

No. 22-15071

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ROGAN O’HANDLEY,

Plaintiff-Appellant,

v.

SHIRLEY N. WEBER, in her
official capacity as SECRETARY
OF STATE,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of
California Case No. 3:21-cv-07063-CRB; Hon. Charles R. Breyer

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APPELLANT'S EXCERPTS OF RECORD VOL. 1

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JUDGMENT

The Court hereby enters judgment for Defendants and against Plaintiff Rogan O'Handley, consistent with the Court's order granting Defendants' motions to dismiss. See Order (dkt. 86).¹

IT IS SO ORDERED.

Dated: January 10, 2022



CHARLES R. BREYER
United States District Judge

¹ The Court declined to exercise supplemental jurisdiction over the California Constitution (Free Speech clause) claim, and dismissed it without prejudice to Plaintiff bringing that claim in state court. See Order at 47.

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**ORDER GRANTING MOTIONS TO
DISMISS**

Plaintiff Rogan O'Handley believes that he is the victim of a conspiracy to censor conservative voices surrounding the 2020 Presidential Election. See generally Compl. (dkt. 1). After Twitter appended labels to several of O'Handley's tweets and then permanently suspended his Twitter account, O'Handley brought suit against Twitter, as well as three other sets of defendants with whom he contends Twitter conspired: State defendants (Dr. Shirley Weber, in her official capacity as California Secretary of State, Jenna Dresner, Akilah Jones, Sam Mahood, Paula Valle, and former Secretary of State Alex Padilla); a private contractor, SKDKnickerbocker ("SKDK"); and the National Association of Secretaries of State ("NASS"). Id. Each of those four sets of defendants has now brought a motion to dismiss, and Twitter has brought a Motion to Strike Count II of the Complaint under California's anti-SLAPP statute.¹ See generally Twitter MTD (dkt. 60); State MTD (dkt. 59); SKDK MTD (dkt. 57); NASS MTD (dkt. 58); Twitter Anti-SLAPP (dkt. 61). The Court held a motion hearing on December 16, 2021. See Motion Hearing (dkt. 85). As discussed below, the Court GRANTS the motions to dismiss, and does not reach the anti-SLAPP motion.

¹ This refers to California's Anti-Strategic Lawsuits Against Public Participation statute, Cal. Civ. Proc. Code § 425.16(b)(1).

I. BACKGROUND²

A. Parties and Actions Leading Up to Enforcement Action

1. O’Handley

O’Handley, an attorney licensed to practice in California, makes his living as a political commentator. Compl. ¶ 9. He alleges that he “left private practice in order to better utilize his legal education in defense of liberty and constitutional ideals.” Id. ¶ 70. He posts on social media, speaks at colleges and political conferences, and comments on television. Id. O’Handley’s social media handle is “DC_Draino”; in the lead-up to the 2020 election, DC_Draino had 420,000 Twitter followers. Id. ¶¶ 69, 71.

2. Twitter

Twitter is a social media platform with roughly 330 million monthly active users. Id. ¶ 17. Twitter has content-moderation policies called the Twitter Rules that are designed, among other things, to minimize the reach of harmful and misleading information. See Twitter, The Twitter Rules, <https://help.twitter.com/en/rules-and-policies/twitter-rules>.³ The rules are publicly available on Twitter’s website. Id. In the User Agreement, to which individuals agree as a condition of using Twitter, Twitter reserves the right to remove content that violates the Twitter Rules. See Twitter, Twitter Terms of Service, https://twitter.com/en/tos/previous/version_15 (“By using the Services you agree to be bound by these Terms”; “We reserve the right to remove Content that violates the User Agreement”).

The relevant content-moderation policy in this case is the Civic Integrity Policy, which prohibits the posting of “false or misleading information intended to undermine public confidence in an election or other civic process.” See Civic Integrity Policy (1/12/21); Civic Integrity Policy (11/12/20); Civic Integrity Policy (5/27/20).⁴ That policy begins by explaining that “The public conversation occurring on Twitter is never more important than during elections” and that

² This Background section draws from the allegations in the Complaint and the facts of which the Court can take judicial notice.

³ The Court takes judicial notice of the Twitter Rules as they are referenced in the Complaint and their authenticity is not questioned. See Twitter MTD at 1 n.1.

⁴ Copies of the relevant pages are at Sprankling Decl. (dkt. 60-1) Exs. C through F. Twitter’s Civic Integrity Policy is also the subject of the State Defendants’ Request for Judicial Notice (dkt. 59-1), which the Court grants.

1 “attempts to undermine the integrity of our service is antithetical to our fundamental rights and
2 undermines the core tenets of freedom of expression, the value upon which our company is
3 based.” Sprankling Decl. Ex. C (dkt. 60-4). It explains how to report violations of the Civic
4 Integrity Policy, and states that Twitter will “work with select government and civil society
5 partners . . . to provide additional channels for reporting and expedited review.” Id.

6 One of the mechanisms for reporting suspected violations of the Twitter Rules is the
7 Partner Support Portal. Compl. Ex. 2. The Portal was a priority pathway for persons and entities
8 that Twitter believed had an interest in promoting civic processes “to flag concerns directly to
9 Twitter,” including “technical issues . . . and content on the platform that . . . may violate our
10 policies.” Id. Twitter granted access to the Portal to election officials from at least 38 states,
11 including California. Compl. Ex. 3.

12 The Civic Integrity Policy of October 2020 defines what does and does not violate it, and
13 states that Twitter will “label or remove false or misleading information intended to undermine
14 public confidence in an election or other civic process.” Sprankling Decl. Ex. D (dkt. 60-5). It
15 explains that “[i]n circumstances where we do not remove content which violates this policy, we
16 may provide additional context on Tweets,” which “means we may . . . Apply a label and/or
17 warning message to the content where it appears in the Twitter product,” or “Provide a link to
18 additional explanations or clarifications. . .,” among other options. Id. It adds that “[f]or severe or
19 repeated violations of this policy, accounts will be permanently suspended.” Id.

20 On January 12, 2021, following the Capitol insurrection on January 6, 2021, Twitter
21 announced that it had again updated its Civic Integrity Policy to “aggressively increase . . .
22 enforcement action” in light of “misleading and false information surrounding the 2020 US
23 presidential election [that] has been the basis for incitement to violence around the country.”
24 Sprankling Decl. Ex. E (dkt. 60-6). Twitter continued: “Ahead of the inauguration, we’ll continue
25 to monitor the situation, keep open lines of communication with law enforcement, and keep the
26 public informed of additional enforcement actions.” Id. Twitter instituted a five-strike
27 enforcement protocol, pursuant to which enforcement actions became more severe as an account
28 holder continued to violate the policy, progressing from no account-level action for one strike to

1 permanent suspension for five or more strikes. See Sprankling Decl. Ex. F (dkt. 60-7); see also
2 Compl. ¶ 78.

3 Twitter analyzes the reports it receives through the Portal: it determines that some of the
4 reported tweets violate its Rules, and others do not. While O’Handley contends that Twitter
5 complied with the State defendants’ requests to remove content 98% of the time, see Opp’n to
6 State MTD (dkt. 68) at 1 (“98% of the [Office of Election Cybersecurity (‘OEC’)] reported posts
7 were ‘promptly removed’”), the underlying materials are less clear. An excerpted OEC IDEAS
8 award application in the Complaint allegedly stated that “The [OEC] discovered nearly 300
9 erroneous or misleading social media posts that were identified and forwarded to Facebook and
10 Twitter to review and 98 percent of those posts were promptly removed for violating the
11 respective social media company’s community standards.”). Compl. ¶ 64 (emphasis added). On
12 the other hand, an OEC spreadsheet attached to the Complaint (involving content from Citizen,
13 Facebook, Instagram, and Twitter) reflects that Twitter took no action on OEC-reported content in
14 about one-third of the instances of alleged misinformation covered by that exhibit. See Compl.
15 Ex. 9 (numerous entries listing “No Action Taken”).

16 3. State Defendants

17 In 2018, in response to concerns about election interference in the 2016 presidential
18 election, the California Legislature established the OEC within the Secretary of State’s office to
19 monitor and respond to potential interference with election security and integrity. 2018 Cal. Stat.
20 c. 241, § 1. OEC is “[t]o monitor and counteract false or misleading information regarding the
21 electoral process that is published online or on other platforms and that may suppress voter
22 participation or cause confusion and disruption of the orderly and secure administration of
23 elections.” Cal. Elec. Code § 10.5(b)(2). The statute directed OEC to undertake three functions:
24 (1) “assess . . . false or misleading information regarding the electoral process”; (2) “mitigate the
25 false or misleading information”; and (3) “educate voters . . . with valid information from election
26 officials such as a county elections official or the Secretary of State.” Id.

27 Padilla was the Secretary of State at the time of O’Handley’s alleged injury. Compl. ¶ 10.
28 Padilla authorized the contract with SKDK, discussed below, and, per the Complaint, “oversaw

the efforts to take down disfavored speech.” Id. The Complaint alleges that Padilla “was reportedly already under consideration to fill then Vice-Presidential candidate Kamala Harris’s California seat” if the Biden/Harris ticket prevailed, and therefore “stood to personally benefit from that ticket’s elevation to higher office.” Id. ¶¶ 46, 47. Weber, sued in her official capacity, is the current California Secretary of State. Id. ¶ 16. And the four remaining State defendants—Dresner, Jones, Mahood, and Valle—are or were all employees of the Secretary of State’s office.⁵

The Complaint quotes from what it asserts is an OEC response to a reporter’s question in 2020 about how OEC handles voter misinformation.⁶ Compl. ¶ 25. OEC allegedly responded that “We have working relationships and dedicated reporting pathways at each major social media company. When we receive a report of misinformation on a source where we don’t have a pre-existing pathway to report, we find one.” Id., Ex. 1. It continues: “We worked closely and proactively with social media companies to keep misinformation from spreading, take down sources of misinformation as needed, and promote our accurate, official election information at every opportunity.” Id.

4. SKDK

In 2020, the California Secretary of State’s Office recruited political consultants to help monitor misinformation online. Id. ¶ 37. The Complaint alleges that many of those invited to bid were affiliated with the Democratic Party, and that Padilla ran afoul of the competitive bidding process in the course of awarding the contract. Id. ¶¶ 37–41.⁷ SKDK, “a public affairs and consulting firm known for working with Democrat[s],” id. ¶ 11, won the \$35-million contract, id.

⁵ The Complaint alleges that Valle was the Deputy Secretary of State, Chief Communications Officer for Padilla, id. ¶ 12, that Dresner was the Senior Public Information Officer for the OEC, id. ¶ 13, that Mahood was the Press Secretary for Padilla “and one of the OEC employees responsible for receiving reports of alleged election misinformation . . . and requesting social media platforms censor speech with which the OEC disagreed”), id. ¶ 14, and that Jones was OEC’s Social Media Coordinator, responsible for receiving reports of election misinformation . . . and requesting social media platforms censor speech,” id. ¶ 15. The State’s motion refers to all four as “current and former OEC employees.” State MTD at 3.

⁶ This Exhibit has perplexing formatting and does not identify the title of the document, the date of the document, the author of the document, the source of the documents, or even the first question the document purports to answer. See Compl. Ex. 1.

⁷ The Complaint includes a number of allegations about the impropriety of the contract. See Compl. ¶¶ 43–55.

¶ 42. It then allegedly “rapidly went to work as hatchet for hire to target Padilla’s political enemies, relabeling even innocuous speech that criticized Padilla’s handling of election administration as ‘false’ and ‘dangerous’ attempts at voter suppression and voter fraud.” Id. ¶ 56.

SKDK created a document called “Misinformation Daily Briefing,” which it sent to Valle, Dresner, Mahood, and Jones at the California Secretary of State’s office. Id. ¶¶ 57–58. The Complaint alleges that OEC would then “curate” the “misinformation” from those daily briefings to submit to social media companies. Id. ¶ 59.

5. NASS

NASS is a nonprofit professional organization for secretaries of state, headquartered in Washington, D.C. Id. ¶ 18. It is incorporated in Kentucky. Reynolds Decl. (dkt. 58-1) ¶ 7. NASS is not a government agency. Id. ¶ 4. The Complaint alleges that NASS does business in California, and that the California Secretary of State is a member, Compl. ¶ 18, but NASS disputes that it has any presence in California, see NASS MTD at 9–10; Reynolds Decl. ¶ 8.

The Complaint alleges that NASS “spearheaded efforts to censor disfavored election speech.” Compl. ¶ 26. It alleges that NASS did so by creating “direct channels of communication between Secretaries of States’ staff and social media companies to facilitate the quick take-down of speech deemed ‘misinformation.’” Id. ¶ 27. The Complaint cites to an email from NASS’s Director of Communications stating that “Twitter asked her to let Secretary of States’ offices know that it had created a separate dedicated way for election officials to ‘flag concerns directly to Twitter.’” Id. ¶ 28, Ex. 2 (10/1/20 email). It cites to another email from the same individual at NASS, which explains that “if your state is onboarded into the partner support portal, it provides a mechanism to report election issues and get them bumped to the head of the queue.” Id. ¶ 29, Ex. 3 (8/28/20 email). And it cites to an email in which the same individual, in the context of passing along reporting mechanisms for Facebook, Twitter, and Google, stated, “If you see something on a platform, please report it. In addition, please pass this on to your local election officials as well. I would also appreciate a heads up so I know what is going on, this helps us create a more national

narrative.” Id. ¶ 30, Ex. 4 (4/30/19 email).⁸

O’Handley alleges that OEC sometimes reported misinformation directly to social media companies and sometimes did so “through NASS.” See id. ¶¶ 60–61. He further alleges that NASS had an annual award that recognized “[s]ignificant state contributions to the mission of NASS,” and that the California Secretary of State’s office won the award in 2020 for OEC’s work. Id. ¶¶ 63, 64. In accepting the award, Padilla allegedly stated: “We worked in partnership with social media platforms to develop more efficient reporting procedures for potential misinformation. Misinformation identified by our office or voters was promptly reviewed and, in most cases, removed by the social media platforms.” Id. ¶ 65, Ex. 8.

B. Enforcement Action Regarding Certain O’Handley Tweets

On November 12, 2020, just over a week after the 2020 Presidential Election, O’Handley tweeted the following: “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.” Id. ¶ 72. The following day, SKDK included O’Handley’s tweet in its Misinformation Daily Briefing, which it emailed to Valle, Dresner, Mahood, and Jones. Id. ¶ 74. Although the Complaint reads as though O’Handley’s tweet was the only one SKDK sent to the State defendants that day, see id., it was one of eighteen articles or tweets included in the November 13 Misinformation Daily Briefing, see Compl. Ex. 6. SKDK included no commentary about O’Handley’s tweet; it just included it, along with other tweets and articles, under the heading “California.” Id.

Four days after SKDK flagged O’Handley’s tweet, “a Secretary of State agent or staff member”—not identified in the Complaint—included the tweet as one of 30 total posts for Twitter to review. See Compl. ¶ 76; Compl. Ex. 9. The Secretary of State’s office included the message:

Hi, We wanted to flag this Twitter post:
https://twitter.com/DC_Drain/status/1327073866578096129

⁸ The Complaint alleges that this email directs election officials to keep NASS’s guidance for reporting mis/disinformation handy as they “prepare[d] for battle,” id. ¶ 31, but the document does not say this, see id. Ex. 4.

From user @DC_Draino. In this post user claims California 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.

Id. The Complaint does not allege that Twitter ever responded to the Secretary of State's office about O'Handley's tweet. But Twitter subsequently applied a label to the tweet, adding text immediately below it that said: "This claim about election fraud is disputed." Compl. ¶¶ 72, 77. The Complaint alleges that Twitter then added a strike to O'Handley's account. Id. ¶ 78.

The other tweets at issue in the Complaint occurred more than two months later, shortly after the insurrection at the U.S. Capitol. The Complaint does not allege that any of the other defendants communicated with Twitter about any of these subsequent tweets. On January 18, 2021, two days before the inauguration, 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." Id. ¶ 84. On January 21, 2021, he tweeted: "We are captives under a government we didn't elect / It was forced upon us / That is by definition a dictatorship." Id. ¶ 85. On January 22, 2021, 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." Id. ¶ 86. Twitter allegedly applied the following label to each of those 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." Id. ¶¶ 84–86. The Complaint also alleges that Twitter treated each tweet as an additional strike against O'Handley's account, and locked his account for seven days after the fourth strike. Id.

On February 22, 2021, O'Handley tweeted his last tweet: the words "'Most votes in American history'" in quotation marks above an image of the Capitol building with a fence around it. Id. ¶ 87. In response to that tweet, Twitter permanently suspended O'Handley's account. Id. ¶ 88. It then sent him the following message:

Hello,
Your account, DC_Draino has been suspended for violating the
Twitter Rules.
Specifically, for:
Violating our rules about election integrity.
You may not use Twitter's services for the purpose of manipulating
or interfering in elections. This includes posting or sharing content

that may suppress voter turnout or mislead people about when, where, or how to vote.

Id.

O’Handley alleges that “As a rising political commentator, Twitter’s ban has had a direct and detrimental impact on [his] ability to make a living in his chosen profession.” Id. ¶ 91. He claims to have “lost his platform to communicate with his followers.” Id. ¶ 94.⁹

C. Procedural History

O’Handley challenges Twitter’s decisions to label his tweets and to permanently suspend his account. See generally id. He does not dispute that Twitter has rules that govern the use of its platform. Id. ¶ 99 (acknowledging that Twitter has Terms of Service). Instead, he asserts that “Twitter’s stated reasons for suspending [him] were pretextual,” and that it coordinated and conspired with the State defendants, SKDK, and NASS to censor him “because of his criticism of the government.” Id. ¶¶ 98, 99. Based on this theory, he brings suit for: (1) violation of the First Amendment (42 U.S.C. § 1983), against all Defendants; (2) violation of the California Constitution (Free Speech clause), against all Defendants; (3) violation of the Equal Protection Clause (42 U.S.C. § 1983), against all Defendants; (4) violation of the Due Process Clause (42 U.S.C. § 1983), against SKDK, Twitter, and the State defendants; (5) a Void for Vagueness challenge (42 U.S.C. § 1983) to California Elections Code § 10.5, against the State defendants only; and (6) civil conspiracy (42 U.S.C. § 1985), against all Defendants. See id. ¶¶ 101–76.

All of the defendants move to dismiss, and Twitter moves to strike the California Constitutional claim. Twitter MTD; State MTD; SKDK MTD; NASS MTD; Twitter Anti-SLAPP.

II. LEGAL STANDARD

A. 12(b)(6) Motion to Dismiss

All of the defendants move to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Twitter MTD at 6; State MTD at 6–7; NASS MTD at 8; SKDK MTD at 3–4.

⁹ Specifically, he has lost one platform: Twitter. His “combined social media following across all his accounts currently reaches over 3 million people” and he has made “75 national news appearances in the last year and [a] half.” Id. ¶ 70.

Under Rule 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) applies when a complaint lacks either “a cognizable legal theory” or “sufficient facts alleged” under such a theory. Godecke v. Kinetic Concepts, Inc., 937 F.3d 1201, 1208 (9th Cir. 2019). Whether a complaint contains sufficient factual allegations depends on whether it pleads enough facts to “state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. at 678. “Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” Id. (quoting Twombly, 550 U.S. at 557). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Id.

Courts should allow a plaintiff leave to amend unless amendment would be futile. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246–47 (9th Cir. 1990).

B. 12(b)(1) Motion to Dismiss

The State defendants and SKDK also move to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, arguing that O’Handley lacks standing to sue them. State MTD at 6; SKDK MTD at 3.

“The doctrine of standing limits federal judicial power.” Or. Advocacy Ctr. v. Mink, 322 F.3d 1101, 1108 (9th Cir. 2003). The question of whether plaintiffs have standing “precedes, and does not require, analysis of the merits.” Equity Lifestyle Props., Inc. v. Cnty. of San Luis Obispo, 548 F.3d 1184, 1189 n.10 (9th Cir. 2008). To have standing, plaintiffs must establish (1) that they have suffered an injury in fact, (2) that their injury is fairly traceable to a defendant’s conduct, and (3) that their injury would likely be redressed by a favorable decision. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992). Each of these elements must be supported “with the manner and degree of evidence required at the successive stages of the litigation.” Id. at 561. And plaintiffs “must have standing to seek each form of relief requested in the complaint.” Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1651 (2017).

Under Rule 12(b)(1), a defendant may move to dismiss for lack of standing and thus lack of subject matter jurisdiction. See White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). Rule 12(b)(1) attacks on standing can be either facial, confining the court's inquiry to allegations in the complaint, or factual, permitting the court to look beyond the complaint. Id.; Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). For facial attacks, courts accept the jurisdictional allegations in the complaint as true. See, e.g., Whisnant v. U.S., 400 F.3d 1177, 1179 (9th Cir. 2005). When addressing a factual attack, however, courts may consider evidence like declarations submitted by the parties, and the party opposing the motion to dismiss has the burden of establishing subject matter jurisdiction by a preponderance of the evidence. See, e.g., Leite v. Crane Co., 749 F.3d 1117, 1121 (9th Cir. 2014).

C. 12(b)(2) Motion to Dismiss

NASS also moves to dismiss under Rule 12(b)(2) of the Federal Rules of Civil Procedure, arguing that the Court does not have personal jurisdiction over it. NASS MTD at 8.

