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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 SPECIAL
MOTION TO STRIKE COUNT II OF
THE COMPLAINT (ANTI-SLAPP);
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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1 **NOTICE OF MOTION AND MOTION TO STRIKE**

2 PLEASE TAKE NOTICE THAT, on December 16, 2021, at 10:00 a.m., or as soon thereafter as
3 the matter may be heard, in Courtroom 6 of the United States District Court for the Northern District of
4 California, San Francisco Division, this Motion to Strike will be heard. Twitter, Inc. moves to strike Count
5 II of the Complaint pursuant to California’s anti-SLAPP statute. This Motion to Strike is based on this
6 Notice of Motion and the Memorandum of Points and Authorities.

7 **STATEMENT OF REQUESTED RELIEF**

8 Pursuant to California’s anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, Twitter requests that
9 Count II of the Complaint be struck, and that Twitter be awarded its fees and costs associated with
10 litigating this motion.

11 **SUMMARY OF ARGUMENT**

12 Plaintiff Rogan O’Handley’s California state law claim (Count II) challenges and seeks to override
13 decisions of Defendant Twitter, Inc. (“Twitter”) *to speak*—by adopting policies designed to avoid certain
14 types of harmful content appearing on its platform and by applying labels to certain of O’Handley’s Tweets
15 that Twitter deemed to violate those policies—and *not to speak*—by suspending O’Handley’s Twitter
16 account in order to stop disseminating additional harmful content from him. All of these decisions
17 constituted free expression by Twitter on matters of public interest. As a result, these decisions are
18 protected by the First Amendment, *see Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974), and
19 O’Handley’s suing over them under California state law triggers California’s anti-SLAPP statute, Cal. Civ.
20 Proc. Code § 425.16. That statute requires that claims “aris[ing] from” First Amendment-protected
21 expression (or from any activity “in furtherance” of rights to free speech) regarding a “public issue” *id.* §
22 425.16(b)(1), (2), be struck unless the claim has been plausibly pleaded. *Vess v. Ciba-Geigy Corp. USA*, 317
23 F.3d 1097, 1110 (9th Cir. 2003). As a matter of law, O’Handley’s California-law claim has not been, and
24 cannot be, plausibly pleaded. This Court therefore should grant this motion to strike.

25 In an effort to combat misinformation on its platform in the lead up to the 2020 federal election,
26 Twitter adopted a Civic Integrity Policy expressly prohibiting anyone from using the platform to post
27 misleading information about elections. *See* Twitter, Civic Integrity Policy (May 27, 2020). Just as it does
28 with its other content-related policies that comprise the Twitter Rules, to which all Twitter account holders

1 promise to abide as part of the Twitter User Agreement, Twitter takes various steps to enforce this policy.
2 These steps include labeling or removing offending Tweets and suspending accounts that have been used
3 repeatedly to violate the policy. *See id.* Twitter engages in such content moderation as part of its overall
4 effort to provide a platform that is safe for its community of account holders and for society more
5 generally.

6 On multiple occasions, O’Handley used his Twitter account to post content regarding elections
7 and voting that Twitter determined violated its Civic Integrity Policy. Compl. ¶¶ 72-86. Twitter’s initial
8 response was to append a label to a Tweet O’Handley posted in November 2020. That Tweet asserted:
9 “Election fraud is rampant nationwide and we all know California is one of the culprits[.]” Twitter’s label
10 stated: “This claim about election fraud is disputed.” Compl. ¶¶ 72, 77. Over the following months,
11 O’Handley posted more Tweets that similarly violated the Civic Integrity Policy. Compl. ¶¶ 84-86. Twitter
12 responded progressively, labeling several more of his Tweets, temporarily suspending his account, and
13 ultimately imposing a permanent suspension. *Id.*

14 California’s anti-SLAPP statute “provides for early dismissal” of “strategic lawsuits against public
15 participation.” *Navellier v. Sletten*, 29 Cal. 4th 82, 85 (2002). California enacted this law to reduce the
16 proliferation of “lawsuits brought primarily to chill the valid exercise of the constitutional rights of
17 freedom of speech.” Cal. Civ. Proc. Code § 425.16(a). The statute applies to a “cause of action against a
18 person arising from any act of that person in furtherance of the person’s right of petition or free speech
19 under the United States Constitution or the California Constitution in connection with a public issue.” *Id.*
20 § 425.16(b)(1), (e)(4). The Ninth Circuit has recognized that the statute places substantive limits on claims
21 brought under California law, and therefore that motions to strike may be brought in federal court to
22 strike such claims. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1110 (9th Cir. 2003).

23 The state law count of O’Handley’s Complaint (Count Two) is subject to being struck under the
24 California anti-SLAPP statute because it takes direct aim at Twitter’s First Amendment expression. This
25 count, like the remainder of the Complaint, challenges Twitter’s decisions to comment on and ultimately
26 cease publishing messages from O’Handley about the United States presidential election and electoral
27 process that Twitter deemed to be harmful and misleading. Courts have consistently recognized that
28 Twitter and similar social media platforms have “a First Amendment right to decide what to publish and

1 what not to publish on [their] platform[s].” *LaTiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex.
2 2017). And a platform operator’s open expression of its own view about someone else’s statements
3 regarding a matter of public concern (such as an election)—like Twitter’s labeling of several of
4 O’Handley’s Tweets—lies at the very core of what the First Amendment protects. *See, e.g., Boos v. Barry*,
5 485 U.S. 312, 318 (1988) (noting that political speech “operates at the core of the First Amendment”).
6 Twitter’s labeling of O’Handley’s Tweets and decision to ultimately bar him from posting on the Twitter
7 platform were therefore plainly “in furtherance of [its] right of petition or free speech under the United
8 States Constitution or the California Constitution in connection with a public issue.” Cal. Civ. Proc. Code
9 § 425.16(b)(1), (e)(4).

