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592 (S.D.N.Y. 2020) (subsequent history omitted);  
8 *hiQ Labs Inc. v. LinkedIn Corp.*, 273 F.Supp.3d 1099, 1116 (N.D. Cal. 2017) (subsequent history omitted);  
9 *Kinderstart.com LLC v. Google, Inc.*, 2006 WL 3246596, at \*7 (N.D. Cal. July 13, 2006). O’Handley’s  
10 allegations provide no basis to depart from this uniform consensus. The Complaint recognizes, for  
11 example, that Twitter has set forth restrictions on what content account holders may post (*see* ¶¶ 3, 79,  
12 88) and that account holders must agree to these restrictions to obtain access to the platform. Twitter  
13 Terms of Service. (“We reserve the right to remove Content that violates the User Agreement.”). By  
14 contrast, a citizen speaking in a shopping mall’s common area does not agree to any such terms. On that  
15 basis alone, Twitter does not fit within *Pruneyard*’s definition of a public forum; it is not used by all  
16 members of the public as a general forum for unlimited speech dissemination. *See Kinderstart.com, Inc.*,  
17 2006 WL 3246596, at \*7 (declining to extend *Pruneyard* to Google because the plaintiff failed to plausibly  
18 allege that “users’ freedom extends to the realm of speech”); *Domen*, 433 F. Supp. 3d at 607 (“The Vimeo  
19 website is not the equivalent of a California-based shopping center where large groups of citizens  
20 congregate.” (internal quotation marks omitted)).

21 Moreover, because “the analogy between a shopping mall and the Internet is imperfect,” there are  
22 a host of potential “‘slippery slope’ problems that are likely to surface were *Pruneyard* to apply to the  
23 Internet.” *See hiQ Labs*, 273 F.Supp.3d at 1116. Most notably, such a ruling would prevent Twitter—and  
24 any other private-sector social media platform—from taking steps to remove violent and hateful content  
25 from their platforms. For example, were Twitter subject to the same strictures regarding speech as a  
26 government, it would be hard pressed to prohibit content from violent extremist groups or hateful content  
27 that harasses others on the basis of race or other immutable characteristics. *R.A.V. v. City of St. Paul*, 505  
28 U.S. 377 (1992); *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Much of this speech may be constitutionally

1 protected, but is hardly conducive to creating a social media environment in which diverse perspectives  
 2 and beliefs can be shared. Extending *Pruneyard* to social media companies would expose hundreds of  
 3 millions of people from all over the world on the Twitter platform alone—and billions more on all other  
 4 major social media sites—to a firehose of hateful and/or violent speech that the companies would be  
 5 powerless to moderate. Such an expansion of the *Pruneyard* exception could not be squared with the  
 6 doctrine’s limited scope.

7 **IV. O’HANDLEY’S CLAIMS AGAINST TWITTER ARE BARRED BY THE FIRST AMENDMENT AND**  
 8 **SECTION 230 OF THE COMMUNICATIONS DECENCY ACT**

9 Apart from the fatal claim-specific defects discussed above, O’Handley’s claims against Twitter  
 10 are independently barred by the First Amendment and Section 230 of the Communications Decency Act,  
 11 47 U.S.C. § 230(c)(1), both of which protect Twitter’s right to exercise editorial control over third-party  
 12 content on its platform, just as Twitter did here.

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

15 O’Handley has the relevant First Amendment interests in this case exactly backwards. His claims  
 16 against Twitter all arise from the same acts: Twitter’s adoption and administering of editorial rules and  
 17 policies that prohibit use of its platform for purposes of “manipulating or interfering in elections or other  
 18 civic processes.” *See* Civic Integrity Policy (January 12, 2021); Civic Integrity Policy (November 12, 2020);  
 19 Civic Integrity Policy (May 27, 2020). As a private actor imbued with its own federal constitutional rights,  
 20 Twitter restricted and then completely blocked O’Handley from Tweeting after determining that he had  
 21 violated those rules.