Under Rule 12(b)(2), a defendant may move to dismiss for lack of personal jurisdiction. The plaintiff bears the burden of establishing the court's personal jurisdiction over a defendant. Cabbage v. Merchant, 744 F.2d 665, 667 (9th Cir. 1984). In assessing whether personal jurisdiction exists, the court may consider evidence presented in affidavits or order discovery on jurisdictional issues. Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280, 1285 (9th Cir. 1977). "When a district court acts on a defendant's motion to dismiss under Rule 12(b)(2) without holding an evidentiary hearing, the plaintiff need make only a prima facie showing of jurisdictional facts to withstand the motion to dismiss." Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995). A prima facie showing is established if the plaintiff produces admissible evidence which, if believed, would be sufficient to establish personal jurisdiction. See Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clemens Ltd., 328 F.3d 1122, 1129 (9th Cir. 2003). "[U]ncontroverted allegations in [plaintiff's] complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in [plaintiff's] favor." Brayton Purcell LLP v. Recordon & Recordon, 606 F.3d 1124, 1127 (9th Cir. 2010). But "bare bones assertions of minimum contacts with the forum or legal conclusions unsupported by specific factual allegations

will not satisfy a plaintiff's pleading burden." Swartz v. KPMG LLP, 476 F.3d 756, 766 (9th Cir. 2007).

D. Anti-SLAPP Motion

Twitter brings a Motion to Strike under California's anti-SLAPP statute. That law provides that any "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue" is "subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Cal. Code Civ. Proc. § 425.16(b)(1). The statute facilitates "the early dismissal of unmeritorious claims filed to interfere with the valid exercise of the constitutional rights of freedom of speech and petition." Club Members for an Honest Election v. Sierra Club, 45 Cal. 4th 309 (2008).

III. DISCUSSION

This order will discuss each of the pending motions, beginning with Twitter's motions.

A. Twitter Motion to Dismiss

Twitter moves to dismiss all of O'Handley's claims against it based on three main arguments: (1) the federal constitutional claims fail because Twitter is not a state actor; (2) the remaining claims fail on the merits; and (3) Twitter's own First Amendment rights are at stake.¹⁰ See generally Twitter MTD. The Court largely agrees.

1. State Action

Twitter moves to dismiss the First Amendment claim, the Equal Protection claim, and the Due Process claim against it, arguing that it is not a state actor. Twitter MTD at 6. "[T]he First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on State action." Hudgens v. N.L.R.B., 424 U.S. 507, 519 (1976) (quoting Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 567 (1972)). Put another way, "conduct allegedly causing the deprivation

¹⁰ Twitter also argues that Section 230 of the Communications Decency Act, 47 U.S.C. § 230, separately bars O'Handley's claims. Twitter MTD at 19–21. The Court does not reach this argument.

1 of a federal right [must] be fairly attributable to the State.” Lugar v. Edmondson Oil Co., 457 U.S.
2 922, 937 (1982). That means both that the deprivation must be “caused by the exercise of some
3 right or privilege created by the State or by a rule of conduct imposed by it or by a person for
4 whom it is responsible” and that “the party charged with the deprivation must be a person who
5 may fairly be said to be a state actor.” Id. Twitter argues the second prong: that it is not a state
6 actor, but a private company that made independent decisions about O’Handley’s account.
7 Twitter MTD at 6.

8 Twitter is a private entity. Compl. ¶ 17. The Ninth Circuit reaffirmed just recently that “a
9 private entity hosting speech on the Internet is not a state actor” subject to constitutional
10 constraints. See Prager Univ. v. Google LLC, 951 F.3d 991, 995 (9th Cir. 2020) (“Despite
11 YouTube’s ubiquity and its role as a public-facing platform, it remains a private forum, not a
12 public forum subject to judicial scrutiny under the First Amendment.”).¹¹ The Supreme Court also
13 recently explained that “merely hosting speech by others is not a traditional, exclusive public
14 function and does not alone transform private entities into state actors subject to First Amendment
15 constraints.” Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019).
16 O’Handley knows this. See Opp’n to State MTD at 4 (“The fact that no social media company has
17 ever been treated as a state actor under § 1983 might be relevant if any plaintiff had ever filed a
18 complaint alleging facts, and documentation to support those allegations, that were remotely like
19 the ones Mr. Handley does here.”).

20 O’Handley argues that Twitter’s coordination with the State (and others) in this case
21 transforms what might otherwise be private content-moderation decisions into state action. Id.;
22 Opp’n to Twitter MTD (dkt. 69) at 3–8 (citing Brentwood Acad. v. Tennessee Secondary Sch.
23 Athletic Ass’n, 531 U.S. 288, 295 (2000) (“private behavior” may be treated as state action “if
24 there is such a close nexus between the State and the challenged action that seemingly private
25

26 ¹¹ O’Handley argued at the motion hearing that Twitter is like the corporate-owned town in Marsh
27 v. Alabama, 326 U.S. 501 (1946), which the Supreme Court held was a state actor. But the Ninth
28 Circuit rejected that argument in Prager University, noting that the Court has “unequivocally
confined Marsh’s holding to the unique and rare context of ‘company town[s]’ and other situations
where the private actor ‘perform[s] the full spectrum of municipal powers.’” Id. at 998 (quoting
Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 569 (1972); Hudgens, 424 U.S. at 518–20).

1 behavior may be fairly treated as that of the State itself.”) (cleaned up)). At the motion hearing, he
2 characterized this case as a “very different scenario” due to an unprecedented degree of
3 “interconnectedness” between Twitter and the State.

4 “The United States Supreme Court has articulated four different factors or tests to
5 determine state action.” Gorenc v. Salt River Project Agr. Imp. & Power Dist., 869 F.2d 503, 506
6 (9th Cir. 1989) (citing Lugar, 457 U.S. at 939); Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1140
7 (9th Cir. 2012). These are the nexus test, the joint action test, the public function doctrine, and the
8 state compulsion test. Gorenc, 869 F.2d at 506–09. O’Handley argues that the joint action test
9 applies. See Opp’n to Twitter MTD at 48; Compl. ¶ 110 (“Defendants . . . willfully and
10 cooperatively participated in the government Defendants’ efforts to censor”), ¶ 112 (“Defendants .
11 . . . took action, jointly . . . against Mr. O’Handley”).

12 The joint action test asks “whether the state has ‘so far insinuated itself into a position of
13 interdependence with [the private entity] that it must be recognized as a joint participant in the
14 challenged activity.” Gorenc, 869 F.2d at 507 (quoting Burton v. Wilmington Parking Auth., 365
15 U.S. 715, 725 (1961)). “[A] bare allegation of such joint action will not overcome a motion to
16 dismiss.” DeGrassi v. City of Glendora, 207 F.3d 636, 647 (9th Cir. 2000). The Supreme Court
17 has explained:

18 [A] State normally can be held responsible for a private decision
19 only when it has exercised coercive power or has provided such
20 significant encouragement, either overt or covert, that the choice
21 must in law be deemed to be that of the State. Mere approval of or
acquiescence in the initiatives of a private party is not sufficient to
justify holding the State responsible for those initiatives.

22 Blum v. Yaretsky, 457 U.S. 991, 1004–05 (1982). And this circuit has required “substantial
23 cooperation” or that the private entity’s and government’s actions be “inextricably intertwined.”
24 Brunette v. Humane Society of Ventura Cnty., 294 F.3d 1205, 1211 (9th Cir. 2002). “A
25 conspiracy between the State and a private party to violate constitutional rights may also satisfy
26 the joint action test.” Id. However, the private and government actors must have actually agreed
27 to “violate constitutional rights.” Fonda v. Gray, 707 F.2d 435, 438 (9th Cir. 1983).

28 The allegations here fall short of plausibly alleging joint action.

a. November 2020 Message to Twitter

Despite O’Handley’s assertions at the motion hearing about unprecedented “interconnectedness” and “back-and-forth” communications, the Complaint alleges that an unidentified OEC official sent a single message to Twitter, flagging a single O’Handley tweet. See Compl. ¶¶ 28–29, 32–33, 76–78. That is the central act in the Complaint. OEC’s message did not direct or even request that Twitter take any particular action in response to the tweet. See id. ¶ 76, Ex. 9. This single message occurred in November 2020. Id. ¶ 76. The Complaint does not allege that there was any further communication between Twitter and the government about that tweet, or about any other O’Handley tweets—including the February 2021 tweet that prompted Twitter to permanently suspend O’Handley’s account for violating its Civic Integrity Policy. See id. ¶ 88; see also id. ¶ 81 (arguing instead: “Prior to OEC requesting Twitter censor the [first] Post, Twitter had never before suspended Mr. O’Handley’s account or given him any strikes. He suddenly became a target of Twitter’s speech police, at the behest of Defendants.”).

One party supplying information to another party does not amount to joint action. See Lockheed v. Weinstein, 24 Fed. App’x 805, 806 (9th Cir. 2001) (“[M]ere furnishing of information to police officers does not constitute joint action”); Fed. Agency of News LLC v. Facebook, Inc., 432 F. Supp. 3d 1107, 1124 (N.D. Cal. 2020) (“supplying information to the state alone [does not amount] to conspiracy or joint action”) (alteration added); Deeths v. Lucile Slater Packard Children’s Hospital at Stanford, No. 1:12-cv-02096-LJO, 2013 WL 6185175, at *8, 9 (E.D. Cal. Nov. 26, 2013) (“Even if Dr. Stirling made false statements to Kern County social workers regarding the need to remove R.D. from Plaintiff’s care, supplying information alone does not amount to conspiracy or joint action under color of state law.”).¹²

Moreover, the one-off, one-way communication here does not reflect “substantial cooperation.” See Brunette, 294 F.3d at 1212. Nor does it reflect that the State of California “exercised coercive power” over Twitter’s decisions to progressively discipline and ultimately suspend O’Handley, such that those decisions “must in law be deemed to be that of the State.”

¹² O’Handley accurately notes that these cases all involve a private party giving information to the government and not the other way around. See Opp’n to Twitter MTD at 6–7. But he does not point to any authority holding that the distinction makes a difference.

1 See Blum, 457 U.S. at 1004–05. O’Handley’s reference to Desert Palace at the motion hearing
2 only illustrates how meager the allegations here are. In Desert Palace, the government “train[ed]
3 casino] security guards, provid[ed] information from the records department, and delegate[ed to
4 the casino’s security guards] the authority to issue citations,” thereby “insinuat[ing] itself into a
5 position of interdependence with [the casino].” 698 F.3d at 1140 (internal quotation marks
6 omitted). Here, OEC on a single occasion alerted Twitter to a single O’Handley tweet. See
7 Compl. Ex. 9 (“Hi, We wanted to flag this Twitter post. . . .”). The State did not delegate to
8 Twitter any “authority, normally reserved to the state.” See Desert Palace, 698 F.3d at 1140. Nor,
9 in its single email sending Twitter information, did the State “exert[] control over how [Twitter]
10 used the information [it] obtained.” See Deeths, 2013 WL 6185175, at *10. While the State
11 might have approved of how Twitter acted in response to O’Handley’s tweet—and it might just as
12 well not have—mere approval or acquiescence does not make the State responsible for Twitter’s
13 actions. See Blum, 457 U.S. at 1004–05.¹³

14 b. Working Together and the Portal

15 O’Handley argues, though, that there is more involved than the single November 2020
16 message from OEC to Twitter about his tweet. He points to OEC and Twitter’s broader efforts on
17 election misinformation, and he quotes from OEC’s alleged statements about “working closely
18 with social media companies” as evidence of how intertwined Twitter was with the government.
19 Opp’n to Twitter MTD at 5 (citing Compl. Ex. 2). At the motion hearing, O’Handley asserted
20 that the State said in its “own words” that it partnered with Twitter “to take down speech,” which
21 was inaccurate; the Complaint instead includes an alleged OEC statement that “We worked
22 closely and proactively with social media companies to . . . take down sources of misinformation.
23 . . .” See Compl. Ex. 1. O’Handley further argues that Twitter created the Portal to allow OEC’s
24 “censorship reports” to be “bumped to the head of the queue.” Opp’n to Twitter MTD at 5 (citing
25 Compl. Ex. 3).

26
27 ¹³ Nor do the Complaint’s conclusory allegations of joint action bolster O’Handley’s case. See
28 Compl. ¶¶ 108–10; Dietrich v. John Asuaga’s Nugget, 548 F.3d 892, 900 (9th Cir. 2008) (bare
allegation that defendants acted in concert “insufficient to establish joint action”).

Generalized statements about working together do not demonstrate joint action. See Children’s Health Def. v. Facebook, Inc., No. 20-cv-05787-SI, 2021 WL 2662064, at *10–11 (N.D. Cal. June 29, 2021). In addition, the government can work with a private entity without converting the private entity’s decisions into government decisions. In Mathis v. Pacific Gas Company, 75 F.3d 498, 501 (9th Cir. 1996), where PG&E conducted an undercover operation in close partnership with the county narcotics Task Force, the plaintiff argued that PG&E’s “later decision to exclude him from the plant was attributable to the Task Force as part of a ‘joint action,’ exposing PG&E to liability under 42 U.S.C. § 1983.” The Ninth Circuit explained that “the specific action [the plaintiff challenged] is the procedure by which PG&E decided to exclude him from its plant,” and that while “PG&E conducted its investigation in close cooperation with the Task Force,” his “challenge is limited to PG&E’s decision-making process after the investigation was completed.” Id. at 504. The plaintiff argued that “without an investigation, he wouldn’t have been excluded.” Id. But the Ninth Circuit found it significant that “the Task Force wasn’t involved in the decision to exclude [the plaintiff] from the plant. Whether or not its previous acts facilitated the decision, the mantle of its authority didn’t.” Id. (emphasis added). Because PG&E had independently decided to exclude the plaintiff, there was no joint action and no 1983 liability for PG&E. Id.

In Mathis, general “consultation and information sharing” in advance of the challenged decision were not enough for joint action. Id. Here, Twitter created a Portal and informed the state about it through NASS, see Compl. Exs. 2, 3, and the state may have used the Portal to report election misinformation on Twitter’s platform, see id. ¶ 32. There was no consultation and very little information sharing about O’Handley. See Compl. Ex. 9. Arguably, “without” OEC flagging O’Handley’s tweet to Twitter, O’Handley “wouldn’t have” had his first tweet labeled. See Mathis, 75 F.3d at 504.¹⁴ O’Handley indeed suggests this. See Compl. ¶ 81 (“Prior to OEC requesting Twitter censor the [first] Post, Twitter had never before suspended Mr. O’Handley’s account. . . .”). But there is no evidence or even allegation that the government played any role in

¹⁴ On the other hand, someone else could have reported the tweet to Twitter.

1 Twitter’s “internal . . . decisions,” see Mathis, 75 F.3d at 504, to label O’Handley’s tweets, or to
2 add strikes to and ultimately suspend O’Handley’s account.

3 O’Handley disputes the notion that Twitter “always acted independently, only ‘sometimes’
4 acquiescing to the OEC’s censorship requests.” Opp’n to Twitter MTD at 5. He emphasizes
5 OEC’s alleged claim that Facebook and Twitter “promptly removed” 98% of erroneous or
6 misleading posts. Id. (citing Compl. ¶ 64). And he suggests that this high number reveals that
7 Twitter “understood its role” as government censor. Id. at 6. The 98% number is of somewhat
8 limited value, as it represents both Facebook and Twitter posts. See Compl. ¶ 64. It is also of
9 limited value because O’Handley does not actually allege that the “misinformation” identified by
10 OEC was not really misinformation. He suggests that his own tweets were not misinformation,
11 see id. ¶ 74 (incorrectly characterizing his tweet that “Election fraud is rampant nationwide and we
12 all know California is one of the culprits” as “personal opinion”), but does not squarely address
13 the other “misinformation” identified by OEC. The 98% number is also in conflict with the OEC
14 spreadsheet attached to the Complaint, which shows that Twitter took no action on OEC-reported
15 content in about one-third of the instances of alleged misinformation listed. See id. Ex. 9.

16 Regardless of the percentage of flagged tweets that Twitter ultimately removed, there is
17 ample evidence that it was Twitter who decided whether to remove them. The spreadsheet reflects
18 that when Twitter responded to OEC about its reports, it described its decision of whether to
19 remove a post, or take no action on it, by referencing its own interpretation of its own Rules. See,
20 e.g., id. (“After our review, we’ve locked the account for breaking our rules regarding civic
21 integrity”; “We’re writing to let you know that after a review, we didn’t find a violation of our
22 civic integrity policy in the content you reported.”). This is consistent with Twitter’s
23 characterization of the Portal as a tool for people interested in promoting civic processes “to flag
24 concerns directly to Twitter,” including “technical issues . . . and content on the platform that . . .
25 may violate our policies.” See Compl. Ex. 2 (emphasis added). The spreadsheet does not show,
26 and the Complaint does not allege, that Twitter consulted or conferred with the government on
27 content decisions. See Compl. Ex. 9. Twitter’s Terms of Service gave it unlimited authority to
28 remove or discipline accounts, see Twitter Terms of Service, and Twitter referenced its own

1 policies when it exercised that authority, see Compl. ¶ 88 (“Your account, DC_Draino has been
2 suspended for violating the Twitter Rules. Specifically, for: Violating our rules about election
3 integrity.”).

4 The allegations about working together and the Portal therefore do not demonstrate joint
5 action.

6 **c. Conspiracy**

7 Finally, there is no support for O’Handley’s assertion that Twitter was a willful participant
8 in “an agreement or meeting of the minds to violate constitutional rights.” See Opp’n to Twitter
9 MTD at 5. Participants in a conspiracy need not know the exact details of the plan, so long as they
10 share the general conspiratorial objective. Fonda, 707 F.2d at 438; Franklin v. Fox, 312 F.3d 423,
11 441 (9th Cir. 2002). Whether an unlawful conspiracy exists is “generally” an issue for the jury,
12 “so long as . . . the jury can infer from the circumstances that the alleged conspirators had a
13 meeting of the minds and thus reached an understanding to achieve the conspiracy’s objectives.”
14 Mendocino Env’tl Ctr. v. Mendocino Cnty., 192 F.3d 1283, 1301–02 (9th Cir. 1999) (internal
15 marks and citation omitted). A jury can infer an agreement if “alleged conspirators have
16 committed acts that ‘are unlikely to have been undertaken without an agreement.’” Id. (citation
17 omitted).

18 Here, though, the only allegations that O’Handley points to in support of a conspiracy are
19 the allegations that OEC “work[ed] closely with social media companies to be proactive so when
20 there’s a source of misinformation, we can contain it.” See Opp’n to Twitter MTD at 5 (quoting
21 Compl. ¶¶ 24–25, Ex. 2); see also Opp’n to State MTD at 4 (referencing, incorrectly, a “myriad of
22 direct communications demonstrating extensive coordination”).¹⁵ Such allegations might
23 demonstrate a meeting of the minds to promptly address election misinformation, but not a
24

25 ¹⁵ He also points to an email exchange between OEC and Twitter in which OEC emailed Twitter
26 on December 30, 2019 asking that a tweet by an entirely different Twitter account be taken down,
27 to which Twitter responded the following morning that it had removed the tweet. Id. (citing
28 Compl. ¶ 35). That tweet allegedly shared “a doctored image of a California Registration Card
(inaccurately claiming that the Republican Party is not an option),” see Comp. ¶ 34, and so its
prompt removal is not evidence of wrongdoing or an action unlikely to have been taken without an
agreement to violate rights.

1 meeting of the minds to “violate constitutional rights,” let alone O’Handley’s constitutional rights.
2 See Fonda, 707 F.2d at 438; see also Children’s Health Def., 2021 WL 2662064, at *11 (general
3 statements about working together “do[] not support the inference that Facebook (or Zuckerberg)
4 worked in concert with the CDC to censor CHD’s speech, retaliate against CHD, or otherwise
5 violate CHD’s constitutional rights.”). Nor does the Court find generalized statements about
6 working together to counteract the dissemination of election misinformation particularly
7 nefarious—such statements do not support an inference of an illegal conspiracy.

8 The Complaint makes a single conclusory allegation that Twitter’s “real reasons for
9 suspending Mr. O’Handley do not stem from a violation of Twitter’s terms of service, but from
10 the content of his speech raising concerns about election administration and integrity, specifically
11 concerns related to the work of then-California Secretary of State Alex Padilla.” Compl. ¶ 99.
12 There is no support for this allegation. There is no basis in the Complaint for a jury to infer that
13 Twitter agreed with the government to retaliate against O’Handley because of his criticism of
14 Padilla.

15 Far from it being “unlikely” for Twitter to have acted the way it did “without an
16 agreement,” see Mendocino Env’tl Ctr., 192 F.3d at 1301, the Complaint reflects that Twitter
17 routinely took the enforcement actions it did based on violations of its Civic Integrity Policy. See,
18 e.g., Compl. Ex. 2 (Portal is a way to “to flag concerns directly to Twitter,” including “technical
19 issues . . . and content on the platform that . . . may violate our policies.”); Compl. Ex. 9 (“After
20 our review, we’ve locked the account for breaking our rules regarding civic integrity”; “We’re
21 writing to let you know that after a review, we didn’t find a violation of our civic integrity policy
22 in the content you reported.”); Compl. ¶ 88 (“Your account, DC_Draino has been suspended for
23 violating the Twitter Rules. Specifically, for: Violating our rules about election integrity.”).