10 In order to defeat this motion to strike, O’Handley would have to show that he has pled a plausible
11 cause of action against Twitter on his California state law claim, *id* § 425.16(a)(3); *Resolute Forest Prods., Inc.*
12 *v. Greenpeace Int’l*, 302 F. Supp. 3d. 1005, 1025 (N.D. Cal. 2017). There are multiple reasons why O’Handley
13 cannot satisfy this test. First, the state law claim fails because Twitter’s decisions to label his Tweets and
14 permanently suspend his account were not state action. Second, the First Amendment itself independently
15 precludes claims that seek to override Twitter’s exercise of editorial discretion regarding whether or how
16 someone’s content is disseminated through its platform. Third, Section 230 of the Communications
17 Decency Act, 47 U.S.C. § 230(c)(1), also precludes claims like O’Handley’s that arise from “exercise[] [of]
18 a publisher’s traditional editorial functions—such as deciding whether to publish, *withdraw*, post-pone, or
19 alter content.” *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009), *as amended* (Sept. 28, 2009)
20 (emphasis added).

21 For these reasons, Twitter requests that the Court strike O’Handley’s California claim (Count II)
22 and award Twitter its fees and costs associated with this motion.

BACKGROUND

A. The Twitter Platform And Its Content Moderation Policies

As explained in Twitter’s motion to dismiss, *see* Mot. to Dismiss 1-3, Twitter adopts and enforces policies and rules to govern the content shared on its Internet communications platform that reaches hundreds of millions of people around the world. One such policy is Twitter’s Civic Integrity Policy. *See* Twitter, Civic Integrity Policy (January 12, 2021); Civic Integrity Policy (November 12, 2021); Civic Integrity Policy (May 27, 2020).¹ Under that 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.” *Id.* The policy provides that Twitter may apply “labels” to Tweets that, in its judgment, make false or misleading claims about elections or other civic processes in violation of the policy. *Id.* Such labels add context to Tweets deemed violative by flagging that they may contain false or misleading information and directing viewers to other sources that contain what Twitter considers to be credible and authoritative information about the topic. *Id.*

Following the deadly Capitol insurrection on January 6, 2021, Twitter instituted a five-strike enforcement protocol for responding to violations of the Civic Integrity Policy. *See* Civic Integrity Policy; Twitter Safety, *An update following the riots in Washington, DC*, https://blog.twitter.com/en_us/topics/company/2021/protecting--the-conversation-following-the-riots-in-washington--. In addition to labeling violative Tweets, Twitter began to take progressive “account-level” measures for each new violation of the policy (or “strike”) that it identified from any particular account, including temporary lock-outs, and eventually permanent suspension. *Id.*; *see also* Compl. ¶ 78.

¹ “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 strike. *See Knievel v. ESPN*, 393 F.3d 1068, 1076-77 (9th Cir. 2005) (considering website under “‘incorporation by reference’ doctrine”). 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.

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

Over the course of several months following the November 2020 U.S. federal election, Plaintiff O’Handley posted a number of Tweets regarding the election that Twitter deemed to violate its Civic Integrity Policy, including one dated November 12 stating: “Audit every California ballot[.] Election fraud is rampant nationwide and we all know California is one of the culprits[.] Do it to protect the integrity of that state’s elections[.]” Compl. ¶ 72. Twitter subsequently applied a label to this Tweet, adding text immediately below the Tweet that stated: “This claim about election fraud is disputed.” Compl. ¶¶ 72, 77.

Soon after the insurrection at the Capitol, on January 18, 2021, O’Handley tweeted: “When your country is stolen and you aren’t even allowed to talk about it, that’s not freedom[.] It’s fascism[.]” Compl. ¶ 84. On January 21, he tweeted: “We are captives under a government we didn’t elect[.] It was forced upon us[.] That is by definition a dictatorship[.]” Compl. ¶ 85. And on January 22, he tweeted: “How about a 9/11 commission-style report on what the hell just happened this past election?! When half our country stops believing in the integrity of our vote, that’s an *emergency* issue[.]” Compl. ¶ 86. Twitter applied the following label to each of these Tweets: “This claim of election fraud is disputed, and this Tweet can’t be replied to, Retweeted, or liked due to a risk of violence.” Compl. ¶¶ 84-86. O’Handley then posted a Tweet picturing the White House behind a security fence with the caption “Most votes in American history.” Compl. ¶ 87. Twitter then permanently suspended his account. Compl. ¶ 88. Twitter also sent him a message stating that it had suspended his account for violating “the Twitter Rules,” and specifically, for “[v]iolating our rules about election integrity.” Compl. ¶ 88.

C. O’Handley’s Allegations About California Officials

In his Complaint, O’Handley attempts to connect the Twitter content-moderation decisions described above to the California Office of Election Cybersecurity (“OEC”), which is a sub-division within the California Secretary of State’s Office that “monitor[s] and counteract[s] false or misleading information regarding the electoral processes that is published online or on other platforms.” Compl. ¶ 20 (quoting Cal. Elec. Code § 10.5(b)(2)). The Complaint identifies only a single, one-way communication from anyone at OEC to Twitter regarding O’Handley, flagging O’Handley’s November 12, 2020 Tweet as potentially violating Twitter’s policy against election-related misinformation. The

1 Complaint does not allege that Twitter ever responded to the OEC. Nor does it allege that OEC ever
2 communicated with Twitter about any of O’Handley’s other Tweets (posted months later) that allegedly
3 led to his eventual suspension.