22 The First Amendment protects the “exercise of editorial control and judgment” by privately  
 23 operated communications media over what content they do or do not disseminate. *See Miami Herald*, 418  
 24 U.S. at 257-58. That is why the Supreme Court has held that a newspaper cannot be required to publish  
 25 op-ed columns with which it disagrees or simply wishes to exclude. *Id.* at 258. It is why the California  
 26 Public Utilities Commission could not order Pacific Gas, a private company, to include in its billing  
 27 envelopes speech of a third party with which the company disagreed. *See Pacific Gas*, 475 U.S. at 4. It is  
 28 why private citizens organizing a parade on city streets cannot be compelled “to include among the  
 marchers a group imparting a message that the organizers do not wish to convey.” *Hurley v. Irish-Am. Gay*,

1 *Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 559 (1995). And it is why numerous courts have held that  
 2 the First Amendment safeguards the decisions of online platforms about what content to moderate, filter,  
 3 promote, or restrict. *See La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017) (“Facebook[]  
 4 [has a] First Amendment right to decide what to publish and what not to publish on its platform.”); *Zhang*  
 5 *v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 443 (S.D.N.Y. 2014); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-  
 6 30 (D. Del. 2007).

7 Any judicial ruling that would override or punish Twitter’s editorial decisions regarding what  
 8 content-moderation policies to adopt and how to enforce those policies—whether through a state-action  
 9 theory, a Section 1985 claim, or an extension of California’s narrow *Pruneyard* exception—would deeply  
 10 intrude on Twitter’s own First Amendment rights. *See Halleck*, 139 S. Ct. at 1932 (noting caution is needed  
 11 when applying state action doctrine to avoid “eviscerat[ing] certain private entities’ rights to exercise  
 12 editorial control over speech and speakers on their properties or platforms”). Indeed, any injunction  
 13 requiring Twitter to reinstate his account would itself constitute government-compelled speech—a  
 14 content-based restriction that is presumptively invalid under the First Amendment. *See Nat’l Inst. of Family*  
 15 *& Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018). The First Amendment thus independently requires  
 16 dismissing all of O’Handley’s claims.

### 17 **B. Section 230 Also Bars Plaintiff’s Claims**

18 O’Handley’s claims are separately barred by Section 230(c)(1) of the Communications Decency  
 19 Act, 47 U.S.C. § 230. As the Ninth Circuit has repeatedly recognized, Congress enacted Section 230 “to  
 20 encourage voluntary monitoring” of objectionable material, *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119,  
 21 1122 (9th Cir. 2003), by “immuniz[ing] a webhost who exercises a publisher’s traditional editorial  
 22 functions—such as deciding whether to publish, *withdraw*, postpone, or alter content,” *Barnes*, 570 F.3d at  
 23 1102 (emphasis added); *see also Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d  
 24 1157, 1170 (9th Cir. 2008) (en banc) (explaining that Congress enacted Section 230 to “immunize” online  
 25 platform operators’ decisions of “whether or not to prevent [a given posting]”). Courts in this Circuit and  
 26 elsewhere thus routinely hold that Section 230(c)(1) bars the kind of claims at issue here: claims that seek  
 27 to impose liability for, or countermand by judicial order, a service provider’s “decision to block access  
 28 to—or, in other words, to refuse to publish”—user content. *Sikhs for Justice, Inc. v. Facebook, Inc.*, 144 F.

1 Supp. 3d 1088, 1094-1095 (N.D. Cal. 2015), *aff'd*, 697 F. App'x 526 (9th Cir. 2017) (mem.); *see also, e.g., Fyke*  
 2 *v. Facebook, Inc.*, 808 F. App'x 597, 598 (9th Cir. 2020), *cert. denied*, 141 S.Ct. 1067 (2021); *Lewis v. Google*  
 3 *LLC*, 461 F. Supp. 3d 938, 952 (N.D. Cal. 2020), *aff'd*, 851 F. App'x 723 (9th Cir. 2021), *pet. for cert. filed*,  
 4 No. 21-419 (U.S. Sept. 13, 2021); *Ebeid v. Facebook, Inc.*, 2019 WL 2059662, at \*5 (N.D. Cal. May 9, 2019);  
 5 *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 33-35 (2021).