24 OEC’s lone message to Twitter did not state that Twitter should remove (or do anything
25 with) O’Handley’s tweet because it criticized Padilla. See Compl. ¶ 76, Ex. 9 (asserting that
26 O’Handley’s tweet “is a blatant disregard to how our voting process works and creates
27 disinformation and distrust among the general public”). Moreover, none of the other O’Handley
28 tweets at issue in this case even referred to Padilla, California, or the OEC. All referred to the

2020 Presidential Election in national terms. See id. ¶¶ 84–87. It is simply not plausible that Twitter shared a conspiratorial objective with the OEC to retaliate against O’Handley for criticizing Padilla.

O’Handley has therefore failed to plausibly allege that Twitter was a state actor by virtue of the joint action test. Because Twitter was not a state actor, it cannot be liable under § 1983, and the Court DISMISSES the First Amendment, Equal Protection, and Due Process Claims against Twitter.

2. Remaining Claims

Twitter next moves to dismiss the two remaining claims against it on the merits. See Twitter MTD at 14.

a. Section 1985

The elements of conspiracy under 42 U.S.C. § 1985(3) are (1) a conspiracy; (2) “for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws”; (3) an “act in furtherance” of the conspiracy; and (4) an injury or deprivation of rights. Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 502 (9th Cir. 1979) (quoting Griffin v. Breckenridge, 403 U.S. 88, 102–03 (1971)). Because “the purpose[] of the Ku Klux Klan Act . . . [is] only to protect against deprivations of equal protection,” Hickman v. Block, 81 F.3d 168 (9th Cir. 1996), a plaintiff must also show “[5] some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators’ action” and [6] that the conspiracy “aimed at interfering with rights” that are “protected against private, as well as official, encroachment,” Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263, 267–68 (1993). “A mere allegation of conspiracy without factual specificity is insufficient to support a claim.” Sanchez v. City of Santa Ana, 936 F.2d 1027, 1039 (9th Cir. 1990).

Twitter moves to dismiss the section 1985 claim, arguing that O’Handley fails to plausibly allege the first, third, and fifth elements. Twitter MTD at 15. The Court agrees that O’Handley fails to plausibly allege a conspiracy to deprive anyone “of the equal protection of the laws, or of equal privileges and immunities under the laws.” See Life Ins. Co. of N. Am., 591 F.2d at 502.

As discussed above in connection with the joint action test, O’Handley fails to plausibly

1 allege a conspiracy between the defendants—whether that conspiracy is framed as one to “violate
2 the constitutional rights of individuals who questioned election processes and outcomes—or in
3 Defendants’ words, spread ‘misinformation,’” see Compl. ¶ 168, “to seek out and swiftly censor
4 speech with which they disagreed,” see id. ¶ 169, “to jointly deprive Mr. O’Handley of his rights,”
5 see id. ¶ 170, or “to censor speech which they found objectionable or ‘misleading,’” see id. ¶ 171.
6 There are allegations that support the notion that the defendants collaborated to counteract election
7 misinformation generally. See id. ¶¶ 24–25, Ex. 2. And there are allegations that an unnamed
8 OEC official communicated with Twitter one time to alert Twitter to O’Handley’s first tweet. See
9 id. ¶ 76, Comp. Ex. 9. But these allegations do not support any of the conspiracies alleged in this
10 claim, particularly given the evidence discussed above that Twitter made content decisions based
11 on its own application of its own Rules. Nor do the Complaint’s conclusory allegations of
12 conspiracy aid O’Handley in stating a claim. See Compl. ¶ 99 (re Twitter’s “real reasons for
13 suspending Mr. O’Handley”).

14 Because the Complaint fails to plausibly allege a conspiracy to deprive O’Handley of his
15 rights, the Court DISMISSES the section 1985 claim against Twitter.

16 **b. California Constitution (Free Speech Clause)**

17 Twitter argues that “[l]ike his federal constitutional claims, Plaintiff’s claim under the free
18 speech cause of the California Constitution must be dismissed because Twitter is a private entity,
19 not a state actor.” Twitter MTD at 16. Having dismissed the federal claims against Twitter, the
20 Court declines to exercise supplemental jurisdiction over the California Constitution (Free Speech
21 Clause) claim. See 28 U.S.C. § 1367(c)(3) (district court may decline to exercise supplemental
22 jurisdiction where it has dismissed all claims over which it has original jurisdiction); Oliver v.
23 Ralphs Grocery Co., 654 F.3d 903, 911 (9th Cir. 2011) (not error to decline supplemental
24 jurisdiction where “balance of the factors of ‘judicial economy, convenience, fairness, and comity’
25 did not ‘tip in favor of retaining the state-law claims’ after dismissal of the [federal] claim”); Acri
26 v. Varian Assocs., Inc., 114 F.3d 999, 1000 (9th Cir. 1997) (“[S]tate law claims ‘should’ be
27 dismissed if federal claims are dismissed before trial”) (emphasis in original). That claim involves
28 novel issues that are best addressed, in the first instance, by the state court.

3. Twitter's First Amendment Rights

Twitter finally argues that its own First Amendment rights are at stake in this lawsuit. Twitter MTD at 18–19. O’Handley has argued that his case stems from “Twitter’s retaliatory strikes and [the] eventual removal of Mr. O’Handley from its platform,”¹⁶ and so “simply does not require, nor do the factual allegations rest on, Twitter engaging in expressive activity of any sort.” Opp’n to Twitter Anti-SLAPP (dkt. 70) at 6 (emphasis in original). To be clear, the Complaint repeatedly objects to Twitter having “appended commentary [to his tweets] asserting that [his] claim about election fraud was disputed.” See Compl. ¶ 77; see also *id.* ¶ 86. Indeed, in other briefs, O’Handley argues that Twitter “retaliated against Mr. O’Handley . . . by appending a public label” to his tweets. See Opp’n to State MTD at 2; Opp’n to SKDK MTD (dkt. 66) at 2 (“Twitter punished Mr. O’Handley for criticizing a California state official . . . by appending commentary asserting that Mr. O’Handley’s tweet was false”). His case against Twitter is therefore based on Twitter appending labels to his tweets for allegedly violating Twitter’s Civic Integrity Policy, its imposition of strikes on his account, its limitation on the reach of his tweets, and its ultimate removal of his account from the platform. Those acts are all interrelated.

Moreover, those acts are expressive. “The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment” and are protected by the First Amendment. See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 257–58 (1974); see also *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 135 (9th Cir. 1971) (“Appellant has not convinced us that the courts . . . should dictate the contents of a newspaper.”); cf. *Pacific Gas & Elec. Co. v. Public Utilities Com’n of California*, 475 U.S. 1, 4 (1986) (government cannot force PG&E to include in billing statements speech of third party with which PG&E disagreed). Likewise, “where . . . an action directly targets the way a content provider chooses to deliver, present, or publish news content on matters of public interest, that action is based on conduct in furtherance of free speech rights.” *Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 424–25 (9th Cir. 2014).

¹⁶ He also argued at the motion hearing that Twitter’s conduct limited the reach of his tweets.

Like a newspaper or a news network, Twitter makes decisions about what content to include, exclude, moderate, filter, label, restrict, or promote, and those decisions are protected by the First Amendment. See NetChoice, LLC v. Paxton, No. 1:21-cv-840-RP, 2021 WL 5755120, at *7 (W.D. Tex. Dec. 1, 2021) (“Social media platforms have a First Amendment right to moderate content disseminated on their platforms.”); Isaac v. Twitter, Inc., No. 21-cv-20684-BLOOM/Otazo-Reyes, 2021 WL 3860654, at *6 (S.D. Fla. Aug. 30, 2021) (Twitter “has a First Amendment right to decide what to publish and what not to publish on its platform”) (internal quotation marks and citation omitted); Cross v. Facebook, Inc., 14 Cal. App. 5th 190, 202 (2017) (“source of . . . alleged injuries . . . is the content of the pages and Facebook’s decision not to remove them, an act ‘in furtherance of the . . . right of petition or free speech’”); La’Tiejira v. Facebook, Inc., 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017) (acknowledging “Facebook’s First Amendment right to decide what to publish and what not to publish on its platform”); Publius v. Boyer-Vine, 237 F. Supp. 3d 997, 1008 (E.D. Cal. 2017) (owner of website has “First Amendment right to distribute and facilitate protected speech on the site”); Zhang v. Baidu.com Inc., 10 F. Supp. 3d 433, 437–43 (S.D.N.Y. 2014) (holding that suit “to hold [website] liable for . . . a conscious decision to design its search-engine algorithms to favor certain expression on core political subjects over other expression on those same political subjects” would “violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”); Kronemyer v. Internet Movie Database, Inc., 150 Cal. App. 4th 941, 946–47 (2007) (“[L]isting of credits on respondent’s Web site is an act in furtherance of the right of free speech. . . .”). Indeed, the Supreme Court recently cautioned against treating a defendant as a state actor, even though it was regulated by the State and provided a forum for speech, because doing so could “eviscerate certain private entities’ rights to exercise editorial control over speech and speakers on their properties or platforms.” Manhattan Community Access Corp., 139 S. Ct. at 1932.

The Court therefore rejects O’Handley’s argument that this case is analogous to Rumsfeld v. Forum for Acad. & Institutional Rts., Inc. (“FAIR”), 547 U.S. 47, 48 (2006), which involved a law requiring law schools to provide equal access on campus to military recruiters. See Opp’n to

1 Twitter Anti-SLAPP at 7. The Court held that that law did not violate the law schools’ freedom of
2 speech because “[u]nlike a parade organizer’s choice of parade contingents, a law school’s
3 decision to allow recruiters on campus is not inherently expressive.” FAIR, 547 U.S. at 64.
4 O’Handley contends that banning someone from a social media platform, or issuing a strike
5 against his account, is like allowing military recruiters on campus—not a form of speech. Opp’n
6 to Twitter Anti-SLAPP at 7. But unlike an entity that organizes itself for non-expressive purposes,
7 Twitter is “the primary social channel for political commentary and news in American society at
8 present.” See Compl. ¶ 90. As O’Handley commented at the motion hearing, “on Twitter, all
9 there is is discussion of issues.” Twitter’s decisions to include, exclude, or label a tweet on a site
10 that is entirely a “discussion of issues” are expressive. As Twitter explained, it “expressed its
11 negative opinions about the content of O’Handley’s tweets by labeling them as disputed and/or
12 likely to cause violence,” and it expressed its “view that O’Handley’s particular tweets were not
13 appropriate for sharing on its platform” by suspending O’Handley’s account. Reply re Twitter
14 Anti-SLAPP (dkt. 80) at 1; see also Kronemyer, 150 Cal. App. 4th at 947 (“It is, of course, well
15 established that the constitutional right of free speech includes the right not to speak.”). These
16 decisions operated “together with numerous decisions regarding other tweets and users to more
17 broadly shape and develop the nature, tone, and substance of the ongoing dialogue that Twitter
18 seeks to foster and present on its platform.” Reply re Twitter Anti-SLAPP at 1. That is
19 expression.

20 O’Handley disagrees, arguing at the motion hearing that no one would think that
21 O’Handley’s tweets were Twitter’s speech, and that Twitter could simply have used its own
22 Twitter account to express its disagreement with O’Handley. But a Twitter user encountering
23 O’Handley’s tweets would indeed think that Twitter is the kind of place that allows such tweets on
24 its platform. A user who encountered enough such tweets might think that Twitter was content to
25 be complicit in spreading election misinformation. This is because a platform’s decision to
26 publish or not publish particular tweets says something about what that platform represents.¹⁷ See

27
28 ¹⁷ The Court thus finds Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 655–56 (1994),
which involved provisions requiring cable operators to carry local broadcast stations,

1 NetChoice, LLC, 2021 WL 5755120, at *8 (“This Court is convinced that social media platforms .
2 . . . curate both users and content to convey a message about the type of community the platform
3 seeks to foster and, as such, exercise editorial discretion over their platform’s content.”). The
4 notion that Twitter should be powerless to do anything but post its own tweets responding to every
5 tweet on its platform that spreads misinformation makes very little sense from either a legal or
6 practical perspective.

7 Additionally, as the court noted in Zhang, 10 F. Supp. 3d at 441, O’Handley’s assertion
8 that Twitter’s challenged conduct is not expressive “is belied by [O’Handley’s] own theory of the
9 case, which is that by exercising editorial discretion, [Twitter] favors some ‘political speech’ over
10 other ‘political speech,’” see, e.g., Compl. ¶¶ 4 (“Defendants’ exercise of government force to
11 censor political speech with which they disagree”), 83 (commentators who supported Democrats
12 were not censored while conservative commentators were). See also NetChoice, LLC, 2021 WL
13 5755120, at *8 (“Without editorial discretion, social media platforms could not skew their
14 platforms ideologically, as the State accuses [] them of doing.”).

15 Twitter has important First Amendment rights that would be jeopardized by a Court order
16 telling Twitter what content-moderation policies to adopt and how to enforce those policies. The
17 Court will issue no such order. For the foregoing reasons, Twitter prevails on its motion to
18 dismiss all of the claims against it, save and except for the California Constitution (Free Speech
19 Clause) claim, over which this Court declines to exercise jurisdiction.

20 **B. Twitter Anti-SLAPP Motion**

21 Twitter has also filed an anti-SLAPP motion against O’Handley in connection with the
22 California Constitution (Free Speech Clause) claim only.¹⁸ Twitter Anti-SLAPP. Analysis of a
23 motion to strike pursuant to the anti-SLAPP statute consists of two steps. The defendant must first
24 show that the statute applies because the defendant was “engaged in conduct (1) in furtherance of

25
26 distinguishable. The Court there noted that “Given cable’s long history of serving as a conduit for
27 broadcast signals, there appears little risk that cable viewers would assume that the broadcast
28 stations carried on a cable system convey ideas or messages endorsed by the cable operator.”
Turner Broadcasting System, Inc., 512 U.S. at 655. Not so here.

¹⁸ “The anti-SLAPP statute does not apply to federal law causes of action.” Doe v. Gangland Prods., Inc., 730 F.3d 946, 955 n. 3 (9th Cir. 2013).

the right of free speech; and (2) in connection with an issue of public interest.” See Doe, 730 F.3d at 953. If the defendant makes the requisite showing, the court then considers whether the plaintiff has demonstrated “a reasonable probability” of prevailing on the merits of his claims. In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1273 (9th Cir. 2013) (quoting Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003)).

Because the Court does not exercise supplemental jurisdiction over the California Constitution (Free Speech Clause) claim, the Court cannot rule on whether O’Handley has demonstrated a reasonable probability of prevailing on the merits of that claim. Accordingly, the Court does not reach the anti-SLAPP motion.

C. State Defendants Motion to Dismiss

The State defendants move to dismiss all of O’Handley’s claims against them, for five reasons: (1) the Complaint fails to establish O’Handley’s standing; (2) the Complaint fails to establish liability under section 1983; (3) the Complaint fails to state a claim as to each cause of action; (4) qualified immunity bars all claims against the individual defendants; and (5) Eleventh Amendment immunity bars the California Constitutional claim, and any claim for damages, against Secretary Weber. See generally State MTD.¹⁹ The State defendants prevail.

1. Standing

The State defendants argue first that the Complaint fails to establish standing over them because it does not establish that they took any action that is fairly traceable to the suspension of O’Handley’s Twitter account. State MTD at 7–8 (citing Lujan, 504 U.S. at 560–61). Traceability is one of the requirements for standing. See Lujan, 504 U.S. at 560–61.

The State defendants assert that the only conduct the Complaint actually attributes to Dresner, Jones, Mahood and Valle is receiving the Misinformation Daily Briefing email from SKDK that highlighted election-related news and social media posts, including O’Handley’s “[a]udit every California ballot” post. See Compl. ¶ 74 & Ex. 6. But the State receiving an email

¹⁹ The Court declines to exercise supplemental jurisdiction over the California Constitution (Free Speech Clause) claim, but notes that O’Handley fails to dispute the State defendants’ Eleventh Amendment argument. See generally Opp’n to State MTD; Reply re State MTD (dkt. 78) at 15. This order addresses only the four disputed arguments.

1 did not harm O’Handley. The non-conclusory allegations about Padilla are that he authorized the
2 State’s contract with SKDK. See Compl. ¶¶ 37–56. But the alleged improper granting of a state
3 contract to an outside contractor did not harm O’Handley.

4 The central allegation in the Complaint is that an unidentified agent or staff member—not
5 even, necessarily, one of the individual State defendants—flagged the O’Handley tweet identified
6 in the Misinformation Daily Briefing in an email to Twitter. See id. ¶¶ 76, 77, Ex. 9. The State
7 defendants argue that O’Handley cannot trace his injury—the permanent suspension of his Twitter
8 account—back to this event: “reporting the post to Twitter, by itself, could not cause any alleged
9 injury to plaintiff, as Twitter alone had the power to determine to label the post as disputed and
10 apply a strike to plaintiff’s account.” State MTD at 7 (citing the Civic Integrity Policy). And
11 again, the State email to Twitter involved just one O’Handley tweet; there is no allegation that the
12 State had any contact with Twitter about any of O’Handley’s subsequent tweets, including the
13 final one, which prompted the suspension of his account. Nor is there any allegation that the State
14 was involved in any of Twitter’s content moderation decisions.

15 O’Handley argues that “a defendant need not be the injury’s ‘sole source’ or ‘proximate
16 cause’ as long as the link is ‘not tenuous or abstract.’” Opp’n to State MTD at 3 (quoting Barnum
17 Timber Co v. EPA, 633 F.3d 894, 901 (9th Cir. 2011); Ocean Advocates v. U.S. Army Corps of
18 Eng’rs, 402 F.3d 846, 860 (9th Cir. 2005)). That is correct. See Maya v. Centex Corp., 658 F.3d
19 1060, 1070 (9th Cir. 2011) (“A causal chain does not fail simply because it has several links,
20 provided those links are not hypothetical or tenuous and remain plausible.”) (cleaned up). In
21 Barnum Timber, the Ninth Circuit held that the plaintiff’s injury—a reduction in property value—
22 was fairly traceable to the EPA’s decision to deem the creek that the property was on an impaired
23 water body; the plaintiff had submitted declarations explaining that the EPA’s decision would
24 make the property appear to be subject to “additional and onerous regulation.” 633 F.3d at 898–
25 99. The link there was not particularly tenuous, and the plaintiff had “more than met its burden . .
26 . at the pleading stage.” Id. at 899. Similarly, in Ocean Advocates, the Ninth Circuit held that the
27 plaintiff’s harm—increased tanker traffic and the risk of an oil spill—was traceable to the planned
28 extension of an oil tanker dock. 402 F.3d at 860. The court explained that while “[t]he causal

1 connection put forward for standing purposes cannot be too speculative, or rely on conjecture
2 about the behavior of other parties,” “the link [between the action and the harms was] not tenuous
3 or abstract.” Id.

4 In Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41 (1976), the
5 Supreme Court found the link too tenuous. The plaintiffs there had been denied hospital services,
6 and brought suit against the government, alleging that by adopting a revenue ruling allowing
7 favorable tax treatment to hospitals that offered only emergency room services to indigents, the
8 government had encouraged the hospitals to deny services to indigents. Id. at 41. The Court held
9 that the plaintiffs had no standing against the government, as it was “purely speculative whether
10 the denials of service specified in the complaint fairly can be traced to [the government’s]
11 ‘encouragement or instead result from decisions made by the hospitals without regard to the tax
12 implications.” Id. at 42.

13 As in Simon, the link here is tenuous. The Court would have to conclude that Twitter’s
14 decision to suspend O’Handley’s account for violating its Civic Integrity Policy stemmed from the
15 State’s flagging of a single O’Handley’s post three months earlier, rather than from Twitter’s
16 application of its own Rules. But, as discussed above, Twitter described its decision of whether to
17 remove a post, or take no action on it, by referencing its own interpretation of its own Rules. See,
18 e.g., Compl. Ex. 9 (“After our review, we’ve locked the account for breaking our rules regarding
19 civic integrity”; “We’re writing to let you know that after a review, we didn’t find a violation of
20 our civic integrity policy in the content you reported.”). Twitter characterized the Portal as a tool
21 “to flag concerns directly to Twitter,” including “technical issues . . . and content on the platform
22 that . . . may violate our policies.” See Compl. Ex. 2 (emphasis added). Twitter’s Terms of
23 Service gave it unlimited authority to remove or discipline accounts, see Twitter Terms of Service,
24 and Twitter referenced its own policies when it exercised that authority, see Compl. ¶ 88 (“Your
25 account, DC_Draino has been suspended for violating the Twitter Rules. Specifically, for:
26 Violating our rules about election integrity.”).

27 “In cases where a chain of causation ‘involves numerous third parties’ whose ‘independent
28 decisions’ collectively have a ‘significant effect’ on plaintiffs’ injuries,” the causal chain is “too

1 weak to support standing.” See Maya, 658 F.3d at 1070 (citation omitted); see also Clapper v.
2 Amnesty Int’l USA, 568 U.S. 398, 414 (2013) (expressing reluctance about allegations that “rest
3 on speculation about the decisions of independent actors”); Ass’n of Am. Physicians & Surgeons
4 v. U.S. FDA, 13 F.4th 531, 546 (6th Cir. 2021) (collecting cases holding “that a plaintiff failed to
5 establish that an injury was traceable to a defendant when the injury would arise only if some third
6 party decided to take the action triggering the injury.”). Here, the causal chain alleged in the
7 Complaint is the State improperly installing SKDK, SKDK flagging O’Handley’s tweet to the
8 State, the State flagging O’Handley’s tweet to Twitter, O’Handley tweeting several more times,
9 Twitter applying several more labels and strikes over the course of multiple months, and then
10 Twitter suspending O’Handley’s account. See Compl. ¶¶ 19–88. That chain involves “numerous
11 third parties” making “independent decisions,” culminating in Twitter making the decision to
12 suspend O’Handley’s account.