4 **D. This Litigation**

5 O’Handley filed this lawsuit challenging Twitter’s decision to permanently suspend his account.
6 Count II of the Complaint, which is the basis for Twitter’s invocation of the anti-SLAPP statute, alleges
7 that Twitter’s decisions to label O’Handley’s Tweets and eventually remove him from the platform
8 violated the California constitution’s free speech clause. Compl. ¶¶ 126-137. In particular, it alleges that
9 Twitter violated O’Handley’s rights under that clause by “[q]uashing [his] speech criticizing election
10 processes and elected officials” on the Twitter platform. Compl. ¶ 135. His theory seems to be that even
11 though Twitter is a private company, it is subject to the free speech constraints that California’s
12 Constitution places on state actors. Compl. ¶¶ 129-135. All of O’Handley’s remaining claims against
13 Twitter purportedly arise under federal law and are not subject to this motion.

14 This case was transferred to this Court on September 14, 2021. Dkt. 36. This motion is filed in
15 accordance with the timetable established by a further stipulation that the parties entered and filed on
16 September 20, 2021, Dkt. 42, and that this Court so ordered on September 30, 2021, Dkt. 51.

17 **ARGUMENT**

18 California’s anti-SLAPP statute provides that “[a] cause of action against a person arising from
19 any act of that person in furtherance of the person’s right of petition or free speech under the U.S. or
20 California Constitution in connection with a public issue shall be subject to a special motion to strike,
21 unless the court determines that the plaintiff has established that there is a probability that the plaintiff
22 will prevail on the claim.” Cal. Civ. Proc. Code. § 425.16(b)(1). Under this provision, state law claims
23 that arise from a defendant’s exercise of its speech rights or any action taken in furtherance of those rights
24 in connection with an issue of public interest must be struck unless the plaintiff establishes that he can
25 make out a claim on the merits. *Hilton v. Hallmark Cards*, 599 F.3d 894, 902 (9th Cir. 2010). This rule
26 applies regardless whether the claims are filed in federal or state court. *See Planned Parenthood Fed’n of Am.,*
27 *Inc. v. Ctr. for Med. Progress*, 214 F. Supp. 3d 808, 819 (N.D. Cal. 2016) (subsequent history omitted).

28 To determine whether a motion to strike should be granted, federal courts in this circuit first

1 consider whether “the plaintiff’s suit arises from an act in furtherance of the defendant’s rights of petition
 2 or free speech” in connection with a public issue. *Vess*, 317 F.3d at 1110. That requirement should be
 3 “construed broadly,” Cal. Civ. Proc. Code § 425.16(a), and covers not only First Amendment activity
 4 itself, but also “any ... conduct in furtherance of the exercise of the constitutional right of petition or the
 5 constitutional right of free speech in connection with a public issue or an issue of public interest,” *id.*
 6 § 425.16(e)(4). When that standard is met, “the burden shifts to the plaintiff to demonstrate a probability
 7 of prevailing on the challenged claims.” *Vess*, 317 F.3d at 1110; *see also Resolute Forest Prods.*, 302 F. Supp.
 8 3d. at 1025.

9 Where, as here, “an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim,
 10 a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether
 11 a claim is properly stated.” *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834
 12 (9th Cir. 2018), *amended by*, 897 F.3d 1224 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1446 (2019). If O’Handley
 13 “cannot plead a plausible cause of action under the FRCP 12(b)(6) standard, then [he] cannot meet the
 14 probability of success on the merits standard” as a matter of law. *Resolute Forest Prods.*, 302 F. Supp. 3d at
 15 1026; *see also Niantic, Inc. v. Global*, 2020 WL 1548465, at *7-8 (N.D. Cal. Jan. 30, 2020).

16 **I. O’HANDLEY’S CALIFORNIA CONSTITUTIONAL CLAIM ARISES FROM TWITTER’S FIRST**
 17 **AMENDMENT PROTECTED ACTIVITY IN CONNECTION WITH AN ISSUE OF PUBLIC**
 18 **INTEREST**

19 At the first prong of the anti-SLAPP analysis, “the critical consideration is whether the [plaintiff’s]
 20 cause of action is *based on* the defendant’s protected free speech or petitioning activity” or on any action
 21 taken in furtherance of those rights. *Navellier v. Sletten*, 20 Cal. 4th 82, 89 (2002); *see also Elec. Frontier Found.*
 22 *v. Glob. Equity Mgmt. (SA) Pty Ltd.*, 290 F. Supp. 3d 923, 943 (N.D. Cal. 2017). “[A] court focuses its anti-
 23 SLAPP analysis on the specific conduct that the claim is challenging.” *Jordan-Benel v. Universal City Studios,*
 24 *Inc.*, 859 F.3d 1184, 1190 (9th Cir. 2017).

25 **A. Twitter’s Decisions To Label O’Handley’s Tweets And Suspend His Account Were**
 26 **Protected Free Speech Activity**

27 O’Handley’s claim under the California constitution is “based on” Twitter’s First Amendment-
 28 protected free speech activity. It challenges Twitter’s decisions to promulgate its policy against posting
 election-related disinformation and to enforce that policy by labeling some of O’Handley’s Tweets,

1 temporarily suspending his account, and ultimately permanently barring him from continuing to post
2 content on the platform. These actions were indisputably exercises of Twitter’s First Amendment rights,
3 and *a fortiori* taken “in furtherance of” those rights.