6 Section 230 bars a claim when three elements are met: “(1) Defendant is a provider or user of an  
 7 interactive computer service; (2) the information for which Plaintiffs seeks to hold Defendant liable is  
 8 information provided by another information content provider; and (3) Plaintiffs’ claim seeks to hold  
 9 Defendant liable as the publisher or speaker of that information.” *Sikhs for Justice*, 144 F. Supp. 3d at 1092-  
 10 1093 (quotation marks omitted); *accord Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009), as  
 11 amended (Sept. 28, 2009). Each of these conditions is satisfied as to O’Handley’s claims.

12 First, Twitter is an “interactive computer service[]” within the meaning of the statute. *See Fields v.*  
 13 *Twitter, Inc.*, 217 F.Supp.3d 1116, 1121 (N.D. Cal. 2016), *aff'd*, 881 F.3d 738 (9th Cir. 2018). Second, the  
 14 content at issue is O’Handley’s Tweets, both those that led Twitter to enforce its Rules against his content  
 15 and account, and those that he would post on the Twitter platform were Twitter’s decision to permanently  
 16 suspend his account were overturned by a court. His claims thus concern content “provided by *another*  
 17 *information content provider.*” 47 U.S.C. §230(c)(1) (emphasis added); *see Sikhs for Justice*, 697 F. App'x at  
 18 526; *Murphy*, 60 Cal. App. 5th at 17.

19 Finally, the Complaint and each of its causes of action seek to hold Twitter liable as the publisher  
 20 of O’Handley’s Tweets. *See* 47 U.S.C. § 230(c)(1). To prevent plaintiffs from skirting Section 230’s  
 21 protection, courts have emphasized that “what matters is not the name of the cause of action.” *Barnes*,  
 22 570 F.3d at 1101-1102. What matters is whether the cause of action seeks to impose liability for “*publishing*  
 23 *conduct*”—such as “reviewing, editing, and deciding whether to publish or to *withdraw from publication* third-  
 24 party content.” *Id.* at 1101-1103 (second emphasis added). Each of O’Handley’s claims against Twitter  
 25 challenges Twitter’s decisions to periodically lock and eventually suspend his account. Compl. ¶¶ 106-  
 26 110, 139-145, 154-156, 169-171. Because Twitter’s decision to temporarily and then permanently suspend  
 27 O’Handley’s account involved “deciding whether to exclude material that third parties seek to post  
 28 online,” it “is perforce immune under section 230.” *Id.* at 1170-71; *see also Lewis*, 461 F. Supp. 3d at 953-



1 955 (Section 230(c)(1) barred claim for violation of the First Amendment predicated on 42 U.S.C. § 1983);  
2 *Ebeid*, 2019 WL 2059662, at \*3 (Section 230(c)(1) immunized Facebook from First Amendment claim,  
3 among others, because the claim sought “to hold Facebook liable for restricting what plaintiff can post  
4 on [its] platform”).

5 **CONCLUSION**

6 For the foregoing reasons, the Court should grant Twitter’s motion and dismiss with prejudice all  
7 of O’Handley’s claims against Twitter (Counts I-IV, VI).

8 Dated: October 5, 2021

Respectfully submitted,

9 /s/ Patrick J. Carome

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 5, 2021, I electronically filed the above document and the accompanying declaration of Thomas G. Sprankling and proposed order with the Clerk of the Court using CM/ECF which will send electronic notification of these filings to all registered counsel.

Dated: October 5, 2021

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

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