13 O’Handley’s response is again to cry conspiracy: Twitter used the Portal to “streamline
14 state censorship submissions for priority actions”; the State’s use of the Portal was an instruction
15 to Twitter to “take down” the flagged tweets; and, “[a]cting as the arm of the OEC,” Twitter
16 complied with the State’s censorship requests 98% of the time. Opp’n to State MTD at 3. He
17 argues: “These were not ‘independent decisions,’ but coordinated steps taken in furtherance of a
18 conspiracy.” Id. Because, as discussed above, the conspiracy allegations are not plausible—
19 particularly as to the purpose of the defendants’ work together—they do not save O’Handley’s
20 standing.

21 Standing allegations “need not be so airtight at this stage of litigation as to demonstrate
22 that the plaintiffs would succeed on the merits.” See Ocean Advocates, 402 F.3d at 860. Even so,
23 given the tenuous causal chain alleged, the Court DISMISSES the claims against the State
24 defendants for lack of standing.²⁰

25 2. State Action

26 The State defendants next argue that the claims brought under section 1983 all fail because

27
28 ²⁰ The Court’s ruling does not pertain to the California Constitution (Free Speech Clause) claim,
over which the Court declines to exercise supplemental jurisdiction.

they are not “fairly attributable to” the State. See State MTD at 8 (quoting Pasadena Republican Club v. W. Just. Ctr., 985 F.3d 1161, 1167 (9th Cir. 2021)). O’Handley responds that Twitter is a state actor by virtue of the joint action and nexus tests. Opp’n to State MTD at 3–5.

As discussed above in connection with Twitter’s motion to dismiss, the Complaint does not satisfy the joint action test. The nexus test “asks ‘whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so the action of the latter may be fairly treated as that of the state itself.’” Gorenc, 869 F.2d at 506 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)); see also Villegas v. Gilroy Garlic Festival Ass’n, 541 F.3d 950, 955 (9th Cir. 2008) (listing factors to consider for nexus test, including whether state officials dominate decision-making of organization and whether organization’s funds largely come from state). For the same reasons the Complaint does not meet the joint action test, it also does not meet the nexus test.

Because Twitter’s actions are not attributable to the State, the Court DISMISSES the First Amendment, Equal Protection, and Due Process²¹ claims against the State.

3. Failure to State a Claim

The State defendants next argue that the Complaint fails to state a claim as to each cause of action. See State MTD at 10–15. The Court need not reach most of these arguments. As discussed above in connection with Twitter’s motion, the Court also DISMISSES the section 1985 conspiracy claim for failure to state a claim, and declines to exercise supplemental jurisdiction over the California Constitution (Free Speech Clause) claim.

That leaves the claim that O’Handley brings against the State defendants only, alleging that California Elections Code § 10.5 violates the Due Process Clause because it “is impermissibly vague because it fails to provide a reasonable opportunity to know what conduct is prohibited or is so indefinite as to allow arbitrary and discriminatory enforcement.” Compl. ¶ 162. A statute can be void for vagueness where it “fails to provide a person of ordinary intelligence fair notice of

²¹ This refers to the fourth claim for relief, which alleges that the defendants “cause[d] Twitter to inflict the constitutional injury of depriving Plaintiff of his occupation and taking the business goodwill he had garnered through his Twitter account.” See Compl. ¶ 152.

1 what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory
2 enforcement.” United States v. Williams, 553 U.S. 285, 304 (2008). The State defendants move
3 to dismiss the void-for-vagueness claim, arguing that “[b]ecause section 10.5 proscribes no speech
4 or conduct, there is no need to provide fair notice of any proscription.” State MTD at 14.
5 O’Handley responds that the statute is void for vagueness because it grants OEC the right to
6 “counteract false or misleading information” without defining those terms, and that O’Handley
7 “had no way of knowing what it prohibited, while OEC officials had unbridled discretion to
8 determine what speech warranted action.” Opp’n to State MTD at 9.

9 The State defendants are right, though, that section 10.5 does not prohibit any conduct. It
10 simply sets out the mission of the OEC. See Cal. Elec. Code § 10.5(b)(2) (“To monitor and
11 counteract false or misleading information regarding the electoral process”); id. § (c)(8) (“Assess
12 the false or misleading information regarding the electoral process . . . mitigate the false or
13 misleading information, and educate voters”). It does not restrict what anyone can say. It is
14 therefore “not amenable to a vagueness challenge.” See United States v. Beckles, 137 S. Ct. 886,
15 895 (2017) (no vagueness challenge to U.S. Sentencing Guidelines, which “do not regulate the
16 public by prohibiting any conduct”); see also State v. Dums, 149 Wis. 2d 314, 324 (1989) (void-
17 for-vagueness statute does not apply where statute “does not prohibit conduct, but instead
18 regulates the court’s procedure”). And while O’Handley objects to the OEC’s “unbridled
19 discretion” under section 10.5, the Supreme Court in Beckles observed that “we have never
20 suggested that unfettered discretion can be void for vagueness.” 137 S. Ct. at 895. Unbridled
21 discretion in enacting a statutory mission that does not proscribe or restrict an individual’s conduct
22 is particularly unproblematic.

23 The Court also rejects O’Handley’s suggestion that “false and misleading” are vague terms
24 that he could never hope to understand. See Opp’n to State MTD at 9. “False” and “misleading”
25 are not vague. See, e.g., First Resort, Inc. v. Herrera, 860 F.3d 1263, 1274–75 (9th Cir. 2017)
26 (ordinance prohibiting false or misleading advertising by clinics that do not offer abortion not
27 vague); United States v. Matanky, 482 F.2d 1319, 1321–22 (9th Cir. 1973) (statute proscribing
28 false statements in a manner within the jurisdiction of a department or agency of the United States

not vague); United States v. Rodriguez-DeHaro, 192 F. Supp. 2d 1031, 1038–39 (E.D. Cal. 2002) (statute criminalizing the making of “any false or fictitious oral or written statement” in connection with acquisition of firearm not unconstitutionally vague). While O’Handley repeatedly seeks to blur the line between truth and opinion,²² the word “false” is not up for debate.

Accordingly, the Court DISMISSES the void-for-vagueness claim against the State defendants.

4. Qualified Immunity

The State defendants next argue that the five defendants named in their individual capacity (Padilla, Dresner, Jones, Mahood and Valle) are all entitled to qualified immunity. See State MTD at 16. Qualified immunity shields government officials who are performing a discretionary function from money damages unless a plaintiff has pled “(1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.” Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (qualified immunity protects government officials performing a discretionary function).

The State defendants seeking qualified immunity were exercising a discretionary function by identifying and mitigating election misinformation pursuant to section 10.5. What the parties dispute is whether O’Handley has pled that in exercising that discretionary function, those officials violated a constitutional right of O’Handley’s that was clearly established. This order already concludes that the Complaint fails to adequately allege the violation of a constitutional right. But the Court also agrees that “there is no controlling precedent that would have informed the State [d]efendants in November 2020 that identifying social media posts containing false or misleading election information to the private platform on which they are posted violates a clearly established constitutional right to a point that is ‘beyond debate.’” See State MTD at 16.

²² O’Handley asserts repeatedly that his statements were mere opinions. See, e.g., Compl. ¶ 3 (“Twitter promptly complied with OEC’s request to censor Mr. O’Handley’s problematic opinions”); id. ¶ 73 (re 11/12/20 tweet: “Mr. O’Handley’s Post expressed an opinion widely held by California voters”); ¶ 74 (“personal opinion”); Opp’n to State MTD at 1 (“politically inconvenient opinions”); Opp’n to SKDK MTD at 2 (“labeled Mr. O’Handley’s opinion as ‘misinformation’”). But “Election fraud is rampant nationwide” is not an opinion. It is an assertion of fact.

O’Handley argues that he need not identify case law arising from analogous circumstances because “a general constitutional rule already identified in the decisional law [applies] with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.” Opp’n to State MTD at 11 (quoting Villarreal v. City of Laredo, Texas, No. 20-40359, 2021 WL 5049281, at *1 (5th Cir. Nov. 1, 2021) (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002))). He maintains that even if section 10.5 is valid, OEC’s enforcement of it, “censoring and punishing private speech from public discourse because of the speech’s viewpoint,” is so clearly unlawful that “no reasonable person would consider it constitutional.” Id. at 12.

But the Supreme Court has “repeatedly told courts . . . not to define clearly established law at a high level of generality.” Ashcroft, 563 U.S. at 742. The Complaint here does not plausibly allege that the State defendants engaged in viewpoint discrimination. It alleges that an unidentified OEC official sent a single message to Twitter, flagging a single O’Handley tweet without directing or even requesting that Twitter take any particular action in response to the tweet. See Compl. ¶ 76; Compl. Ex. 9. If there is clearly established law holding that a state employee violates an individual’s constitutional rights by flagging his post to the social media company where he posted, O’Handley has not identified it. Indeed, section 10.5 instructed such employees to mitigate false or misleading information. See Cal. Elec. Code § 10.5(b)(2).

Because O’Handley failed to adequately allege that the State defendants violated his constitutional rights or that there was clearly established law such that “every reasonable official would have understood that what he [was] doing violate[d] that right,” see Ashcroft, 563 U.S. at 741, the Court GRANTS qualified immunity to the individual State defendants.²³

Accordingly, the Court GRANTS the State defendant’s motion to dismiss as to each of the claims against them, save and except for the California Constitution (Free Speech Clause) claim.

D. SKDK Motion to Dismiss

SKDK moves to dismiss all of O’Handley’s claims against it, arguing that (1) the

²³ The Court rejects O’Handley’s invitation to revisit the law of qualified immunity more broadly. See Opp’n to State MTD at 13 n7.

1 Complaint fails to establish O’Handley’s standing; and (2) the Complaint fails to state a claim as
2 to each cause of action. SKDK is correct.

3 **1. Standing**

4 SKDK’s first argument is that the Court should dismiss the claims against it because
5 O’Handley lacks standing. To have standing, a plaintiff must establish (1) that he suffered an
6 injury in fact, (2) that his injury is fairly traceable to a defendant’s conduct, and (3) that his injury
7 would likely be redressed by a favorable decision. See Lujan, 504 U.S. at 560–61. SKDK argues
8 that O’Handley failed to establish an injury in fact resulting from SKDK’s actions and that
9 O’Handley’s alleged injury is not traceable to SKDK’s conduct. SKDK MTD at 4–6. This is two
10 different ways of saying the same thing: SKDK is not to blame.

11 The Court agrees. The only relevant allegation about SKDK’s actions is that on November
12 13, 2020, SKDK included one of O’Handley’s tweets in its “Misinformation Daily Briefing,”
13 which it emailed to Valle, Dresner, Mahood, and Jones at the OEC. Compl. ¶¶ 57–58, 74, Ex. 6.
14 That briefing did not include any commentary about the tweet other than to list it under the
15 heading “California.” Id. Ex. 6. It did not instruct the State, or Twitter, to take any action. That
16 was the extent of SKDK’s involvement with O’Handley. SKDK’s email to OEC did not cause
17 O’Handley any direct harm, and the Complaint does not allege otherwise. O’Handley instead
18 must argue that the harm he experienced when Twitter suspended his account in February 2021—
19 or perhaps when it labeled his tweets or added strikes to his account leading up to that—is
20 traceable to SKDK’s November 2020 conduct. See Opp’n to SKDK MTD at 2. He cannot do so.

21 “In cases where a chain of causation ‘involves numerous third parties’ whose ‘independent
22 decisions’ collectively have a ‘significant effect’ on plaintiffs’ injuries,” the causal chain is “too
23 weak to support standing.” See Maya, 658 F.3d at 1070. If Twitter’s enforcement actions
24 regarding O’Handley’s tweets cannot be traced back to the State’s November 17, 2020 email to
25 Twitter—which the Court concludes above—then those enforcement actions also cannot be traced
26 back to SKDK’s November 13, 2020 briefing email to the State. That causal chain is even longer
27 and involves additional independent decisions.

28 O’Handley again falls back on his allegations of conspiracy. See Opp’n to SKDK at 2

1 (“Mr. O’Handley was injured by the foreseeable consequences of the Defendants’ conspiracy,
2 whose objectives SKDK both agreed to and contributed overt acts towards.”) (citing Compl. ¶¶
3 56–57, 68, 74). As discussed above, the conspiracy allegations are not plausible, particularly as to
4 the purpose of the defendants’ work together. See Reply re SKDK MTD (dkt. 77) at 9 (“Without
5 any non-conclusory allegations that SKDK had a meeting of the minds with the other Defendants
6 with the shared goal of depriving him of his constitutional rights, O’Handley has failed to plead a
7 conspiracy.”). They therefore do not save O’Handley’s standing.

8 Accordingly, the Court DISMISSES the claims against SKDK for lack of standing.²⁴

9 2. Failure to State a Claim

10 SKDK’s second argument is that the Complaint fails to state a claim as to each cause of
11 action. SKDK MTD at 6–15. SKDK argues that the constitutional claims fail because of lack of
12 state action and because SKDK did not act under color of state law,²⁵ and that the claims also fail
13 on their merits. Id.

14 a. State Action

15 SKDK maintains that “O’Handley’s claims under the First and Fourteenth Amendments,
16 Section 1983, and the California Constitution each fail because those provisions do not apply to
17 private actors like SKDK, but only against the government or those acting under color of state
18 law.” SKDK Reply at 6. The Court does not reach the California Constitution (Free Speech
19 Clause) claim. “[C]onduct allegedly causing the deprivation of a federal right [must] be fairly
20 attributable to the State.” Lugar, 457 U.S. at 937. O’Handley responds that SKDK acted pursuant
21 to a \$35 million contract with the State, and that, by joining in a conspiracy with the other
22 defendants, SKDK was a state actor. Opp’n to SKDK MTD at 3–5.

23 i. Contract

24 That SKDK acted pursuant to a contract with the State does not means that its actions were

25
26 ²⁴ The Court’s ruling does not pertain to the California Constitution (Free Speech Clause) claim,
27 over which the Court declines to exercise supplemental jurisdiction.

28 ²⁵ SKDK treats these as separate arguments in its opening brief, see SKDK MTD at 6–10, but
reluctantly adopts O’Handley’s combined organization for its reply brief, see SKDK Reply at 6
n.2. This order also handles the state action inquiry all at once.

1 state actions. In Rendell-Baker v. Kohn, 457 U.S. 830, 841 (1982), a private high school received
2 funds from the state and had to comply with state regulations. Plaintiffs were former teachers at
3 the school who alleged that their discharges were unconstitutional. Id. at 834. The Supreme Court
4 held that the school’s decisions to discharge the teachers were not “compelled or even influenced
5 by any state regulation.” Id. at 841. It stated that “[t]he school . . . is not fundamentally different
6 from many private corporations whose business depends primarily on contracts [with] the
7 government. Acts of such private contractors do not become acts of the government by reason of
8 their significant or even total engagement in performing public contracts.” Id. at 841–42. In
9 Manhattan Community Access Corp., 139 S. Ct. at 1932, the Court likewise explained:

10 Numerous private entities in America obtain government licenses,
11 government contracts, or government-granted monopolies. If those
12 facts sufficed to transform a private entity into a state actor, a large
13 swath of private entities in America would suddenly be turned into
14 state actors and be subject to a variety of constitutional constraints
15 on their activities. As this Court’s many state-action cases amply
16 demonstrate, that is not the law.

17 To state a section 1983 claim against SKDK, O’Handley must demonstrate that,
18 notwithstanding SKDK’s status as a private entity, SKDK was acting under color of state law.
19 See Gorenc, 869 F.2d at 506. O’Handley argues that SKDK was doing so, based on the joint
20 action and the nexus tests. Opp’n to SKDK MTD at 3.

21 ii. Conspiracy

22 O’Handley primarily asserts that he satisfies those tests because he has “plausibly allege[d]
23 that SKDK conspired with Defendants to deprive individuals of their constitutional rights.” Id. at
24 4 (citing Compl. ¶ 99). But paragraph 99 of the Complaint is a conclusory three sentences about
25 “Twitter’s real reasons for suspending” his account, and the only possible reference to SKDK is
26 the line that “[t]he trigger for Twitter’s censorship of Mr. O’Handley was its coordination and
27 conspiracy with other Defendants to silence the protected speech of many Americans.” See
28 Compl. ¶ 99. O’Handley lists as “Actions in furtherance of the conspiracy” a series of utterly
unremarkable events: “creating a state agency to ‘monitor and counteract false or misleading
information,’ outsourcing this task to SKDK with instructions to identify social media ‘election
misinformation,’ and ‘working closely and proactively’ with social media companies to ‘take

1 down sources of misinformation.” Opp’n to SKDK MTD at 4. Again, such allegations might
2 demonstrate a meeting of the minds to promptly address election misinformation, but not a
3 meeting of the minds to violate anyone’s constitutional rights. See Fonda, 707 F.2d at 438. The
4 conspiracy allegations are not plausible.

5 **iii. Other Evidence of Joint Action/Nexus**

6 O’Handley next contends that “[e]ven without evidence of conspiracy,” it is possible to
7 demonstrate joint action. Opp’n to SKDK MTD at 4–5. That is true. But then he insists that he
8 has met the joint action and nexus tests “[f]or the same reasons that SKDK and OEC ‘conspired.’”
9 Id. at 5. This is problematic for him given the lack of plausible allegations that the two conspired.

10 Moreover, the Complaint does not allege that the State exercised any control over the
11 substance of the “Misinformation Daily Briefing,” or SKDK’s decision to flag O’Handley’s tweet.
12 “Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify
13 holding the State responsible for those initiatives.” Blum, 457 U.S. at 1004–05. The State may
14 have acquiesced in SKDK’s decision to flag O’Handley’s tweet, but there are no plausible
15 allegations that the State substantially cooperated with SKDK’s flagging of the tweet. See
16 Brunette, 294 F.3d at 1212. Nor was SKDK’s decision to flag O’Handley’s tweet “compelled or
17 even influenced by any state regulation.” See Rendell-Baker, 457 U.S. at 841.

18 The Complaint therefore fails to satisfy the joint action test. For the same reasons, there
19 are not plausible allegations that “there is a sufficiently close nexus between the State and the
20 challenged action of the regulated entity so the action of the latter may be fairly treated as that of
21 the state itself.” See Gorenc, 869 F.2d at 506 (citing Jackson v. Metropolitan Edison Co., 419
22 U.S. 345, 351 (1974)); see also Villegas, 541 F.3d at 955. And so the Complaint also fails to
23 satisfy the nexus test. SKDK was not a state actor. It cannot be liable under § 1983. The Court
24 therefore DISMISSES the First Amendment, Equal Protection, and Due Process Claims against
25 SKDK. The Court declines to exercise supplemental jurisdiction over the California Constitution
26 (Free Speech Clause) claim.

27 **b. Remaining Claim**

28 While SKDK makes a number of arguments about O’Handley’s claims in addition to the

state action argument, see SKDK MTD at 11–14, the Court need not reach them. That leaves only the section 1985 conspiracy claim against SKDK. As discussed above in connection with Twitter and the State defendants, the Complaint fails to adequately allege a meeting of the minds to violate O’Handley’s constitutional rights, and therefore fails to adequately allege a conspiracy. See Bray, 506 U.S. at 268 (conspiracy must be aimed at interfering with protected rights); Sanchez, 936 F.2d at 1039 (“mere allegation of conspiracy without factual specificity is insufficient.”). The Court DISMISSES that claim against SKDK as well.

Accordingly, the Court GRANTS SKDK’s motion to dismiss as to each of the claims against it, save and except for the California Constitution (Free Speech Clause) claim.

E. NASS Motion to Dismiss

Finally, NASS moves to dismiss all of O’Handley’s claims against it, arguing that (1) the Court lacks personal jurisdiction over NASS, and (2) the Complaint fails to state a claim as to each cause of action. See NASS MTD.²⁶ While a “plaintiff need make only a prima facie showing of jurisdictional facts to withstand [a] motion to dismiss,” Ballard, 65 F.3d at 1498, O’Handley has not done so; the Court therefore lacks jurisdiction over NASS. In addition, the Complaint fails to state a claim.

1. Personal Jurisdiction

NASS argues that it is an out-of-state nonprofit organization over which the Court has no personal jurisdiction. See NASS MTD at 12–17. NASS notes that it has never had subsidiaries or offices or employees or bank accounts or registered agents in California, has never been registered to do business in California, has no current officers or directors in California, does not direct advertising toward California, and has not contracted with anyone in California to do advertising here. Id. at 9–10 (citing Reynolds Decl. ¶¶ 2, 8). A court has personal jurisdiction over a non-resident defendant when that defendant has “certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal quotations omitted).

²⁶ NASS does not argue, as the State defendants and SKDK do, that O’Handley lacks standing to sue it.

California’s long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U.S. Constitution. Daimler AG v. Bauman, 571 U.S. 117, 125 (2014).

Personal jurisdiction can be either general or specific. Data Disc, 557 F.2d at 1287. NASS argues that the Court lacks both general jurisdiction and specific jurisdiction. See NASS MTD at 12–17. O’Handley does not contest that this Court lacks general jurisdiction. See generally Opp’n to NASS MTD (dkt. 67). The question is therefore whether the Court has specific jurisdiction.