4 The First Amendment protects such “exercise[s] of editorial control and judgment” over what
5 content to publish or not to publish on the Internet, just as it protects a newspaper from being required
6 to publish columns with which it does not agree. *See Miami Herald*, 418 U.S. at 257-58; *see also Reno v.*
7 *ACLU*, 521 U.S. 844, 870 (1997) (finding “no basis for qualifying the level of First Amendment scrutiny
8 that should be applied to [the Internet]”). Indeed, courts consistently hold that the First Amendment
9 safeguards online platforms’ decisions about what content to moderate, filter, promote, or restrict. *See*
10 *La’Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d at 991 (“Facebook[] [has a] First Amendment right to decide
11 what to publish and what not to publish on its platform.”); *NetChoice, LLC v. Moody*, 2021 U.S. Dist. LEXIS
12 121951, at *28 (N.D. Fla. June 30, 2021),), *appeal filed sub. nom. NetChoice, LLC v. Att’y Gen.*, No. 21-12355
13 (11th Cir. July 13, 2021); *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 443 (S.D.N.Y. 2014); *Langdon v.*
14 *Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007). And the Ninth Circuit has explained that “where
15 ... an action directly targets the way a content provider chooses to deliver, present, or publish news content
16 on matters of public interest, that action is based on conduct in furtherance of free speech rights and must
17 withstand scrutiny under California’s anti-SLAPP statute.” *Greater L.A. Agency on Deafness, Inc. v. Cable*
18 *News Network, Inc.*, 742 F.3d 414, 424–425 (9th Cir. 2014).

19 California courts have likewise held that online platforms’ content-moderation decisions are
20 protected First Amendment activity within the scope of the anti-SLAPP statute’s first prong. For example,
21 in *Kronemyer v. Internet Movie Database, Inc.*, 150 Cal. App. 4th 941, 946 (2007), the court held that a claim
22 based on the defendant’s determination to exclude a movie producer from movie credits posted to its
23 website satisfied the first prong of the anti-SLAPP test. *See also Cross v. Facebook, Inc.*, 14 Cal. App. 5th
24 190, 202 (2017). As in those cases, Twitter’s decisions to label O’Handley’s Tweets and ultimately bar
25 him from posting on its platform are protected activity satisfying the statutory test. *See Isaac v. Twitter, Inc.*,
26 2021 WL 3860654, at *6 (S.D. Fla. Aug. 30, 2021) (Twitter has a “First Amendment right to decide what
27 to publish and what not to publish on its platform”).
28

1 **B. Twitter’s Enforcement Of Its Civic Integrity Policy Is Related To An Issue Of Public**
 2 **Interest**

3 Twitter’s decisions to establish a policy against election-related information and then, in
 4 furtherance of that policy, to label some of O’Handley’s Tweets and permanently suspend his account,
 5 satisfy the second requirement of the anti-SLAPP statute—that the protected activity on which the
 6 plaintiff’s claim is based have been “in connection with a public issue.” Cal. Civ. Proc. Code
 7 § 425.16(b)(1). The editorial discretion that Twitter exercised here, and that O’Handley’s state-law claim
 8 attacks, easily meets this test.

9 Twitter’s policy that its platform should not be used to interfere with civic processes, including
 10 elections, and its determinations that O’Handley’s Tweets should be labeled and his account suspended
 11 in furtherance of that policy, plainly were “in connection with” quintessential “public issues”—including
 12 democracy itself. The content from O’Handley that Twitter took editorial action against proclaimed that
 13 “election fraud is rampant nationwide,” accused government officials of purposefully interfering with
 14 electoral results, and claimed that the “country was stolen,” including in the days following the deadly
 15 insurrection that occurred at the U.S. Capitol in response to similar claims of election fraud. Compl. ¶¶
 16 72, 84-86. It is difficult to imagine expression on a subject of more significant public interest than that
 17 relating to the legitimacy of, and efforts to falsely sow doubt in the public mind about, the results of a
 18 U.S. federal presidential election. Indeed, courts have long held that speech bearing on elections and other
 19 political matters lies at the very core of what the First Amendment protects. *See Snyder v. Phelps*, 562 U.S.
 20 443, 453 (2011).

21 California courts have found expressive activity on matters of far less importance than this to have
 22 been undertaken “in connection with an issue of public interest.” One California appellate court held that
 23 “an issue of public interest ... is any issue in which the public is interested.” *Nygaard, Inc. v. Uusi-Kerttula*,
 24 159 Cal. App. 4th 1027, 1042 (2008). Others have had little difficulty holding even fairly idiosyncratic
 25 issues to be “issue[s] of public interest.” *See, e.g., Kronemyer*, 150 Cal. App. 4th at 949-950 (defendant’s
 26 policy about who was listed as an executive producer of the movie “My Big Fat Greek Wedding”); *Gilbert*
 27 *v. Sykes*, 147 Cal. App. 4th 13, 23 (2007) (“plastic surgery”).

28 Indeed, the fact that Twitter’s expressive activity entailed moderation of content on a platform
 reached by many millions of people is sufficient, by itself, to satisfy the “in connection with public issue”

1 test. Such expression would have public significance even if it were not directed at a topic as significant,
 2 potentially harmful, and momentous as election misinformation and its ability to undermine public
 3 confidence in U.S. elections. Given the wide reach of online platforms, courts have found that a private
 4 operator’s ability to “decisively police the integrity of its platform[] is without question a pressing public
 5 interest.” *Stackla, Inc. v. Facebook, Inc.*, 2019 WL 4738288, at *6 (N.D. Cal. Sept. 27, 2019). Indeed, matters
 6 that “can affect many people [are] generally deemed to involve an issue of public interest for purposes of
 7 the anti-SLAPP statute.” *Wong v. Jing*, 189 Cal. App. 4th 1354, 1366 (2010).²

8 In sum, the prerequisites for application of the anti-SLAPP statute to O’Handley’s state-law claim
 9 are plainly satisfied, and the claim must be struck if it has not been plausibly pleaded.

10 **II. O’HANDLEY’S PURPORTED CLAIM UNDER CALIFORNIA STATE LAW IS NOT PLAUSIBLY**
 11 **PLEADED**

12 As more fully explained in Twitter’s concurrently filed motion to dismiss, O’Handley’s state law
 13 claim fails for several, independent reasons: First, the claim is foreclosed by California law because, as a
 14 private actor, Twitter’s actions are not constrained by the California constitution. *See infra* at 7-13; Mot.
 15 to Dismiss at 16-18. Second, judicially imposed relief based on this claim would infringe on, and is
 16 foreclosed by, Twitter’s own First Amendment rights under the U.S. Constitution. *See infra* at 13-14; Mot.
 17 to Dismiss at 18-19. And third, Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c)(1),
 18 independently bars this claim. *See infra* at 14-15; Mot. to Dismiss at 19-21.

19 **A. O’Handley Fails To State A Claim Under California Law**

20 O’Handley’s claim against Twitter under the free speech provision of the California constitution
 21 must be struck because Twitter is a private entity, not a state actor. “The constitutional guarantee of free
 22 speech is a guarantee only against abridgment by government, federal or state.” *Hudgens v. N.L.R.B.*, 424
 23 U.S. 507, 513 (1976) (emphasis added). And the California Supreme Court has made clear that “[n]either
 24 the text of California’s free speech clause nor [California] case law reveals an intent to depart from the

25
 26
 27 ² The Complaint itself recognizes the public’s interest in the Twitter platform and the potential public
 28 impact of messages disseminated there. *See* Compl. ¶ 133 (“Twitter is an essential and invaluable forum
 for the rights of free speech and petition.”); ¶ 90 (“Twitter serves as the primary social channel for political
 commentary and news in American society at present.”); ¶ 71 (prior to his suspension, O’Handley’s Tweets
 were reaching “approximately 420,000 Twitter followers”).

1 bedrock principle” of requiring state action. *Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 26 Cal.
2 4th 1013, 1031 (2001) (plurality op.).

3 **1. The Complaint Cannot Plead “Joint Action” Between California Officials And**
4 **Twitter**

5 Twitter’s decisions to label O’Handley’s Tweets and suspend his account were not state actions,
6 and thus cannot violate the California constitution’s free speech clause. The Complaint’s reliance on a
7 “joint action” theory to try to establish the requisite state action, *see, e.g.*, Compl. ¶ 109, is misplaced.
8 Although California courts have not defined the contours of state action for the purposes of the free
9 speech clause, federal courts have applied Section 1983’s “joint action” test to California constitutional
10 claims brought against private actors. *See, e.g., Bain v. Cal. Teachers. Ass’n*, 156 F. Supp. 3d 1142, 1154 (C.D.
11 Cal. 2015); *San Mateo Union High Sch. Dist. v. Educ. Testing Servs.*, 2013 WL 4711611, at *13 (N.D. Cal. Aug.
12 30, 2013). The Complaint does not come close to satisfying that exacting test.

13 Joint action “require[s] a substantial degree of cooperation,” *Franklin v. Fox*, 312 F.3d 423, 445
14 (9th Cir. 2002), with respect to the “particular decision challenged,” *Mathis v. Pac. Gas & Elec. Co.*, 75 F.3d
15 498, 503-504 n.4 (9th Cir. 1996). And the bar is equally demanding for a plaintiff who seeks to establish
16 joint action on a conspiracy theory. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970). “Mere
17 passive acquiescence in the direction of state officials generally is not sufficient,” nor even is an agreement
18 to take some particular action. *See Taylor v. List*, 880 F.2d 1040, 1048 (9th Cir. 1989). Rather, the private
19 and government actors must have specifically agreed to “violate constitutional rights.” *See Fonda v. Gray*,
20 707 F.2d 435, 438 (9th Cir. 1983).

21 The Complaint falls far short of alleging substantial cooperation between Twitter and OEC
22 officials to suspend O’Handley’s account. It merely alleges that an OEC official sent a single
23 communication to Twitter “flag[g]ing concerns” about one of O’Handley’s Tweets through the Partner
24 Support Portal that Twitter had created to receive, and enable quick review of, reports from government
25 officials and others regarding election misinformation and other content violating the Twitter
26 Rules. Compl. ¶¶ 28-29, 32-33, 77-78. O’Handley does not allege any other communication between the
27 OEC and Twitter regarding that single Tweet. And he does not allege that the OEC reported any of the
28 four subsequent Tweets that, according to the Complaint, Twitter determined also violated its Civic

1 Integrity Policy and ultimately led Twitter to permanently suspend O’Handley’s account. In sum, the
2 Complaint contends that a *single* report by a governmental actor to Twitter regarding a *single* Tweet
3 somehow transformed all subsequent content moderation by Twitter with respect to O’Handley’s account
4 into “joint action” with the OEC. Under well-established law, this falls far short of the kind of “substantial
5 cooperation” required to establish state action based on joint action.