“There are three requirements for a court to exercise specific jurisdiction over a nonresident defendant: (1) the defendant must either ‘purposefully direct his activities’ toward the forum or ‘purposefully avail himself of the privileges of conducting activities in the forum’; (2) ‘the claim must be one which arises out of or relates to the defendant’s forum-related activities’; and (3) ‘the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.’” Axiom Foods, Inc. v. Acerchem Int’l, Inc., 874 F.3d 1064, 1068 (9th Cir. 2017) (original alterations omitted). The plaintiff has the burden on the first two prongs, after which “the burden . . . shifts to the defendant to ‘present a compelling case’ that the exercise of jurisdiction would not be reasonable.” Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004).

While the parties initially disagreed about whether the purposeful availment or purposeful direction tests apply, see NASS MTD at 13; Opp’n to NASS MTD at 4, they ultimately agreed that the Court should apply the “Calder test” pursuant to Calder v. Jones, 465 U.S. 783 (1984), see Opp’n to NASS MTD at 4 (applying Calder); Reply re NASS MTD (dkt. 76) at 8–12 (applying Calder); see also Yahoo! Inc. v. LA Ligue Contre Le Racisme Et L’Antisemitisme, 433 F.3d 1199 (9th Cir. 2006) (applying Calder test to case involving constitutional claims). The Calder test requires that a defendant have “(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” Yahoo!, 433 F.3d at 1206.

O’Handley argues that NASS expressly aimed its censorship efforts at California, knowing that harm would occur here. See Opp’n to NASS MTD at 4–6. But the allegations do not support

1 that position. The Complaint alleges broadly that NASS “spearheaded efforts to censor disfavored
2 election speech” by “creat[ing] direct channels of communication between Secretaries of States’
3 staff and social media companies.” Compl. ¶¶ 26, 27. It focuses on three emails that NASS’s
4 Director of Communications presumably sent to all of its members’ “Communications Directors.”
5 See id. Exs. 2–4. Those emails: (1) state that “Twitter asked her to let Secretary of States’ offices
6 know that it had created a separate dedicated way for election officials to ‘flag concerns directly to
7 Twitter,’” id. ¶ 28, Ex. 2 (10/1/20 email); (2) explain that “if your state is onboarded into the
8 [Twitter] partner support portal, it provides a mechanism to report election issues and get them
9 bumped to the head of the queue,” id. ¶ 29, Ex. 3 (8/28/20 email); and (3) state that “If you see
10 something on a platform, please report it. In addition, please pass this on to your local election
11 officials as well. I would also appreciate a heads up so I know what is going on, this helps us
12 create a more national narrative,” id. ¶ 30, Ex. 4 (4/30/19 email).

13 NASS contends that those contacts are inadequate. NASS MTD at 14 (citing Asahi Metal
14 Industries Co. v. Superior Court of California, 480 U.S. 102 (1987)). In Asahi, 480 U.S. at 112,
15 the Supreme Court explained that it was not enough to put a product into the stream of commerce,
16 knowing “that the stream of commerce may or will sweep the product into the forum state.” The
17 manufacturer in that case had no offices, agents, employees, or property in California, and did not
18 control the distribution system that carried its product into California. Id. at 108. It was not
19 subject to personal jurisdiction in California because there was no “additional conduct” that would
20 “indicate an intent or purpose to serve the market in the forum State, like designing the product for
21 the market in the forum State, advertising in the forum State, establishing channels for providing
22 regular advice to customers in the forum State, or marketing the product through a . . . sales agent
23 in the forum State.” Id. at 112; see also Rio Props., Inc. v. Rio Intern. Interlink, 284 F.3d 1007,
24 1019 (9th Cir. 2002) (passive website was inadequate for express aiming; “‘something more’ was
25 required to indicate that the defendant purposefully directed its activity in a substantial way to the
26 forum state.”). NASS argues persuasively that, as in Asahi, it had no presence in California and
27 no additional conduct demonstrating a focus on California. NASS MTD at 14.

28 Mavrix Photo, Inc. v. Brand Techs., Inc., 647 F.3d 1218 (9th Cir. 2011), to which

O’Handley cites, see Opp’n to NASS MTD at 4–5, is an example of what “additional conduct” or “something more” might look like. In that case, Brand posted celebrity photos taken by Mavrix on its website without Mavrix’s permission. Mavrix Photo, Inc., 647 F.3d at 1223. Even though Brand had no offices, property or staff in California, it had a number of other ties—profiting from third-party advertisements in California, including on its site a Ticket Center that sold tickets to events in California, having agreements with several California businesses, including a link-sharing agreement with a California-based news site, and having “[a] substantial number of hits” on the website from California residents—that made specific jurisdiction appropriate. Id. at 1222, 1229, 1230; see also id. at 1229 (“Brand used Mavrix’s copyrighted photos as part of its exploitation of the California market for its own commercial gain.”). NASS does not have any comparable ties to California, and cannot be said to be exploiting California through its emails. See also PREP Tours, Inc. v. American Youth Soccer Organization, 913 F.3d 11, 23–24 (1st Cir. 2019) (nine emails and a number of telephone calls to single recipient in forum state did not show that the defendants were “contemplating the kind of ongoing and close-working relationship . . . that could establish the requisite substantial connection between the defendants and the forum.”).

O’Handley would dispute that NASS’s involvement in this case is limited to emails. He argues in his opposition brief that “NASS specifically coordinated with both Twitter and OEC, both located in California”²⁷ and “actually set the ball in motion, creating [the portal] in partnership with Twitter, and then repeatedly encouraging its membership to join the portal, giving its members guidance and direction on portal use, using the portal to itself request speech censorship on behalf of its members, and serving as a liaison between Twitter and its members.” Opp’n to NASS MTD at 6. But there is no allegation in the Complaint that NASS created, or co-created, the Portal.²⁸ And despite O’Handley’s assertion in opposing NASS’s motion that NASS

²⁷ O’Handley suggests that there is jurisdiction because Twitter and “all major social media platforms” are in California. See Opp’n to NASS MTD at 5. Under that theory, California would have jurisdiction over all cases involving social media.

²⁸ There is a vague allegation in the Complaint that “NASS created direct channels of communication between Secretaries of States’ staff and social media companies to facilitate the quick take-down of speech deemed ‘misinformation.’” Compl. ¶ 27. The Court reads that allegation as a reference to NASS’s emails alerting its members to the Portal, and to other social media companies’ similar tools. The next paragraph alleges that Twitter created the Portal and

1 was involved in the creation of the Portal, see, e.g., id. at 1 (“NASS worked specifically with
2 Twitter . . . to create [the Portal]”); id. at 2 (“Prior to OEC using the portal created and
3 promulgated by NASS”), his arguments in opposing other motions reflect that only Twitter
4 created the Portal, see Opp’n to Twitter MTD at 1 (“Twitter established the ‘Partner Support
5 Portal’”); Opp’n to State MTD at 3 (“By using a dedicated portal Twitter created”). Nor is it
6 accurate to say that NASS repeatedly encouraged its members to join the Portal. See Compl. Ex.
7 2 (“If you do decide to join the [Portal] please cc’ me for awareness. . . But alas, if you’d like to
8 just report to the new CIS reporting structure that works too! Up to you!”), Ex. 3 (“If you’re not
9 on the list and would like to get on-boarded please email psponboarding@twitter.com”), Ex. 4
10 (“Twitter has an election partner portal which NASS has access to”). And the only allegation that
11 NASS used “the portal to itself request speech censorship on behalf of its members” is the email
12 that states that Twitter has a Portal and “You will need to email me . . . as much information as
13 you have and I will submit it through the portal.” Id. Ex. 4. That email says nothing about
14 censorship.

15 Ultimately, the Court is not persuaded that NASS’s emails to all of its members—rather
16 than to the California Secretary of State in particular—informing them about the Portal
17 demonstrate the kind of express aiming required under Calder. National organizations are not
18 subject to jurisdiction in every state where their members live. See Szabo v. Med Info. Bureau,
19 127 Cal. App. 3d 51, 53 (1981) (collecting cases).²⁹ Presumably that holds true even if the
20 organization emails all of its members.

21 O’Handley has failed to meet the Calder test. The Court need not reach the remainder of

23 that NASS’s role was to alert its members to its existence. See id. ¶ 28 (“ . . . Twitter asked her to
24 let Secretary of States’ offices know that it had created a separate dedicated way for election
officials to ‘flag concerns directly to Twitter.’”); see also Compl. Ex. 2.

25 ²⁹ Amazon.com, Inc. v. National Association of College Stores, Inc., 826 F. Supp. 2d 1242 (W.D.
26 Wash. 2011), on which O’Handley relies, see Opp’n to NASS MTD at 4–5, is distinguishable.
27 Although that case involved a nonprofit trade association, the basis for jurisdiction was not that
28 the association had a member in a particular state or even that it had communicated with that
member. The trade association had sent a letter to Amazon raising a legal concern, then initiated a
challenge against Amazon before the Better Business Bureau. Id. at 1246–47. There was
jurisdiction because the trade association had “expressly aimed its actions at Washington by
individually targeting Amazon, the Washington-based plaintiff.” Id. at 1255. NASS did not
“individually target[]” California. It sent its emails to all of its members.

1 the specific jurisdiction requirements, and GRANTS the motion for lack of personal jurisdiction.

2 **2. Failure to State a Claim**

3 NASS next argues that the Complaint fails to state a claim as to each cause of action.
4 NASS MTD at 17–26. NASS asserts that the federal constitutional claims and California
5 Constitution (Free Speech Clause) claim fail because NASS is not a state actor, id. at 17–25, and
6 that the section 1985 claim fails because O’Handley fails to allege a conspiracy that would violate
7 his constitutional rights, id. at 25–26; Reply re NASS MTD at 19–20.

8 **a. State Action**

9 As discussed above in connection with the other defendants, NASS is correct that the
10 Complaint’s federal constitutional claims require state action.³⁰ Moreover, as NASS points out,
11 there is a “presumption that private conduct does not constitute governmental action.” NASS
12 MTD at 20 (quoting Sutton v. Providence St. Joseph Med. Center, 192 F.3d 826, 835 (9th Cir.
13 1999)). O’Handley concedes this point as to the federal claims, but asserts that he has overcome
14 the presumption here, because NASS and the State “acted in concert in effecting a particular
15 deprivation of constitutional rights.” Opp’n to NASS MTD at 8–10 (quoting Tsao, 698 F.3d at
16 1140). He asserts that the Complaint satisfies both the joint action test and the nexus test, largely
17 because of his conspiracy allegations. Id.

18 **i. Conspiracy**

19 O’Handley’s conspiracy allegations do not demonstrate that NASS acted jointly with the
20 State. See id. (citing Compl. ¶ 99). As discussed above, paragraph 99 of the Complaint is a
21 conclusory three sentences about “Twitter’s real reasons for suspending” O’Handley’s account,
22 and the only possible reference to NASS is the line that “[t]he trigger for Twitter’s censorship of
23 Mr. O’Handley was its coordination and conspiracy with other Defendants to silence the protected
24 speech of many Americans.” See Compl. ¶ 99. O’Handley argues that NASS’s emails with OEC
25 about reporting misinformation through the Twitter Portal prove that the defendants had a meeting
26 of the minds. Opp’n to NASS MTD at 9–10 (citing Compl. Exs. 2, 3). But those emails from
27

28 ³⁰ Again, the Court will not reach the California Constitution (Free Speech Clause) claim herein.

1 NASS to its members do not reflect a meeting of the minds to do anything; they show NASS
2 passing along information, see Compl. Ex. 2 (members free to use Twitter Portal or alternative
3 tool; “Up to you!”), and in one instance asking, “If you see [Mis/Disinformation] on a platform,
4 please report it,” id. Ex. 4. Even if they reflected a meeting of the minds to counteract election
5 misinformation, that is not a meeting of the minds to violate constitutional rights. See Fonda, 707
6 F.2d at 438.

7 O’Handley’s additional arguments about conspiracy fare no better. He again states that
8 NASS “work[ed] with Twitter to create” the Portal, see Opp’n to NASS MTD at 9, an allegation
9 absent from the Complaint. He contends that NASS “gave California’s OEC guidance regarding
10 how to report mis/disinformation directly,” but cites only to an allegation in the Complaint that
11 NASS emailed all of its members that it “wanted election officials to have NASS’s email guidance
12 regarding how to report ‘mis/disinformation’ directly to social media companies ‘handy.’” See id.
13 (citing Compl. ¶ 31, Ex. 4). And he adds that NASS asked its members to alert it to
14 misinformation so that it could “create a more national narrative.” Id. (citing Compl. ¶ 30, Ex. 4).
15 But sharing information with Secretaries of State is not an act “unlikely to have been undertaken
16 without an [illicit] agreement,” see Mendocino Env’tl Ctr., 192 F.3d at 1301. It is NASS’s explicit
17 purpose. See Reynolds Decl. ¶¶ 3, 6 (NASS is a nonprofit professional organization whose
18 function is to “serve[] as a medium for the exchange of information between states” and to
19 “foster[] cooperation in the development of public policy.”).

20 The conspiracy allegations are not plausible.

21 **ii. Other Evidence of Joint Action/Nexus**

22 O’Handley again contends that “[e]ven without evidence of conspiracy,” he has met the
23 joint action and nexus tests “[f]or the same reasons that NASS and OEC ‘conspired.’” Id. at 5.
24 Again, this argument is unavailing given the lack of plausible allegations that the two conspired.
25 O’Handley cites to allegations that “NASS instructed OEC on how to report [misinformation] to
26 Twitter,” that OEC used the Portal, and that NASS later “awarded OEC for their censorship
27 efforts,” Opp’n to NASS MTD at 10 (citing Compl. ¶¶ 32, 61, 64, Ex. 4). O’Handley thus
28 concludes that NASS “affirmed, authorized, encouraged and facilitated the plan to have

1 Secretaries of State, including OEC, report disfavored tweets directly to social media,” and that
2 OEC “‘affirmed, authorized, encouraged, and facilitated’ NASS’s efforts by their use of the
3 portal.” Id. (referencing Polk v. Yee, 481 F. Supp. 3d 1060, 1068 (E.D. Cal. 2020)).

4 The court in Polk, 481 F. Supp 3d at 1066, recognized that one way of showing joint action
5 is “where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct
6 through its involvement with a private party.” That case involved a section 1983 suit against the
7 California State Controller and the Union, alleging the deprivation of the First Amendment right to
8 refrain from subsidizing Union speech through dues. Id. at 1063–64. The Union moved to
9 dismiss, asserting a lack of state action. Id. at 1066. The court held that despite “a connection
10 between the constitutional violation and the state action,” the plaintiffs had failed to allege “that
11 the Union acted in concert with the state to cause the [harm], especially given the state’s lack of
12 involvement in the drafting and executing of the Union agreements.” Id. at 1067.

13 Here, there are no plausible allegations that NASS or the State affirmed any
14 unconstitutional conduct by the other. The State’s alleged agreement to use the Portal did not
15 affirm unconstitutional conduct, as an organization emailing its members with information about
16 how to report election misinformation is not unconstitutional. NASS’s award to OEC, premised
17 OEC’s identification and removal of “misinformation,” Compl. ¶ 65, Ex. 8, and “misleading social
18 media posts,” id. ¶ 64—not “disfavored tweets,” see Opp’n to NASS MTD at 10—also did not
19 affirm unconstitutional conduct, as identifying and removing such material is not unconstitutional.

20 And, as in Polk, 481 F. Supp. 3d at 1067, there is a “lack of involvement” by the State
21 here. NASS is a private organization that emailed its members information about how to report
22 election misinformation. See Compl. ¶¶ 27–31, Exs. 2–4. Sharing information with the
23 government does not amount to joint action. See Lockhead, 24 Fed. App’x at 806. The
24 Complaint does not allege that the State told NASS to send its emails. It alleges only that the
25 State made use of the information NASS sent, employing the Portal to report election
26 misinformation. Compl. ¶ 32 (not actually stating that the State did so when flagging O’Handley’s
27 tweet). “Mere approval of or acquiescence in the initiatives of a private party is not sufficient to
28 justify holding the State responsible for those initiatives.” Blum, 457 U.S at 1004–05. In

1 addition, the circuit requires “substantial cooperation” or that the private entity’s and
2 government’s actions be “inextricably intertwined.” See Brunette, 294 F.3d at 1212. There are no
3 plausible allegations that the two entities’ actions were inextricably intertwined. See Brunette,
4 294 F.3d at 1212–13 (no joint action where each party acted independently and did not assist one
5 another with their separate tasks). There are no plausible allegations that NASS substantially
6 cooperated, or cooperated at all, in the State’s review of social media posts and its determinations
7 of which posts to flag as misinformation.

8 The Complaint therefore fails to satisfy the joint action test. For the same reasons, there
9 are not plausible allegations to satisfy the nexus test. See Gorenc, 869 F.2d at 506; Villegas, 541
10 F.3d at 955. NASS, like Twitter and SKDK, was not a state actor. It cannot be liable under §
11 1983. The Court therefore DISMISSES the First Amendment, Equal Protection, and Due Process
12 Claims against NASS.

13 b. 1985 Claim

14 As discussed above in connection with the other defendants, the Complaint fails to
15 adequately allege a meeting of the minds to violate O’Handley’s constitutional rights, and
16 therefore fails to adequately allege a conspiracy. See Bray, 506 U.S. at 268 (conspiracy must be
17 aimed at interfering with protected rights); Sanchez, 936 F.2d at 1039 (“mere allegation of
18 conspiracy without factual specificity is insufficient.”). The Court DISMISSES that claim against
19 NASS as well.

20 Accordingly, the Court GRANTS NASS’s motion to dismiss as to each of the claims
21 against it, save and except for the California Constitution (Free Speech Clause) claim.

22 IV. CONCLUSION

23 For the foregoing reasons, the Court GRANTS the motions to dismiss. The Court
24 dismisses all of the federal claims with prejudice, as it is convinced that, given the infirmities in
25 the current complaint, O’Handley could not amend sufficiently to state a claim. See Cook, Perkiss
26 & Liehe, Inc., 911 F.2d at 246–47 (amendment would be futile). The Court dismisses the
27 California Constitution (Free Speech Clause) claim without prejudice to O’Handley bringing that
28 claim in state court. The Court does not reach Twitter’s Anti-SLAPP Motion.

1 **IT IS SO ORDERED.**

2 Dated: January 10, 2022



3 CHARLES R. BREYER
4 United States District Judge

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United States District Court
Northern District of California

No. 22-15071

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ROGAN O'HANDLEY,

Plaintiff-Appellant,

v.

SHIRLEY N. WEBER, in her
official capacity as SECRETARY
OF STATE,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of
California Case No. 3:21-cv-07063-CRB; Hon. Charles R. Breyer

APPELLANT'S EXCERPTS OF RECORD VOL. 2

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Pages 1 - 46

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Charles R. Breyer, Judge

ROGAN O'HANDLEY,)	
)	
Plaintiff,)	
)	
VS.	)	NO. C 21-07063 CRB
)	
ALEX PADILLA, et al.,)	
)	
Defendants.)	
)	

San Francisco, California
Thursday, December 16, 2021

TRANSCRIPT OF VIDEOCONFERENCE PROCEEDINGS

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(APPEARANCES CONTINUED ON THE FOLLOWING PAGE)

REPORTED BY: Marla F. Knox, CSR No. 14421, RPR, CRR, RMR
United States District Court - Official Reporter

APPEARANCES: (cont'd, via videoconference)

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Thursday - December 16, 2021

10:12 a.m.

P R O C E E D I N G S

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THE CLERK: Calling -- excuse me -- calling civil action C21-7063, Rogan O'Handley versus Alex Padilla, et al. Counsel, please state your appearances for the record.

MR. HOLTZBLATT: Ari Holtzblatt from WilmerHale representing Twitter and --

THE CLERK: Your volume is very low, if you can turn it up.

THE COURT: Still low.

MR. HOLTZBLATT: Let me put in a headset and see if that works.

(Pause in the proceedings.)

THE CLERK: Thank you.

MS. SWEIGART: While he is doing that, Your Honor, I will chime in. Karin Sweigart. And with me today are my colleagues Josh Dixon and Gregory Michael.

THE COURT: Good morning.

MR. HOLTZBLATT: This is Ari Holtzblatt. Is this better?

THE COURT: Yes.

MR. HOLTZBLATT: Sorry about that. Ari Holtzblatt from the law firm of WilmerHale representing Twitter.

I'm joined by Felicia Ellsworth and Pat Carome, also from

1 WilmerHale representing Twitter.

2 **MS. ELLSWORTH:** Good morning, Your Honor.

3 **THE COURT:** Good morning.

4 **MR. CAROME:** Good morning, Your Honor.

5 **MS. FERRARI:** Good morning, Your Honor, Deputy
6 Attorney General Anna Ferrari representing the State
7 Defendants.

8 **MR. WILLENBURG:** Good morning, Your Honor, Don
9 Willenburg representing the National Association of Secretaries
10 of State.

11 **MR. SPIVA:** Good morning, Your Honor, Bruce Spiva from
12 Perkins Coie representing SKDK Knickerbocker.

13 **THE COURT:** Good morning.

14 **MR. DIXON:** Your Honor, this is Josh Dixon. I have
15 already been introduced. I just wanted to speak and make sure
16 my volume is okay.

17 **THE COURT:** Yeah, that's fine.

18 **MR. DIXON:** Great.

19 **THE COURT:** Well, I think that's the -- that's
20 everybody, in a way. Probably not all the associates who have
21 worked tirelessly on preparing all of the submissions in this
22 case, but I assume that they are somehow listening to what is
23 going on.