6 Courts have repeatedly rejected claims that mere exchanges of information between private and
7 governmental entities amounts to joint action. *See Lockhead v. Weinstein*, 24 F. App’x 805, 806 (9th Cir.
8 2001); *see also Schneider v. Tretola*, 8 F.3d 809 (1st Cir. 1993) (holding that supplying information to police
9 officer did not turn private party into state actor); *see also Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151,
10 1157 (10th Cir. 2016) (same); *Moldowan v. City of Warren*, 578 F.3d 351, 399 (6th Cir. 2009) (same); *Butler v.*
11 *Goldblatt Bros., Inc.*, 589 F.2d 323, 327 (7th Cir. 1978) (same). In *Federal Agency of News LLC v. Facebook,*
12 *Inc.* (“FAN”), 432 F. Supp. 3d 1107 (N.D. Cal. 2020), for example, a Russian news-disseminating company
13 argued that Facebook’s suspension of its account was joint action because Facebook searched for
14 advertisements that “might have originated in Russia,” and “shared these findings with United States
15 authorities.” *Id.* at 1126. The court disagreed, reasoning that “the case law is unequivocal that supplying
16 information to the government alone does not amount to joint action.” *Id.*

17 O’Handley’s allegations of “cooperation” are even less extensive than those found wanting in
18 FAN and the legion of other cases rejecting attempts to transform private behavior into state action. *See,*
19 *e.g., Howard v. AOL*, 208 F.3d 741, 754 (9th Cir. 2000); *Kim v. Apple, Inc.*, 2014 WL 3056136, at *2 (D.D.C.
20 July 7, 2014), *aff’d*, 582 F. App’x 3 (D.C. Cir. 2014).³ FAN, for example, involved allegations of repeated
21 interactions between the governmental actor and the private party. In contrast, the only factual allegation
22 in the Complaint relating to interactions between any government actor and Twitter is the allegation that
23 an employee in the Secretary of State’s office sent one message to Twitter “flag[g]ing” a single post in
24 November 2020. Compl. ¶ 76. This single communication to Twitter did not request (let alone direct)
25 that Twitter take any action whatsoever in connection with even the November 2020 Tweet. Compl.

26
27 ³ *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 ¶ 76. *See id.* And there is no allegation that Twitter ever communicated back. Such a one-off, one-way
2 communication in no way raises a plausible inference of “substantial cooperation.” And the Complaint’s
3 conclusory assertions that “Defendants jointly acted in concert” to “willfully and cooperatively . . . censor
4 [O’Handley’s] speech,” Compl. ¶¶ 108-110, are exactly the sort of “bare allegation[s] that ‘the defendant
5 acted in concert’” that courts routinely deem insufficient to establish joint action,” *Dietrich v. John Ascuaga’s*
6 *Nugget*, 548 F.3d 892, 900 (9th Cir. 2008).

7 To the extent that the Complaint seeks to plead joint action by alleging the existence of a
8 conspiracy, it likewise fails to meet the requisite high showing for doing so. *See Adickes*, 398 U.S. at 152.
9 To be deemed part of an actionable governmental conspiracy, the private defendant must have agreed
10 with state actors specifically to “violate constitutional rights”—applied here, Twitter would have had to
11 have agreed with government officials to act “deliberately” to retaliate against O’Handley for criticizing
12 Mr. Padilla and other Democratic California election officials. *See Fonda*, 707 F.2d at 438 (plaintiff must
13 allege that both the state and the private actor possessed a shared retaliatory motive); *see also Cunningham*
14 *v. Southlake Ctr. for Mental Health, Inc.*, 924 F.2d 106, 107-108 (7th Cir. 1991).

15 The Complaint also contains several allegations and exhibits that undermine any plausible
16 inference that Twitter harbored a shared retaliatory motive with OEC. The single conclusory allegation
17 that Twitter agreed with OEC to suspend O’Handley’s account in retaliation for O’Handley having
18 Tweeted concerns “related to the work of then-California Secretary of State Alex Padilla,” Compl. ¶ 99,
19 is not sufficient because none of the factual allegations of the Complaint conceivably (let alone plausibly)
20 support that assertion. To the contrary, O’Handley’s other allegations demonstrate that Twitter took
21 enforcement action against accounts, including O’Handley’s account, for violating Twitter’s own Civic
22 Integrity Policy and other rules—not because the holders of those accounts had criticized candidates or
23 officials of a certain political party. For example, in communicating the purpose of its Partner Support
24 Portal to the National Association of Secretaries of State, Twitter stated that the Portal is a way for
25 stakeholders to flag concerns regarding “technical issues” and “content on the platform that may violate
26 [Twitter’s] policies.” Compl. Ex. 2 (emphasis added); *see also* Ex. 3. And OEC’s own records indicate that
27 when Twitter communicated with OEC regarding reports that OEC had lodged through the portal,
28 Twitter consistently tied its subsequent content-moderation decisions to its own rules. Compl. Ex. 9.

1 Nothing in the Complaint raises a plausible inference that Twitter’s actions with respect to O’Handley’s
 2 Tweets or account did not follow this routine course. OEC officials’ lone report to Twitter pertaining to
 3 O’Handley did not even state a request that his November 2020 Tweet be taken down—let alone that it
 4 be taken down because it criticized election officials. Compl. ¶ 76. And the Complaint reflects that all of
 5 the other Tweets from O’Handley that allegedly led to Twitter’s temporary and permanent suspensions
 6 of his account did not criticize—or even mention—California or the OEC. Compl. ¶¶ 84-87.

7 **2. The Traditional Public Forum Exception Recognized In *Robins v. Pruneyard***
 8 ***Shopping Center* is Inapplicable To O’Handley’s Claim**

9 O’Handley cannot circumvent the California constitution’s state action requirement based on the
 10 one narrow, idiosyncratic exception that the California Supreme Court identified four decades ago for the
 11 common areas of a shopping mall. *See Robins v. Pruneyard Shopping Ctr.*, 23 Cal.3d 899 (1979). Although
 12 *Pruneyard* extended the reach of California’s constitutional protection of free speech to some privately
 13 owned physical spaces in certain shopping malls, courts have repeatedly recognized that this exception is
 14 an exceedingly limited one. *See, e.g., Albertson’s, Inc. v. Young*, 107 Cal. App. 4th 106, 117-118 (2003)
 15 (rejecting “wishful thinking” that *Pruneyard* applies to “any large business ... simply because it is ‘freely
 16 and openly accessible to the public’”); *see also* 13 *Larsen et al.*, California Jurisprudence 3d § 275 (2018)
 17 (listing “shopping centers” as the only specific application of the *Pruneyard* doctrine).

18 No court has extended the *Pruneyard* exception to a social media platform or any other kind of
 19 Internet company. Indeed, recognizing the “reach and sweeping consequences” of such a ruling, several
 20 courts have soundly rejected California constitutional free speech claims against similar online
 21 platforms. *See hiQ Labs Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d 1099, 1116 (N.D. Cal. 2017) (subsequent
 22 history omitted); *Kinderstart.com LLC v. Google, Inc.*, 2006 WL 3246596, at *7 (N.D. Cal. July 13, 2006);
 23 *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592 (S.D.N.Y. 2020) (subsequent history omitted); *see also Buzza v.*
 24 *Yahoo!, Inc.*, 2011 WL 5041174, at *2 (N.D. Cal. Oct. 24, 2011).

25 O’Handley’s allegations provide no basis to depart from this uniform consensus. First, the
 26 *Pruneyard* exception applies only to “property that is freely and openly accessible to the public,” *Golden*
 27 *Gateway Center*, 26 Cal. 4th at 1033—something that is not true of the Twitter platform. In *Pruneyard*, the
 28 California Supreme Court emphasized that the shopping center was a public forum because it gave an

1 “open and *unrestricted* invitation to the public to congregate freely.” *See id.* at 1032 (emphasis added). By
2 contrast, and as the Complaint recognizes, Twitter has set forth restrictions on what content account
3 holders may post, *see, e.g.*, Compl. ¶¶ 3, 79, 88, and account holders must agree to and abide by these
4 restrictions to obtain access to the platform, *see* Twitter, Terms of Service, <https://twitter.com/en/tos>. A
5 citizen speaking in a shopping mall’s common area does not agree to any such terms. On that basis alone,
6 the Twitter platform does not fit within *Pruneyard*’s definition of a public forum; it is not used by all
7 members of the public as a general forum for unlimited speech dissemination. *See Kinderstart.com, Inc.*,
8 2006 WL 3246596, at *7; *Domen*, 433 F. Supp. 3d at 607.

9 Second, as explained *infra* 13-14, any judicial ruling that would force Twitter to carry messages
10 with which it disagrees on its privately operated communications platform, or make Twitter liable for
11 exercising editorial judgment over what content may or may not appear on that platform, would violate
12 Twitter’s own rights under the First Amendment—a concern that was plainly not at issue in *Pruneyard*.
13 As the U.S. Supreme Court later explained, “[n]otably absent from *Pruneyard* was any concern that access
14 to this area might affect the shopping center owner’s exercise of his own right to speak: the owner did not
15 even allege that he objected to the content of the pamphlets; nor was the access right content based”; the
16 mall owner imposed a blanket ban on *all* expressive activity. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of*
17 *Cal.*, 475 U.S. 1, 12 (1986). By contrast, Twitter has established extensive content-based rules, such as its
18 Civic Integrity Policy, that prohibit account holders from posting various categories of content on its
19 platform, and it also exercises its editorial judgment to remove from its platform content with which it
20 disagrees. As Supreme Court precedent makes clear, *Pruneyard*’s narrow exception cannot override those
21 First-Amendment-protected decisions. Otherwise, private actors like Twitter “would face the
22 unappetizing choice of allowing all comers or closing the platform altogether.” *Manhattan Cmty. Access*
23 *Corp. v. Halleck*, 139 S. Ct. 1921, 1931 (2019).

24 Moreover, because “the analogy between a shopping mall and the Internet is imperfect,” there are
25 a host of potential “‘slippery slope’ problems that are likely to surface were *Pruneyard* to apply to the
26 Internet.” *See hiQ Labs*, 273 F. Supp. 3d at 1116. Most notably, such a ruling would prevent Twitter—
27 and any other private-sector social media platform—from taking steps to remove violent and hateful
28 content from their platforms. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Smith v. Collin*, 439 U.S.

1 916, 99 (1978); *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Whether or not some of this speech is
2 constitutionally protected, it is hardly conducive to creating a social media environment in which diverse
3 perspectives and beliefs can be shared. Extending *Pruneyard* to social media companies would expose
4 millions of people all over the world (on the Twitter platform alone) to a firehose of hateful and/or violent
5 speech that platform operators would be powerless to moderate. Such an expansion of the *Pruneyard*
6 exception cannot be squared with the doctrine’s limited scope or purpose.

7 **B. The First Amendment Forecloses O’Handley’s California State Law Claim**

8 O’Handley’s claim under the California constitution’s free speech provision also cannot succeed,
9 and therefore must be struck, because it would violate Twitter’s First Amendment rights. O’Handley’s
10 claim arises from the same protected acts that trigger the anti-SLAPP statute’s protection: Twitter’s
11 adoption and administration of editorial policies that prohibit use of its platform for purposes of
12 “manipulating or interfering in elections or other civic processes.” *See supra* 4-5. Twitter restricted and
13 then completely blocked O’Handley from posting on the Twitter platform after determining that he had
14 violated those rules. As noted, the First Amendment protects this “exercise of editorial control and
15 judgment” over what content to publish or not to publish. *Id.* Interpreting the California constitution to
16 prohibit or interfere with Twitter’s ability to exercise these rights would conflict with federal constitutional
17 law.