24 Anyway, needless to say, this is a fairly detailed,
25 complicated matter. It involves a number of issues, some of

1 which may be characterized as novel; and I have some questions
2 about the assertion that Twitter is a State actor, the --
3 either under the United States Constitution or the California
4 constitution such that it would apply to conduct of Twitter in
5 terms of -- in terms of their regulations and in terms of their
6 subsequent conduct in light of their rules and regulations.

7 I -- I'm interested -- and I think I have to hear from the
8 Plaintiff -- how the Plaintiff distinguishes the -- Twitter's
9 conduct in this case -- alleged conduct in this case -- from
10 the cases that emanated -- or the case that emanated out of the
11 Ninth Circuit which essentially holds, as I understand the law
12 of this circuit, to be that a digital platform is not an area
13 of State action.

14 **MS. SWEIGART:** Your Honor --

15 **THE COURT:** Yes, Ms. Sweigart, yes, thank you.

16 **MS. SWEIGART:** Thank you, Your Honor, this is a very
17 different scenario than the prior cases that have been cited by
18 Twitter.

19 We have never had a situation where there is this level of
20 interconnectedness between the State Defendants and Twitter.

21 We have back-and-forth conversations via e-mail between
22 them where it shows the level of interconnectedness. We have
23 the State specifically asking Twitter to censor and take down
24 speech and Twitter responding and saying is there anything else
25 that we can do.

1 We have the Defendants setting up a special portal where
2 the speech -- I'm sorry, the censorship requests of the State
3 were moved to the top of the queue.

4 And most importantly, I think for this, we have a
5 98 percent takedown rate. The State boasted that 98 percent of
6 the time when they used this special portal that they set up,
7 they took down and censored the speech as the State requested.

8 This is much more than an independent decision making by
9 Twitter. This is a rubber-stamping of State request to censor
10 speech based on the content.

11 **THE COURT:** Well, you know, when you say this is --
12 when you say well, look, while a digital platform normally
13 would have -- would not be a State actor in this case it is a
14 State -- I'm trying to understand this -- in this case it is a
15 State actor because the State asked Twitter to do certain
16 things.

17 And, therefore, it becomes in a sense the agent of the
18 State because it is implementing the State requests. And,
19 therefore, it is a State actor because it's the -- because it's
20 its agent in achieving a particular result.

21 That's essentially, as I understand it, the distinction
22 that you are drawing between a case like the *Prager versus*
23 *Google* case, which is, perhaps, the leading case -- I don't
24 know if it is the leading case or not -- but it is the Ninth
25 Circuit case holding that it is not -- it is not a -- it is not

1 subject to First Amendment constraints.

2 And you say, well, in this case they were simply the
3 handmaid of the Government in its attempt to censor. That's
4 the argument I understand you are making. Is that correct?

5 **MS. SWEIGART:** I would say so, Your Honor. So if you
6 look at the case law for joint action, the test is whether or
7 not the Government affirms, authorizes, encourages, or
8 facilitates the unconstitutional conduct. And that's in the
9 *Tsao versus Desert Palace* case.

10 And when you look at the conduct here, as opposed to what
11 was at issue in the *Prager*, there is -- you can see in the
12 Defendants -- in the State Defendants' own words, we partner --
13 Defendant Padilla called it a partnership. We worked to take
14 down speech. We are proactive in connection with social media
15 companies.

16 So there is a level, again, of connectedness, of
17 authorizing, affirming, establishing, that there was not in the
18 prior cases.

19 **THE COURT:** All right. There aren't allegations -- I
20 mean, the inferences you want to draw from what you have
21 alleged in your complaint is that the State was telling Twitter
22 to censor this speech.

23 What is contained in the allegations, the allegations
24 there and the facts of this particular case, seem to be that
25 the State action in this facilitated the reporting of certain

1 speech to Twitter that -- and you are saying that the
2 inference -- a reasonable inference can be -- and you would
3 attempt to prove it at trial -- is that -- is that this was to
4 encourage in this particular case the speech to be censored.
5 That's what you are saying, as I understand it.

6 **MS. SWEIGART:** Yes, Your Honor.

7 **THE COURT:** Even though the allegations basically in
8 their -- in terms of factual allegations, simply say they --
9 you know, they -- there were some portal -- there was some
10 portal, pipeline, path, for reporting speech to Twitter; and
11 that then Twitter did certain things in connection with the
12 speech that you believe was to carry out the intention of the
13 Government to censor the speech. Have I got that right?

14 **MS. SWEIGART:** Well, Your Honor, I think we alleged
15 more than that in our complaint. If you look at paragraphs 24
16 and 25 of our complaint, it explains the close working
17 relationship between Twitter and the State.

18 So I don't -- I --

19 **THE COURT:** When you say "close working relationship,"
20 I'm not quite sure what that means. I mean, Twitter is a
21 platform of, what, millions of people. I mean, it's not --
22 it's not 50 people out there. It's not your mom-and-pop
23 grocery store.

24 It is an enormous -- at least nationwide and perhaps
25 greater than that -- platform, so that if the Government has

1 any connection with it, if there is anything interaction
2 between the two, it -- it -- you know, one would say it's not
3 immediate -- in my view it is not immediately suspect that the
4 Government is concerned about -- if they are, is concerned
5 about broad dissemination of misinformation as distinct from
6 small information.

7 In other words, I don't know that you draw -- I don't know
8 that it's an inference that you can draw that because there was
9 a connection, some portal, some pathway, and some communication
10 that therefore -- that, therefore, that -- that communication
11 shows an untoward interest by the Government in the content of
12 the speech.

13 I mean, obviously, there is a governmental interest
14 ensuring that information is accurate. I mean, there is that
15 governmental interest. I don't know that that's a bad thing.

16 **MS. SWEIGART:** Well, Your Honor --

17 **THE COURT:** Go ahead.

18 **MS. SWEIGART:** I'm sorry, Your Honor. I didn't mean
19 to interrupt.

20 **THE COURT:** No, no, no, go ahead. Zoom -- there are
21 disadvantages. Don't worry about talking over me, and I
22 apologize for talking over you.

23 **MS. SWEIGART:** The Constitution itself makes a
24 distinction about that speech, whether or not the State has the
25 right to censor opinions it doesn't like.

1 The Constitution says that -- and there is myriad law
2 about this -- that the remedy to false speech is more speech
3 and true speech and putting your own opinion out there.

4 That would have been perfectly okay for the State to do
5 and perfectly within the State's own free speech rights to be
6 able to do that.

7 What the State cannot do and what the constitutional
8 injury was in this case was the State taking down and censoring
9 with Twitter and with the other Defendants my client's speech.

10 That's where the distinction is. That's where the line is
11 drawn here; that if the State were just -- even if -- you know,
12 the censorship is the problem here. It's not the content.

13 And if there is misleading things out there, the State
14 needs to be able to counter. They have their own platform.
15 They have media. They have access to Twitter.

16 They could have put their own commentary on whatever they
17 found false about Mr. O'Handley's Tweet. They didn't. They
18 chose to censor instead. And that is the difference in this
19 case.

20 **THE COURT:** Well, when you say "they," you know, the
21 question is Twitter, did Twitter -- I mean, there is ample
22 evidence in the allegations that it was Twitter that made this
23 decision -- you know, in your resuscitation that Twitter made
24 the decision.

25 Now, what I thought you were saying is: While Twitter

1 made the mechanical decision of doing what it did, it did so at
2 the instance of the Government. And, therefore --

3 **MS. SWEIGART:** I think --

4 **THE COURT:** Isn't that the argument?

5 **MS. SWEIGART:** I don't --

6 **THE COURT:** It's not like, oh, Twitter made no
7 decision in the case. Your argument, I thought, is that
8 Twitter did it at the instance of the Government. This was the
9 conspiracy.

10 **MS. SWEIGART:** They did, Your Honor. They worked
11 together for that. And I just want to read from paragraph 25
12 of the complaint which is the State's own words in this
13 circumstance. It says: We work closely and proactively with
14 social media companies to take down sources of misinformation
15 as needed.

16 And so did Twitter -- was Twitter the one ultimately
17 acting? Yes. But throughout, the Defendants in their speech
18 talk about the close partnership and connection with which they
19 have take down this speech.

20 **THE COURT:** Mr. Holtzblatt, how do you respond?

21 **MR. HOLTZBLATT:** Thank you, Your Honor.

22 I think Your Honor is absolutely correct; that we start
23 from the baseline of the *Prager* decision of the Ninth Circuit
24 which recognized that the platforms like Twitter or Google or
25 other platforms are not State actors.

1 And, in fact, Twitter as a private actor, has its own
2 First Amendment rights and its own First Amendment interests in
3 being able to decide for itself what speech it wishes to
4 disseminate on its platform.

5 It exercised that First Amendment protected right by
6 adopting the civic integrity policy, which is what it enforced
7 in this case against the Tweets of Mr. O'Handley.

8 And in doing so, it made its own -- it exercised its own
9 editorial judgment, like the editorial judgment that the
10 newspapers and *Miami Herald versus Tornillo* exercised to decide
11 what kind of speech it wanted to disseminate across its
12 platform.

13 In exercising that judgment, it decided that false or
14 misleading information intended to undermine public confidence
15 in an election or other civic process is the kind of content
16 that it did not wish to disseminate.

17 Now, Mr. O'Handley would like to override that editorial
18 judgment that Twitter made.

19 The First Amendment protected private decision that
20 Twitter made to enforce private rules on a private
21 communications platform did not become State action simply
22 because -- and I think what is important here is not to look --
23 as Mr. O'Handley apparently does -- to these very generic
24 statements in paragraphs 24 and 25, which are similar
25 statements that other Courts in this district -- for example,

1 Judge Illston in the *Children's Health Defense* case -- found
2 not to be sufficient to establish State action, but to look at
3 the actual factual allegations that are pled. Those were
4 concrete factual allegations.

5 And what do those concrete factual allegations show? They
6 show that Twitter requested and received information from
7 election administrators across the country about what those
8 election administrators viewed to be violations of Twitter's
9 own rules, so that Twitter could decide for itself whether
10 those were, in fact, violations of Twitter's rules. And
11 Twitter could decide what it wanted to do about that.

12 And that is the extent of the coordination or interaction
13 that is pled in the complaint. And I don't think that simply
14 when a private communications platform chooses in deciding how
15 it wants to decide what speech to disseminate across its own
16 platform, which has a First Amendment right for itself to
17 decide to do, when it chooses to solicit information from
18 government officials -- whether that be election administrators
19 or public health officials or cyber security experts or
20 national security experts -- that it has chosen to turn to
21 Government actors for their views about what might violate the
22 platform's own views.

23 The choice to request that information and then to look at
24 that information and decide for itself whether it violates
25 their own -- their own rules does not disable the platform from

1 then exercising its own First Amendment rights. And that's, I
2 think, what we have here.

3 Now, the Supreme Court most recently in the *Halleck*
4 decision, *Manhattan Access versus Halleck* decision, warned that
5 especially when it comes to a communications platform that it
6 is exercising its own First Amendment rights, State action
7 needs to be not swept so broadly that the consequences to
8 eviscerate a platform's own First Amendment rights.

9 And I think that would be the consequence here. And so
10 the test for State action, whether it be on a joint action or a
11 conspiracy basis, is very stringent; and it is very stringent
12 in order to preserve the private actor's own rights including
13 their own First Amendment rights to decide for themselves
14 how -- how to operate.

15 In order to show -- and I think, Your Honor, the *Mathis*
16 decision, which is another decision from the Ninth Circuit,
17 which involved a joint action theory is guiding here.

18 In order to show a State action on a joint action theory,
19 there must be substantial entwinement in the particular
20 decision challenged.

21 And, you know, what we have here is not substantial
22 entwinement in the particular decision challenge.

23 What we have with respect to Mr. O'Handley in particular
24 is Twitter having set up a portal to solicit information from
25 election administrators all across the country about their

1 views. And then in the case of Mr. O'Handley a single flag,
2 one flag in November of 2020, saying we think this one Tweet
3 is -- violates your own rules, which Twitter then labeled.

4 And then months go by and no further communications with
5 respect to Mr. O'Handley. Mr. O'Handley tweets several more
6 times. And then in January of 2021 and February of 2021,
7 Twitter identifies additional tweets from Mr. O'Handley as
8 violating its civic integrity policy. It labels those tweets,
9 and eventually Twitter decides to suspend Mr. O'Handley's
10 account.

11 Those -- that's the sum total. That is not substantial
12 entwinement in the particular decision that Mr. O'Handley is
13 challenging, which is his suspension from the platform.

14 And so I think for all those reasons we do not think that
15 this is sufficient to meet the very high bar to transform --

16 **THE COURT:** How do you distinguish -- let's go back a
17 minute. How do you distinguish the *PruneYard* cases because
18 what -- looking at *PruneYard* -- and I sort of grew up with it
19 in a way -- you know, there was clearly -- before *PruneYard*,
20 you know, there were town squares. There were -- I mean, there
21 still are; but, I mean, it was clear what was State and what
22 was not State.

23 And then you -- and then you got a shopping center. And
24 the shopping center privately owned it. The Government didn't
25 operate the shopping center. You know, who did? You know,

1 Kalman. I don't know.

2 I mean, there were people who owned and developed and
3 became very wealthy with shopping centers. And then *PruneYard*
4 comes along and says, well, you know, the shopping center, that
5 is sort of the new public square.

6 They didn't have shopping centers in 1789. You wouldn't
7 find, you know, James Madison at a shopping center in Boston.

8 This is new. This is -- this has evolved over 200 years.
9 We have a new public forum, and it's open to the public, and
10 public assemblies there. They go there and they disseminate
11 speech.

12 And, therefore -- therefore, we hold -- California courts,
13 I guess, started and it was affirmed by the Supreme Court, I
14 think -- we hold shopping centers to be -- to be public forums.

15 Then fast forward, not so fast, but fast forward to -- to
16 2018. And you have the Internet.

17 And you have -- and you have not a shopping center. You
18 have platforms that reach millions upon millions of people.

19 And, by the way, unlike a shopping center, which also
20 sells clothing and this and that and hamburgers and so forth, a
21 Twitter -- you know, is the dissemination of views. It is
22 pure -- I would say comes close to being pure speech. I don't
23 know what else it does, but I think it is pure speech.

24 So they say, well, that -- the Internet -- you know, you
25 wouldn't have found George Washington on the Internet and --

1 but now you do. You don't find George Washington. You find
2 other people on the Internet. Okay.

3 So, like, as they say, get with the program. Technology
4 has changed. Speech is speech. But dissemination of speech
5 has changed.

6 And what was the newspapers -- and one could say
7 regrettably newspapers are becoming increasingly rare -- now,
8 you have the dissemination of information on a -- on the
9 Internet and on these platforms.

10 So the argument is -- and I'm not saying it has merit.
11 I'm just saying that I understand the argument -- is Twitter is
12 the new public forum. And so how does one distinguish,
13 Mr. Holtzblatt, between *PruneYard* and *Twitter*?

14 **MR. HOLTZBLATT:** Thank you, Your Honor.

15 I want to make a couple different points. The first is
16 that I think as to the *PruneYard* concept, which I think is
17 really a sort of public forum or traditional public forum
18 holding of the California Supreme Court, the *Prager* decision of
19 the Ninth Circuit as a matter of the First Amendment -- the
20 Federal First Amendment has really decided that question.

21 That was the argument in the *Prager* decision, and I think
22 the Ninth Circuit said, as a matter of federal constitutional
23 law, that doesn't fly.

24 So then I think the question becomes well, what about the
25 California constitution? What about -- how would we

1 distinguish as a matter of California constitutional law the
2 *PruneYard* decision under the free speech clause of the
3 California constitution?

4 And, as I think we have explained in our briefs, the
5 California constitution, like the federal constitution,
6 generally constrains only State actors with this one limited
7 exception.

8 And that limited exception, the California courts have
9 been very careful to limit it to really basically two context.

10 One is the -- you know, the common areas of large outdoor
11 shopping malls. And the California courts have even rejected
12 other portions of the malls. Just the common areas of
13 essentially large outdoor shopping malls and essentially a bus
14 stop near a large amusement park.

15 And that narrow exception, I think, needs to be understood
16 as extending no farther than outdoor physical spaces that are
17 organized for some non-communicative purpose. And because they
18 are organized for some non-communicative purpose, they are
19 uniquely like a public forum even though they are privately
20 owned.

21 Now, the Twitter platform is different in two respects.

22 First, it is necessarily a place of limited access. So
23 account holders in order to post on the Twitter platform, must
24 agree to abide by content based rules like the civic integrity
25 policy that Twitter has adopted.

1 And the second is that to post on Twitter -- they must as
2 Mr. O'Handley seeks to do; this is his goal is to seek to post
3 on Twitter -- they must create an account and log in through a
4 password protected entry point.

5 And those restrictions that they have to agree to content
6 based rules; they have to log in, in order to post on the
7 account, make Twitter much more like as in the Six Flags case,
8 much more like the ticketed portions of the park, which the
9 Court in that case recognized the *PruneYard* rule would not
10 apply to rather than the unticketed exterior portions like the
11 bus stop that was outside the park.

12 So the first important distinction is I think that
13 platforms like Twitter are areas of limited access.

14 The second -- and I think this is critical and it speaks
15 to the First Amendment interests that I was addressing
16 earlier -- because Twitter is a communications platform, it is
17 not organized as -- for non-communicative purposes like a
18 shopping mall or a bus stop near an amusement park -- its
19 central function is to gather, curate, and disseminate news and
20 other information.

21 And so Twitter's own rules reflect and they convey
22 Twitter's own expressive choices. And what that means is that
23 extending the *PruneYard* decision to a platform like Twitter
24 would infringe on Twitter's own First Amendment rights in a way
25 that is not true for the physical spaces that serve some other

1 non-communicative purpose.

2 And Your Honor mentioned that the Supreme Court had
3 affirmed the *PruneYard* -- the U.S. Supreme Court, I'm sorry,
4 had affirmed the *PruneYard* decision of the California Supreme
5 Court. When it did so, it did so because it recognized in that
6 case that there would not be an infringement on the shopping
7 mall's First Amendment rights to enforce the *PruneYard* rule.

8 That is simply not the case to enforce the *PruneYard* rule
9 against an online platform like Twitter or any other online
10 platform.

11 As Mr. O'Handley recognizes, First Amendment constraints
12 forced, for example, Skokie to allow Nazis to March through its
13 streets. They compelled Ohio to tolerate a KKK leader who was
14 promoting violent political dissent. They prevented Congress
15 from criminalizing videos depicting animal cruelty.

16 And Mr. O'Handley doesn't deny that if you were to extend
17 the *PruneYard* decision to a platform like Twitter, that it
18 would be forced as an application of traditional First
19 Amendment principles to carry similar content regardless of
20 whether Twitter, as a private actor, or its users view that
21 content as hateful or violent or offensive or otherwise
22 harmful.

23 And so that would tremendously impinge on the First
24 Amendment rights that Twitter has to curate content through its
25 content moderation rules that shape the tone, the nature, the

1 quality of the platform that it has set up.

2 And so I think for all of those reasons, you know, we just
3 believe that, you know, as a matter of -- number one, as a
4 matter of California constitutional law -- and, secondly, as a
5 matter of Federal First Amendment law -- it is simply
6 impossible to extend the *PruneYard* decision to a platform like
7 Twitter.

8 **THE COURT:** So let me ask, Ms. Sweigart, do you
9 agree -- my question to you is: Do you agree that *PruneYard*
10 should not be extended? Or you are not -- your analysis
11 doesn't require the extension of *PruneYard* to Twitter?

12 **MS. SWEIGART:** Your Honor, I'm going to let my
13 colleague Josh Dixon handle that. I just wanted to clarify
14 one --

15 **THE COURT:** Go right ahead.

16 **MS. SWEIGART:** -- one item with that, which was
17 Twitter erroneously stated that the only injury that is at
18 issue here was Mr. O'Handley's ultimate removal from Twitter.

19 We are arguing that the initial strike as well was a
20 retaliation against speech, and there were consequences and
21 injuries to those associated with that.

22 With that, I will turn the platform -- the table over to
23 Josh.

24 **THE COURT:** Mr. Dixon.

25 **MR. DIXON:** Thank you, Your Honor. Our claim is

1 twofold.

2 As you have been discussing with Ms. Sweigart, we believe
3 that there is State action under the First Amendment.

4 Our contention is not that Twitter is a public forum under
5 the First Amendment to the United States Constitution.

6 We believe we have constitutional rights because of a
7 State action doctrine. But under the liberty of speech clause
8 of the California constitution, our argument does not depend on
9 any joint action or conspiratorial theories.

10 Our action is simply that the liberty of speech clause
11 should be extended to Twitter's platform and for several very
12 straight-faced and plain reasons.

13 The California Supreme Court in the *PruneYard* decision --
14 and in the *Fashion Valley* decision that followed it --
15 basically, as Your Honor alluded to earlier, analogized
16 shopping centers to the traditional public forum of the time,
17 the 1840s when the liberty of speech clause was eradicated --
18 I'm sorry -- enacted.

19 Today, Twitter is, as the Supreme Court has recently
20 stated, the public fora of our digital age. As the Supreme
21 Court stated in the *Packingham* case, while in the past there
22 may have been difficulty in identifying the most important
23 places in a spatial sense for the exchange of views, today the
24 answer is clear. It is cyber space and social media in
25 particular.

1 So I think that Twitter because it is a communications
2 platform, frankly, is even more like a traditional public forum
3 than a shopping center was because -- as I believe Your Honor
4 mentioned -- there is other things going on in a shopping
5 center. There are retail stores. There is eating of
6 hamburgers and the like.