18 The First Amendment protects “the exercise of editorial control and judgment” by privately
19 operated communications media over what content they do or do not disseminate. *See Miami Herald*, 418
20 U.S. at 257-58. That is why the Supreme Court has held that a newspaper cannot be required to publish
21 op-ed columns with which it disagrees or simply wishes to exclude. *See id.* at 258. It is why the California
22 Public Utilities Commission could not order Pacific Gas, a private company, to include in its billing
23 envelopes speech of a third party with which the company disagreed. *See Pacific Gas*, 475 U.S. at 4. It is
24 why private citizens organizing a parade on city streets cannot be compelled “to include among the
25 marchers a group imparting a message that the organizers do not wish to convey.” *Hurley v. Irish-Am. Gay,*
26 *Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 559 (1995). And it is why numerous courts have held that
27 the First Amendment safeguards the decisions of online platforms about what content to moderate, filter,
28 promote, or restrict. *See supra* 5.

1 So too here. Any judicial ruling that would override or punish Twitter’s editorial decisions
 2 regarding what content-moderation policies to adopt and how to enforce those policies would deeply
 3 intrude on Twitter’s own First Amendment rights. *See Halleck*, 139 S. Ct. at 1932 (noting caution is needed
 4 when applying state action doctrine to avoid “eviscerat[ing] certain private entities’ rights to exercise
 5 editorial control over speech and speakers on their properties or platforms”). Indeed, any court order
 6 requiring Twitter to reinstate O’Handley’s account would itself constitute government-compelled
 7 speech—a content-based restriction that is presumptively unconstitutional. *See Nat’l Inst. of Family & Life*
 8 *Advocates. v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

9 The conclusion is the same with respect to Twitter’s labeling of O’Handley’s Tweets as “disputed.”
 10 Such labeling decisions are protected as an exercise of Twitter’s editorial judgment regarding how to
 11 address the problem of election-related misinformation appearing on its platform. Especially given the
 12 backdrop of public concerns regarding the integrity of the electoral process, *see* Compl. ¶¶ 72, 84, 85, 86,
 13 as well as the fact that First Amendment protections are at their zenith in the realm of speech about
 14 elections and politics, *see McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995); *Mills v. Alabama*, 384
 15 U.S. 214, 218 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), Twitter’s labeling decisions
 16 plainly qualify for very substantial protection. *See NetChoice*, 2021 U.S. Dist. LEXIS 121951, at *28
 17 (holding that Florida law explicitly forbidding social media platforms from appending their own
 18 statements to posts by some users is subject to First Amendment scrutiny). The First Amendment thus
 19 independently dooms O’Handley’s state law claim.

20 **C. O’Handley’s Claim Is Barred By Section 230 Of The Communications Decency Act**

21 Under well-developed federal law, as recognized by the California Supreme Court and federal
 22 courts alike, O’Handley’s challenge to his temporary and permanent suspensions from Twitter’s platform
 23 is separately barred by Section 230 of the Communications Decency Act, 47 U.S.C. § 230. *See* Mot. to
 24 Dismiss 18-21. This is yet another reason why his state law claim must be struck pursuant to the anti-
 25 SLAPP statute.

26 As the Ninth Circuit has repeatedly recognized, Congress enacted Section 230 “to encourage
 27 voluntary monitoring” of objectionable material, *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th
 28 Cir. 2003), by “immuniz[ing] a webhost who exercises a publisher’s ‘traditional editorial functions—such

1 as deciding whether to publish, *withdraw*, postpone, or alter content,” *Barnes*, 570 F.3d at 1102 (emphasis
2 added); *see also Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170 (9th
3 Cir. 2008) (en banc) (explaining that Congress enacted Section 230 to “immunize” online platform
4 operators’ decisions of “whether or not to prevent [a given posting].”). Courts in this Circuit and
5 elsewhere thus routinely hold that Section 230(c)(1) bars claims, like O’Handley’s, that seek to impose
6 liability for, or countermand by judicial order, a service provider’s “decision to block access to—or, in
7 other words, to refuse to publish”—user content. *Sikhs for Justice, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d
8 1088, 1094-1095 (N.D. Cal. 2015), *aff’d*, 697 F. App’x 526 (9th Cir. 2017) (mem.); *see also, e.g., Fyke v.*
9 *Facebook, Inc.*, 808 F. App’x 597, 598 (9th Cir. 2020), *cert. denied*, 141 S.Ct. 1067 (2021); *Lewis v. Google LLC*,
10 461 F. Supp. 3d 938, 952 (N.D. Cal. 2020), No. 20-632, *aff’d*, 851 F. App’x 723 (9th Cir. 2021), *pet. for cert.*
11 *filed*, No. 21-419 (U.S. Sept. 13, 2021); *Ebeid v. Facebook, Inc.*, 2019 WL 2059662, at *5 (N.D. Cal. May 9,
12 2019); *Murphy v. Twitter*, 60 Cal. App. 5th 12, 33-35 (2021).

13 CONCLUSION

14 For the foregoing reasons, Count II of the Complaint should be struck and Twitter should be
15 awarded its fees and costs associated with litigating this motion.

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1 Dated: October 5, 2021

Respectfully submitted,

2 /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 attached declaration of Thomas G. Sprankling and exhibits with the Clerk of the Court using CM/ECF which will send electronic notification of such filing to all registered counsel.

Dated: October 5, 2021

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