7 But on Twitter all there is is discussion of issues. So
8 it is a perfect digital analogy for a brick-and-mortar public
9 forum.

10 The second aspect of the *PruneYard* case and the Fashion
11 Valley case that the Supreme Court of California discusses when
12 determining whether property fits into this paradigm is whether
13 the property is open to the public.

14 Now, in Twitter's briefing and here today, we have heard
15 that Twitter is not open to the public because it has content
16 rules that prohibit what users may say.

17 **THE COURT:** Well, I don't know that they are saying
18 that. My -- what I heard Mr. Holtzblatt saying is that there
19 are distinctions between your traditional public forum, which
20 is simply walking in or walking there and being found in the
21 mall versus you can't walk in to Twitter. You can be a member
22 of the public. But you have to agree.

23 It is like I enter this premises or this location or this
24 service subject to my agreement that I will abide by certain
25 rules, one of which is that my content of what I say can be

1 reviewed by the provider or the forum and subject to the
2 forum's general rules with respect to the subject to what is
3 the content.

4 You don't walk into a shopping center and they say, okay,
5 you can come into the shopping center or the mall area of the
6 shopping center if you agree to say X or agree not to say Y.

7 That's not there. There is no -- it is open in that
8 sense. What Mr. Holtzblatt is saying, that's not true with
9 Twitter. With Twitter you have to agree that the content of
10 what you say is subject not only to review but is subject to
11 exclusion or whatever it is called. I don't know what --
12 striking or whatever it is.

13 And that's a difference. That's a difference which -- and
14 what I think he is also saying is if you look at cases
15 subsequent to *PruneYard*, you will see that where there are
16 restrictions imposed on people coming into common areas, malls,
17 and so forth, that *PruneYard* doesn't extend to those --

18 **MR. DIXON:** I think that is a -- I'm sorry,
19 Your Honor. I think that is a misinterpretation of the cases.

20 In *PruneYard* itself, *PruneYard* had a policy that the mall
21 owner, *PruneYard*, had a policy that said: No speaking on the
22 premises other than that which is related to commercial
23 purposes.

24 In the *Fashion Valley* case, which followed *PruneYard*,
25 there was a policy that said there shall be no boycott of any

1 of the stores in this particular shopping center.

2 In the -- the case name is escaping me now but the
3 district -- the lower court case holding that the outside of a
4 theme park is -- falls within the *PruneYard* -- the *Park*
5 *Management* case -- the property owner there also had a policy
6 that prohibited speech in that area.

7 And so I don't think that the limitation on speech is what
8 the Supreme Court of California is looking at.

9 If you look at the *Golden Gateway* case, that was the case
10 that held that an apartment complex is not a public forum for
11 purposes of the *PruneYard* doctrine.

12 In that case there was a doorman. In that case there were
13 roving patrols of the hall. In that case there were clear
14 rules that said: If you don't live here, you can't come in.

15 So, I don't think that a limitation on speech undermines
16 the fact that it is open to the public.

17 If you look at First Amendment case law -- for example, if
18 you have a traditional public forum, the Government can't say
19 in order to enter into this park square, you have to agree not
20 to say X, Y, or Z.

21 If the Government does that, then those restrictions are
22 governed according to the rules applicable to the public forum;
23 i.e., in most public fora it would be content neutrality.

24 And so I don't think that a restriction on speech is the
25 type of thing that the California courts are looking at when

1 they are asking whether it is open to the public.

2 I think they are saying that the forum, if open to the
3 public, then it is a public forum. Restrictions on speech in
4 the forum have to be measured according to the rules applicable
5 to speech in the public forum.

6 And, again, I think the *PruneYard*, the *Fashion Valley*
7 case, and the *Park Management* case all stand for that
8 principle.

9 I also -- for the first time today we heard that Twitter
10 is not allegedly a public forum under the liberty of speech
11 clause because you must create account and you must log in.

12 You have to have -- in order to do those things, as far as
13 I'm aware, you must have a pulse. Anyone can create an
14 account. Anyone can log in.

15 In that sense Twitter is -- although it is much in the
16 same way of pushing open the door to a shopping center, the
17 barriers to entering are so minimal that the necessity to
18 create an account or log in cannot be the type of limiting
19 public access that the California Supreme Court is talking
20 about when it talks about public access is what creates a
21 public forum.

22 If I may, Your Honor, speak about the --

23 **THE COURT:** Yes, please do.

24 **MR. DIXON:** -- Twitter's First Amendment defense?

25 **THE COURT:** Yes.

1 **MR. DIXON:** Twitter -- first of all, as we have
2 demonstrated in the briefs, we believe Twitter is a State actor
3 by virtue of the joint action in the conspiracy.

4 I will let Ms. Sweigart speak to any further questions on
5 that. But by virtue of that allegation, we believe that
6 forecloses Twitter's First Amendment argument.

7 If you look at the *Marsh against Alabama* case, which
8 involved a corporate owned town, in that case there was a
9 Jehovah's witness who was precluded from handing out
10 literature.

11 The Supreme Court did not evaluate the corporate owned
12 town's rights. In that case the Supreme Court said the
13 corporate owned town was a State actor.

14 The Supreme Court did not balance the corporate owned
15 town's rights against the First Amendment rights of the town
16 visitor.

17 The First Amendment rights of the town visitor superceded
18 any First Amendment rights that Marsh may have -- the town, I
19 should say, may have precisely because the town is a State
20 actor. And, as we know from the legion of cases cited in the
21 briefs here, it is only State actors who are -- State actors
22 don't have constitutional rights.

23 The Constitution gives rights to individuals against
24 governments, not to governments against individuals.

25 But even if Twitter isn't a State actor, Twitter doesn't

1 have a First Amendment right to censor its users' speech as
2 Twitter has done here or to exclude users from its platform.

3 Twitter spends a great deal of time in its briefs arguing
4 that the Court may not compel Twitter to host my client's
5 speech.

6 But to be clear, my client does not seek an injunction
7 restoring him to Twitter.

8 So there is no issue of forced association, forced
9 compulsion, compelled speech, anything like that here. We are
10 seeking damages for Twitter's past actions.

11 So Twitter argues in that vein, that issue -- that things
12 that it did, the issuing strikes against my client's accounts,
13 limiting access, limiting the distribution, and ultimately
14 banning him, those things are conduct, not speech. Limiting a
15 user's access is a conduct, not speech.

16 So, Twitter argues that these acts, this conduct is
17 expressive; that it conveys a message through its tweets or
18 through the tweets of its users, I should say.

19 But in fair, the -- the law school case involving the
20 Solomon Amendment where the law schools were claiming the right
21 to exclude military recruiters from their campus, the Supreme
22 Court held that law schools refusing to host military
23 recruiters, they were not engaging in any inherently expressive
24 conduct.

25 The only way the exclusion of the military recruiters took

1 on any expressive meaning was because of the words associated
2 with that.

3 The law schools published the editorial in the paper
4 saying we are excluding recruiters for this reason.

5 The exact same thing is true with respect to Twitter's
6 speech.

7 Take, for example, banning someone. If a user is banned,
8 poof, they are just gone. If Twitter chooses to put a
9 commentary on their website that says we ban this user, okay
10 that's fine. But then that commentary is what tells anyone
11 visiting Twitter that the user has been banned.

12 There is no difference for a third party from going onto
13 Twitter not seeing someone because that person may have just
14 decided to disable their account.

15 So, simply banning someone or taking these account actions
16 that Twitter took doesn't convey any meaning independent of any
17 explanation that Twitter puts on it.

18 And in the *FAIR* case the Supreme Court said that that type
19 of conduct is not worthy of First Amendment protection on the
20 facts of those case -- on the facts of the case.

21 Now, the case in *FAIR* basically stands for, excuse me,
22 three propositions. Compelled hosting does not violate the
23 First Amendment if: One, the host is not required to host the
24 Government's message. Two, the compelled hosting does not
25 affect the host's own speech. And, three, the host is free to

1 distance itself from the hosted speech.

2 Those three elements are present here. Even if we were
3 seeking an injunction restoring Twitter, that would not be the
4 Government compelling Twitter to host the Government's speech.

5 That's compelling Twitter to host our speech, which the
6 Supreme Court said in the *FAIR* case requiring law schools to
7 host military recruiters that's not -- that's not the
8 Government speaking.

9 Number two, requiring Twitter to host O'Handley's speech
10 would not affect Twitter's own speech in any way.

11 Twitter has its own Twitter account. Twitter is free to
12 tweet all that it wants.

13 There is no risk based on the platform, the interaction
14 that a user has with Twitter, that any user seeing my client's
15 tweets on Twitter would think that was Twitter's speech.

16 The way that the platform is set up, it clearly says at
17 the top who the speaker is. It clearly says what the speaker
18 is saying. No risk whatsoever anybody looking at Twitter would
19 think oh, my gosh, this Rogan O'Handley guy is posting Twitter.
20 That's what Twitter is saying. That's not how the interface
21 works.

22 And in the third element, Twitter is free to distance
23 itself from my client's speech if it wants.

24 As I mentioned, Twitter has its own Twitter account.
25 Twitter can post its own thoughts on my client's speech.

1 Twitter can write articles. Twitter can do whatever it wants
2 to, to disassociate itself from my client's speech.

3 Now, Twitter argues under three cases. We have heard one
4 mentioned today. The *Tornillo* case, the *Pacific Gas* case, and
5 the *Hurley* case that compelled hosting violates the First
6 Amendment.

7 I will point out that in *FAIR* the Supreme Court's
8 unanimous opinion, by the way, distinguished all three of these
9 cases on the ground that the forced hosting at issue in the
10 *FAIR* case did not require the law school's to alter their own
11 speech in the same way that requiring a newspaper to post an
12 article would or the same way that requiring a newsletter to
13 post additional information would or even to allow parade to
14 allow someone else to join the party.

15 Unlike all three of these types of -- I'm not sure what to
16 call them -- speech milieu, a newspaper, a newsletter, or a
17 parade, as I mentioned earlier, Twitter is open to the public.
18 So there is no risk that anyone looking at Twitter's account
19 or -- I'm sorry, the Twitter page would think that a post came
20 from Twitter.

21 It is obviously very different from a newspaper. When you
22 read a newspaper, you see the article; and you associate it
23 with a newspaper.

24 Same with a parade, as the Supreme Court said in the
25 *Hurley* case.

1 Second distinction between these three cases is that
2 newspapers, newsletters, parades, are spatially limited in a
3 way that Twitter is not.

4 Your Honor mentioned it earlier. There are literally
5 hundreds of millions of tweets per day that occur on Twitter's
6 website.

7 There is zero risk that anyone seeing a tweet on Twitter
8 would associate that with Twitter's speech in the way that
9 someone would by reading a letter to the -- I'm sorry an
10 article on the editorial page, for example, or information in a
11 newsletter or even someone marching along with a parade.

12 That spatial limitation dilutes any message that any
13 individual tweet might have. And, most importantly in the case
14 of all these other three things, something else must be left
15 out for a newspaper to publish article -- ten articles, that's
16 all the space its got. If it has got to post one, it has got
17 to drop another. Now it only can post nine of its choosing.

18 Twitter, as I mentioned, hundreds of millions of tweets a
19 day. So there is no risk whatsoever of limiting Twitter's
20 speech in any way.

21 The, I think *Tornillo* in particular is a useful case to
22 look at because in that case the Supreme Court struck down a
23 right of reply statute, which basically gave political
24 candidates to office, who had a negative article posted about
25 them, the right to reply in the newspaper.

1 The Supreme Court said this type of statute not only is
2 problematic from a spatial sense, but it actually inhibits
3 speech because the newspaper will be discouraged from posting
4 articles negative toward candidates because they don't want to
5 open up the pages of the paper to let the candidate respond.

6 Again, we don't have that problem with Twitter. And then
7 third -- the third distinction in these three cases is unlike a
8 newspaper, newsletter, or a parade, Twitter doesn't review all
9 of the posts -- hundreds of millions of posts that are posted
10 before they are posted.

11 When someone reads a newspaper, they know that there has
12 been an editor who has compiled that, put it together. Same
13 with the parade. Someone watches a parade go by, they know
14 that the parade organizer has called from the applicants a
15 group of people that it wants to be the persons to represent
16 the things it thinks is worth -- are worth celebrating.

17 That's not the case with Twitter. When I type something
18 in on Twitter and hit enter, it's up.

19 So, again, these three distinctions reveal that the three
20 cases that Twitter relies on simply are not analogous to the
21 situation at issue here.

22 The final point that we referred in our briefs, just for
23 sake of clarity, *PruneYard I* as the California Supreme Court
24 decision and *PruneYard II* as the Supreme Court decision.

25 So both *FAIR*, which is the law school decision, and

1 *PruneYard II*, which is the Supreme Court decision, affirming
2 that *PruneYard I* did not violate the First Amendment also
3 focused on the fact that the speakers at issue in those cases
4 were free to distance themselves through their own speech.
5 There was no limitation on their own speech.

6 Just like a person -- you know, the mall could post a sign
7 that says, you know, behind the common areas -- no parade -- no
8 demonstrations in here or things that were said, you know,
9 however they want to do it.

10 The exact same thing is true here. Twitter has its own
11 account. They can append their own commentary to posts, which
12 is precisely what they did here.

13 Twitter appended a statement to our client's posts that
14 said this post is disputed. We are not disputing Twitter's
15 ability to append their commentary to our client's posts saying
16 this post is disputed.

17 And so Twitter is like -- it is another way for Twitter to
18 completely disassociate itself from the speech of my client and
19 its users. And so we don't think that the First Amendment
20 applies -- Twitter has a First Amendment right to do what it
21 did here, Your Honor.

22 **THE COURT:** Okay. Mr. Holtzblatt.

23 **MR. HOLTZBLATT:** Thank you, Your Honor.

24 I will be brief unless, of course, Your Honor has
25 questions.

1 But the first observation I want to make is about the
2 *Miami Herald versus Tornillo* speech. The principle that that
3 case adopted and recognized is that when a platform -- whether
4 it is a newspaper or a parade, as in the *Hurley* case, or any
5 kind of platform for speech, exercises editorial control and
6 judgment -- that was the phrase in the *Tornillo* decision -- it
7 has a First Amendment right to exercise that editorial control
8 and judgment whether, in the case of Twitter, it is doing that
9 by deciding what speech to disseminate or not to disseminate or
10 what labels to append to the speech.

11 Now, Twitter exercises that kind of First Amendment
12 protected right, and it does so to achieve an expressive goal
13 just like the parade organizers in the *Hurley* -- in the *Hurley*
14 case did.

15 They are shaping -- Twitter is shaping the nature, the
16 tone, and the substance of the platform just as a magazine
17 editor or a bookstore owner shapes the expressive quality of
18 their magazine, or their bookstore or a parade organizer shapes
19 the expressly quality of its parade by deciding what mix of
20 different speech is going to be present there.

21 And that's the same kind of expressive decision that
22 Twitter is making when it adopts a rule like the civic
23 integrity policy and it enforces that rule.

24 Now, one thing was notably missing from Mr. Dixon's
25 presentation, which is any disputing of what I had said

1 previously about the consequence of adopting their *PruneYard*
2 rule in terms of the limitations it would put with respect
3 to -- to all sorts of violent and disruptive and upsetting
4 speech that Twitter would be disabled from being able to
5 moderate on its platform.

6 And it is -- I think it goes without saying that being --
7 having its hands tied in its ability to enforce -- to adopt and
8 enforce such rules would transform the expressive qualities of
9 the platform and in that way deeply impact the rights of
10 Twitter on the platform.

11 Now, the second point I want to make -- and I'm a little
12 confused as to the position that Mr. Dixon and Ms. Sweigart are
13 taking here.

14 Ms. Sweigart interjected to make clear that they are
15 challenging the first strike that Twitter applied to
16 Mr. O'Handley's account.

17 The first strike was administered by appending a label to
18 Mr. O'Handley's Twitter account.

19 And, in fact, if you look at paragraph 77 of the --

20 **THE COURT:** Well, but let me ask you this. I sort of
21 understood it that -- that the first strike was numerically
22 significant because five strikes, you are out. I mean, is that
23 the way it worked?

24 You know, it wasn't -- it was -- that was a significance,
25 as -- and Ms. Sweigart can correct me if I'm wrong. Is that

1 correct? I mean, you -- they were able to say something about
2 it.

3 Now, the question is: Why is it then significant, other
4 than its evidentiary value, to the extent it has evidentiary
5 value. But wasn't it significant because it was numerically
6 significant? It was one of a series.

7 **MR. HOLTZBLATT:** Your Honor --

8 **MS. SWEIGART:** Well --

9 **THE COURT:** Let me ask Ms. Sweigart, so I make sure we
10 are under --

11 **MS. SWEIGART:** Yes, it was, as Your Honor said,
12 numerically significant. But if you look at also there were
13 other things that were happening with the strike as well that
14 were retaliatory. We are not taking issue with the language
15 that they appended to the Tweet.

16 It is the other things that their own evidence suggests
17 that they do when they administer a strike, which is make it so
18 the speech does not reach as wide an audience.

19 They prevent tweeting and re-tweeting of it and liking of
20 it. So there are other things as well, and that is in Exhibit
21 4 of Twitter's own submission, Your Honor.

22 **THE COURT:** Okay. Mr. Holtzblatt.

23 **MR. HOLTZBLATT:** So first of all, Your Honor, it is
24 simply not true, what Ms. Sweigart said; that they are not
25 challenging the label.

1 In their opposition, in Docket Number 68 at page 2, and in
2 Docket Number 66 -- I'm quoting from the briefs that they filed
3 on these motions -- Twitter, quote, retaliated against
4 Mr. O'Handley by attending a public label. And in Docket
5 Number 66, Twitter punished Mr. O'Handley by, quote, appending
6 commentary to his tweets.

7 So, and the reason that that's -- that cannot be avoided
8 is that the way in which Twitter administered its strikes, its
9 policy, was to express itself by labeling the Tweets.

10 And so we cannot disaggregate the decisions -- the
11 curatorial and editorial decisions that Twitter was making in
12 this case from its rules and from its expressive judgments.

13 Now even if we have set aside the labels though,
14 Your Honor, all of the other conduct -- all of the other
15 editorial judgments that Ms. Sweigart identified -- changing
16 the reach of a particular tweet, who could see it, whether it
17 could be re-tweeted -- those are expressive judgments that
18 shape the expressive character of the platform and have a
19 meaningful impact and, thus, reflect the expressive judgments
20 of Twitter.

21 Now, that is what distinguishes this case from the *FAIR*
22 case and the other cases and the *PruneYard* case that Mr. Dixon
23 was discussing.

24 In those cases we were talking about ordinary property
25 owners or law school or a mall who have organized themselves

1 for non-communicative purposes. And for that reason, the
2 impact on their expressive rights was nominal if they are being
3 forced to host unwanted speakers.

4 What is being demanded of Twitter here is compelled speech
5 of a communications platform. Now, and that cannot be avoided
6 simply by saying we are not seeking an injunction. I mean, it
7 is standard First Amendment law that if you are seeking money
8 damages for certain expressive decisions, that that is
9 compelling that kind of conduct just as much as if an
10 injunction were being ordered against Twitter.

11 And the final point I want to make, Your Honor, with
12 respect to the First Amendment issue here is that -- you know,
13 I think the First Amendment question arises in two contexts.

14 The first is in setting the meets and bounds of the State
15 action analysis. And this is what the -- the U.S. Supreme
16 Court said just recently in the *Manhattan Community Access*
17 *Corporation versus Halleck* decision.

18 It said that if the State action doctrine is expanded too
19 far, it would, quote, eviscerate a private entity's rights to
20 exercise editorial control over speech and speakers on its
21 properties or platforms.

22 Now, that language could just as well have described this
23 very case. And what that admonition is telling us is that
24 the -- is that in evaluating the claim of State action, the
25 claim of State action needs to respect the guardrails of

1 Twitter's own First Amendment rights at the same time.

2 And the second point I want to make, Your Honor, is that
3 even if the Court were to find State action here, the Ninth
4 Circuit has told us -- and this is from the **Associates in*
5 *Aldridge Company versus Times *Mira* case, at 440 F.2d, 133 at
6 135, that, quote, even if State action were present, there is
7 still the freedom to exercise editorial discretion over speech
8 that a platform chooses to disseminate.

9 So even in the circumstance where State action were to be
10 found, there still needs to be due regard given to Twitter's
11 own First Amendment rights here.

12 **THE COURT:** Thank you.

13 **MR. DIXON:** Your Honor, may I respond briefly?

14 **THE COURT:** Yes, of course, Mr. Dixon. Go ahead.

15 **MR. DIXON:** Very briefly, I just want to highlight --
16 and this case was also cited in -- I don't remember in which of
17 our briefs but at least one of them -- the *Turner Broadcasting*
18 case.

19 In that case Turner was a cable broadcaster, and it was
20 forced through must carry laws to carry local broadcast
21 channels.

22 The exact arguments I'm hearing Twitter make here were
23 made in that case; and that is, that by virtue of a cable
24 operator aggregating channels together, that is an editorial
25 decision.

1 The Supreme Court nevertheless held that the must carry
2 statute, which required them to carry broadcast stations as
3 well, did not infringe with their editorial -- did not infringe
4 with the First Amendment rights despite any *etherial right of
5 editorial control.

6 I would also like to point out that while it is true that
7 if our First Amendment argument prevails -- and by that, I mean
8 that Your Honor concludes that Twitter does not have a First
9 Amendment right to include our client -- Twitter has -- unless
10 I'm misunderstanding something, Twitter is taking the position
11 that the liberty of speech clause can still be countermanded by
12 Section 230 of the Communications Decency Act.

13 So even if Your Honor finds that Twitter is covered by the
14 liberty of speech clause, the parade of horrors that Twitter
15 forecast will follow will not remotely follow because Twitter
16 still has the shield erected by Section 230.

17 Now, maybe I have misunderstood Twitter's argument. Maybe
18 they are actually saying Section 230 doesn't apply in the event
19 the liberty of speech clause does make Twitter a public --

20 **THE COURT:** Let's ask Mr. Holtzblatt.

21 **MR. HOLTZBLATT:** No, that's certainly not our
22 argument. We have argument and it is our view that Section 230
23 applies and would pre-empt the liberty of speech clause of the
24 California constitution.

25 I'm a little surprised to hear Mr. Dixon offer up Section

1 230 as a solution to the problems of his position when their
2 position in their briefing is that we should not be able to
3 rely on Section 230. So, you know, but we certainly do
4 think --

5 **THE COURT:** Well, argument is always filled with a lot
6 of surprises. Let me ask, Ms. Sweigart, do you have anything
7 to say in conclusion? I want to bring this to a conclusion.

8 **MS. SWEIGART:** I would just say, Your Honor, this is a
9 different case than a Court has ever dealt with before. And
10 the State action -- the allegations of State action, the
11 documents that we have backing up the State action, backing up
12 the interconnectedness, no Court has ever looked at this level
13 of connectedness -- this level of admissions of back and forth.
14 And I think that that distinguishes this case.

15 And the -- as well, the potential injury here of this kind
16 of activity is sanctioned moving forward if the Court thinks
17 about, for instance, March 2020, if someone had said "I think
18 masks would help stop the spread of COVID-19," very easily
19 under this kind of a thing, the State could have said actually
20 that's misinformation and I'm going to take that speech down
21 because the Government has said that this is not -- this is
22 not -- this is misleading.

23 We now know it is different. We now know that's not true.
24 And giving the Government this kind of power to censor opinions
25 it doesn't like is frightening and could lead to a number of

1 things that would be *anathema to the constitution.

2 I would say to neither -- Twitter has still not said what
3 about this speech was false. There was nothing false. This
4 was a pure opinion.

5 And so, again, the -- this is a bridge too far, not only
6 the connection between the parties here but the way that they
7 villainized pure opinions has potentially damning effects if it
8 is taken in different context. And I think that that cannot be
9 over looked.

10 **THE COURT:** Okay. Let me ask Mr. Willenburg who has
11 sat by this on the principle that I call the Leo Durocher
12 principle, which is include me out because I think that their
13 argument is one of jurisdiction.

14 And I want -- is there anything that you want to add to
15 the issue of whether there is personal jurisdiction over NASS?

16 **MR. WILLENBURG:** Well, Your Honor, it is true that we
17 are different and that we have jurisdiction.

18 I will add just for a moment on the substantive part that
19 NASS is even further removed from any concept of being a State
20 actor or State action.

21 In fact, the only way that Plaintiffs -- Plaintiff tries
22 to get us in there is paragraph 99 of the complaint that says
23 the trigger for Twitter's censorship with Mr. O'Handley was its
24 coordination conspiracy with Defendant.

25 Well, that doesn't -- that falls under *Iqbal*. That is

1 just a pure conclusion. There are no facts that support that.

2 On jurisdiction, Your Honor, we have no contact with
3 California. We have no contact with Mr. O'Handley. We had no
4 contact with him in California. The only thing that
5 Mr. O'Handley claims justifies California jurisdiction is that
6 we supposedly exchanged e-mails with Twitter.

7 Those e-mails, likewise, had nothing to do with
8 Mr. O'Handley. They didn't mention him. He has -- my client
9 isn't copied on any of the other communications that do relate
10 to Mr. O'Handley.

11 We do have a California member, California Secretary of
12 State, there is no allegations about communications with him.
13 And even if there were, again, I will say, nothing had to do
14 with -- with specifically with Mr. O'Handley.

15 There is no allegation we even met -- mailed or e-mailed
16 Mr. Padilla anything about the portal or about Mr. O'Handley.

17 *Walden versus Fiori*, which is a case that is cited in the
18 paper but we didn't really discuss, I think that goes to the
19 jurisdiction issue very much. It is probably the *Chestnut* case
20 saying that only the conduct of the Defendant and not the
21 conduct of third parties results in jurisdiction.

22 And there, a Georgia officer arrested a Nevada resident in
23 Georgia and then was sued in Nevada. The Court held that's --
24 that's incorrect. You don't get to get judgment or
25 jurisdiction over the Georgia resident just because an effect

1 was felt in Nevada.

2 Here, NASS is even further removed than the officer in
3 Georgia. We are sort of like the driver who took the officer
4 to the airport to go to arrest him.

5 No basis for jurisdiction, no --

6 **THE COURT:** What about standing? What is your
7 argument on standing?

8 **MR. WILLENBURG:** I'm sorry?

9 **THE COURT:** Your argument on standing, is it -- you
10 know, if there were -- is that combined with your
11 jurisdictional argument?

12 **MR. WILLENBURG:** I hadn't thought of it as a standing
13 argument at all, Your Honor. I only thought of it as a
14 jurisdiction argument and then --

15 **THE COURT:** Okay.

16 **MR. WILLENBURG:** -- the other part of our merits --
17 our merits defense is that we are not a State actor. We didn't
18 conspire, and we are not a joint actor.

19 **THE COURT:** I understand those arguments.

20 Well, I would like to thank all the parties for an
21 interesting discussion. You have made my Christmas holiday and
22 I will make yours by not issuing an opinion until after the
23 first of the year.

24 It's a complicated question and it deserves a careful
25 analysis. Hopefully I will be able to give it that. But thank

1 you very much. I'm most appreciative. Mr. Spiva, you want to
2 say something?

3 **MR. SPIVA:** Yes, Your Honor. I'm happy not to --
4 actually, to rest on our briefs. But I just wanted to, since I
5 represent a separate party, *SKDKnickerbocker*, I just wanted to
6 state for the record that the only reason we are here is
7 because of one e-mail on one morning in November of 2020.

8 And so the -- the Plaintiff can't establish standing as to
9 us nor -- nor are we State actors by any means. And I will
10 leave it at that. I think we have made our arguments
11 adequately in the briefing.

12 **THE COURT:** I think the arguments are -- very well.
13 Thank you. I wish you all happy holidays. Thank you.

14 **MS. SWEIGART:** Thank you, Your Honor.

15 **MR. HOLTZBLATT:** Thank you, Your Honor.

16 **MR. DIXON:** Thank you, Your Honor.

17 **THE CLERK:** That concludes this morning's proceeding.
18 Thank you.

19 (Proceedings adjourned at 11:18 a.m.)

20 ---oOo---

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Thursday, January 26, 2022

A handwritten signature in blue ink that reads "Marla Knox". The signature is written in a cursive, flowing style. Below the signature is a solid horizontal line.

Marla F. Knox, CSR No. 14421, RPR, CRR, RMR
United States District Court - Official Reporter

Date Filed	#	Docket Text
02/11/2022	95	TRANSCRIPT ORDER for proceedings held on 12/16/2021 before Judge Charles R. Breyer by Twitter Inc., for Court Reporter Marla Knox. (Carome, Patrick) (Filed on 2/11/2022) (Entered: 02/11/2022)
01/31/2022	94	Transcript of Videoconference Proceedings held on December 16, 2021, before Judge Charles R. Breyer. Court Reporter, Marla F. Knox, RPR, CRR, RMR, telephone number (602) 391-6990/email marla_knox@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 91 Transcript Order) Release of Transcript Restriction set for 5/2/2022. (Related documents(s) 91) (mfk, COURT STAFF) (Filed on 1/31/2022) (Entered: 01/31/2022)
01/28/2022	93	ORDER by Judge Charles R. Breyer: Granting 92 Motion to Withdraw as Attorney, Bruce V. Spiva. (ls, COURT STAFF) (Filed on 1/28/2022) (Entered: 01/28/2022)
01/28/2022	92	MOTION to Withdraw as Attorney filed by SKDKNICKERBOCKER, LLC. Responses due by 2/11/2022. Replies due by 2/18/2022. (Attachments: # 1 Proposed Order)(Spiva, Bruce) (Filed on 1/28/2022) (Entered: 01/28/2022)
01/20/2022	91	TRANSCRIPT ORDER for proceedings held on 12/12/2021 before Judge Charles R. Breyer by Twitter Inc., for Court Reporter Marla Knox. (Trevor, Maurice) (Filed on 1/20/2022) (Entered: 01/20/2022)
01/19/2022	90	USCA Case Number 22-15071 US Court of appeals for the 9th circuit for 89 Notice of Appeal to the Ninth Circuit, filed by Rogan O Handley. (cv, COURT STAFF) (Filed on 1/19/2022) (Entered: 01/19/2022)
01/14/2022	89	NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Rogan O Handley. Appeal of Judgment 87 , Order on Motion to Dismiss,,,,,, Order on Motion to Strike, 86 (Appeal fee of \$505 receipt number ACANDC-16806721 paid.) (Coleman, Ronald) (Filed on 1/14/2022) (Entered: 01/14/2022)
01/13/2022	88	TRANSCRIPT ORDER for proceedings held on 12/16/2021 before Judge Charles R. Breyer by Rogan O Handley, for Court Reporter Marla Knox. (Dhillon, Harmeet) (Filed on 1/13/2022) (Entered: 01/13/2022)
01/10/2022	87	JUDGMENT. Signed by Judge Charles R. Breyer on 1/10/2022. (crblc1, COURT STAFF) (Filed on 1/10/2022) (Entered: 01/10/2022)
01/10/2022	86	ORDER by Judge Charles R. Breyer granting 57 SKDK Motion to Dismiss; granting 58 NASS Motion to Dismiss; granting 59 State Motion to Dismiss; granting 60 Twitter Motion to Dismiss; deferring ruling on 61 Motion to Strike. (crblc1, COURT STAFF) (Filed on 1/10/2022) (Entered: 01/10/2022)
12/16/2021	85	Minute Entry for proceedings held before Judge Charles R. Breyer: Motion Hearing held by Zoom on 12/16/2021 - Re 58 Motion to Dismiss Plaintiff's Complaint Pursuant to Federal Rule of Court 12(b)(2) and 12(b)(6)filed by National Association of Secretaries of State; 57 First Motion to Dismiss filed by SKDKNICKERBOCKER, LLC; 60 Motion to Dismiss filed by Twitter Inc.; 59 Motion to Dismiss Complaint filed by Shirley N Weber, Jenna Dresner, Alex Padilla, Paula Valle Castaon, Akilah Jones, Sam Mahood; 61 Motion to Strike Count II, filed by Twitter Inc. Motions

		<p>taken under submission. The Court will issue an order. (Total Time in Court: 1 Hour and 10 Minutes)</p> <p>Court Reporter: Marla Knox.</p> <p>Plaintiff Attorney: Karin M. Sweigart, Gregory Michael, Joshua Dixon.</p> <p>Defendant Attorney: Anna Ferrari, Bruce Spiva, Patrick J. Carome, Felicia H. Ellsworth, Ari Holtzblatt, Don Willenburg.</p> <p><i>(This is a text-only entry generated by the court. There is no document associated with this entry.)</i> (ls, COURT STAFF) (Date Filed: 12/16/2021) (Entered: 12/17/2021)</p>
12/14/2021	84	NOTICE of Appearance by Joshua Wallace Dixon (Dixon, Joshua) (Filed on 12/14/2021) (Entered: 12/14/2021)
12/13/2021	83	ORDER by Judge Charles R. Breyer: Granting 82 Motion for Pro Hac Vice, Joshua Wallace Dixon. (ls, COURT STAFF) (Filed on 12/13/2021) (Entered: 12/13/2021)
12/10/2021	82	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-16707683.) filed by Rogan O Handley. (Attachments: # 1 Certificate of Good Standing)(Dixon, Joshua) (Filed on 12/10/2021) (Entered: 12/10/2021)
12/02/2021	81	NOTICE of Appearance by Danielle Serbin (Serbin, Danielle) (Filed on 12/2/2021) (Entered: 12/02/2021)
12/01/2021	80	REPLY (re 61 MOTION to Strike <i>Count II</i> ,) filed byTwitter Inc.. (Carome, Patrick) (Filed on 12/1/2021) (Entered: 12/01/2021)
12/01/2021	79	REPLY (re 60 MOTION to Dismiss) filed byTwitter Inc.. (Carome, Patrick) (Filed on 12/1/2021) (Entered: 12/01/2021)
12/01/2021	78	REPLY (re 59 MOTION to Dismiss <i>Complaint</i>) filed byPaula Valle Castaon, Jenna Dresner, Akilah Jones, Sam Mahood, Alex Padilla, Shirley N Weber. (Ferrari, Anna) (Filed on 12/1/2021) (Entered: 12/01/2021)
12/01/2021	77	REPLY (re 57 First MOTION to Dismiss) filed bySKDKNICKERBOCKER, LLC. (Spiva, Bruce) (Filed on 12/1/2021) (Entered: 12/01/2021)
12/01/2021	76	REPLY (re 58 MOTION to Dismiss <i>Plaintiff's Complaint Pursuant to Federal Rule of Court 12(b)(2) and 12(b)(6)</i>) filed byNational Association of Secretaries of State. (Wheatley, Christine) (Filed on 12/1/2021) (Entered: 12/01/2021)
11/17/2021	75	NOTICE of Appearance by Gregory Richard Michael <i>for Plaintiff Rogan O Handley</i> (Michael, Gregory) (Filed on 11/17/2021) (Entered: 11/17/2021)
11/16/2021	74	ORDER by Judge Charles R. Breyer: Granting 73 Motion for Pro Hac Vice, Mark E. Trammell. (ls, COURT STAFF) (Filed on 11/16/2021) (Entered: 11/16/2021)
11/12/2021	73	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-16620221.) filed by Rogan O Handley. (Attachments: # 1 Certificate of Good Standing)(Trammell, Mark) (Filed on 11/12/2021) (Entered: 11/12/2021)
11/09/2021		<p>Set/Reset Hearing - Motion to Dismiss/Motion to Strike Hearing set for 12/16/2021 at 10:00 AM in San Francisco - Video conference Only before Judge Charles R. Breyer. This proceeding will be held via a Zoom webinar.</p> <p>Webinar Access: All counsel, members of the public, and media may access the webinar information at https://www.cand.uscourts.gov/crb</p> <p>Court Appearances: Advanced notice is required of counsel or parties who wish to be identified by the court as making an appearance or will be participating in the argument at</p>

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ROGAN O'HANDLEY,

Plaintiff,

v.

ALEX PADILLA, et. al.,

Defendants.

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

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

Hearing Date: December 16, 2021

Courtroom: 6-17th Floor

Time: 10:00 AM

Judge: Hon. Charles R. Breyer

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SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

ARGUMENT

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

A. O’Handley Fails To Plausibly Plead State Action

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27
28 ² O’Handley refers in passing to a “nexus” between OEC and Twitter (Opp. 8), but does not say how any
nexus theory he may be seeking to advance is different from his attempt to fabricate state action based on
a joint action theory. Any such theory thus fails for the same reasons as his joint action theory.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: December 1, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION
13

14 **ROGAN O'HANDLEY,**

15 Plaintiff,

16 v.

17 **ALEX PADILLA, et al.,**

18 Defendants.
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3:21-cv-07063-CRB

**STATE DEFENDANTS' REPLY TO
PLAINTIFF'S OPPOSITION TO MOTION
TO DISMISS**

Date: December 16, 2021
Time: 10:00 a.m.
Dept: 6 (17th Floor)
Judge: The Honorable Charles R. Breyer
Trial Date: Not set
Action Filed: June 13, 2021

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INTRODUCTION AND SUMMARY OF ARGUMENT

Section 10.5 of the California Elections Code directs the Secretary of State’s Office of Election Cybersecurity (OEC) to identify and mitigate misleading information that could suppress voter turnout or disrupt the orderly administration of elections. Plaintiff’s complaint alleges that, under this statute, OEC identified a single social media post by plaintiff as misleading and informed Twitter about it. Twitter, in turn, determined to apply its content-moderation policies to this post and at least four others not identified by OEC. Plaintiff challenges these actions as evidencing a broad conspiracy among OEC, Twitter, and other private actors to quell the speech of political conservatives. He seeks not only declaratory and injunctive relief but also to recover punitive damages from five officers and employees of the Secretary of State’s Office named in their individual capacities.¹

Plaintiff’s opposition to the State’s motion to dismiss confirms that this Court lacks subject matter jurisdiction to entertain plaintiff’s claims. The complaint pleads no facts suggesting that plaintiff’s alleged harm—Twitter’s application of multiple “strikes” to plaintiff’s account for violations of its civic integrity policy—is fairly traceable to the actions of OEC. The entire action should therefore be dismissed for lack of Article III standing. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–43 (1976).

Even if plaintiff could establish standing, his opposition fails to overcome the basic fact that Twitter is a private actor. The complaint’s allegations, taken as true, do not demonstrate the close cooperation and interdependence necessary to prove state action under the “joint action” or “nexus” tests. Therefore, plaintiff’s section 1983 claims, directed at Twitter’s private conduct, cannot proceed. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1934 (2019); *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128 (9th Cir. 2012).

The complaint also fails to state free speech, equal protection, due process, void-for-vagueness, and civil conspiracy claims. Plaintiff’s speech claims fail because the act of reporting a single post to Twitter as misleading is protected government speech. The claim that that the

¹ In addition to the five defendants named in their individual capacities, the complaint also names Secretary of State Dr. Shirley N. Weber in her official capacity; together, they are referred to here as “State Defendants.”

1 State Defendants selectively enforced Elections Code section 10.5 to discriminate against
2 political conservatives fails because the Equal Protection Clause does not protect against speech-
3 based retaliation, and also because it fails to articulate a plausible theory of selective enforcement
4 based on a suspect classification not involving speech. The due process claim must be dismissed
5 because there is no due process protection from Twitter’s private actions and no protectable
6 property interest in plaintiff’s Twitter account. The complaint fails to state a vagueness claim
7 because Elections Code section 10.5 does not regulate public conduct. And the civil conspiracy
8 claim cannot proceed because 42 U.S.C. §1985 does not protect “individuals who questioned
9 election processes and outcomes” from class-based animus as a matter of law.

10 The opposition also fails to rebut the State Defendants’ showing that the five defendants
11 named in their individual capacities are entitled to qualified immunity. Plaintiff provides no
12 authority for the proposition that reporting false or misleading information about elections to a
13 third-party social media platform is a clearly established infringement of constitutional rights.
14 Accordingly, all five defendants named in their individual capacities should be dismissed from
15 this action, to the extent any of plaintiff’s claims survive dismissal.

16 For the reasons set forth below and in the State Defendants’ opening memorandum, the
17 motion to dismiss should be granted, and the complaint dismissed without leave to amend.

18 ARGUMENT

19 I. PLAINTIFF FAILS TO ESTABLISH THAT HIS ALLEGED INJURY IS FAIRLY 20 TRACEABLE TO THE STATE DEFENDANTS’ CONDUCT

21 The opposition fails to rebut the State Defendants’ showing that plaintiff’s claimed injury is
22 not fairly traceable to the OEC, and he therefore lacks Article III standing. A bevy of cases “hold
23 that a plaintiff failed to establish that an injury was traceable to a defendant when the injury
24 would arise only if some third party decided to take the action triggering the injury.” *Ass’n of*
25 *Am. Physicians & Surgeons v. U.S. Food & Drug Admin.*, 13 F.4th 531, 546 (6th Cir. 2021)
26 (collecting cases). For example, in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426
27 U.S. 26, the plaintiffs challenged a revenue ruling conferring tax-exempt status to hospitals that
28 denied non-emergency medical services based on financial ability on the grounds that it

1 discouraged the provision of services to lower-income patients. The Supreme Court found that
2 the plaintiffs lacked standing to challenge the revenue ruling on a theory that the revenue ruling
3 encouraged hospitals to limit services to indigent plaintiffs as a matter of internal policy, which
4 rested within the hospitals' discretion, thus breaking the chain of causation. *Id.* at 41–43.

5 So too here. The complaint alleges that OEC made an independent decision to flag a single
6 social media post by plaintiff, without directing any further action on Twitter's part. Twitter then
7 allegedly applied its civic integrity policy to determine that the post should be identified as
8 "disputed" and that a strike should be applied to plaintiff's account. The complaint alleges that
9 Twitter enforced its policy against other posts by plaintiff without contending that OEC played
10 any role whatsoever in those determinations. Like the hospitals in *Simon*, Twitter's internal
11 policies authorized it to label and remove plaintiff's posts and ultimately suspend his account.
12 Indeed, the decision to enforce its policies against plaintiff was ultimately within Twitter's sole
13 discretion and thus not traceable to OEC's execution of its responsibility to mitigate misleading
14 election information under section 10.5.

15 Plaintiff's opposition, like the complaint, attempts to fill in gaps in the causal chain with
16 bald conclusions that defendants' respective actions did not simply occur in parallel, but reflect
17 "orchestrat[ion]" of and "agree[ment] to" a broad conspiracy. *E.g.*, Pl.'s Opp to State Defs.' Mot.
18 to Dismiss ("Opp.") 3, ECF No. 68 (arguing that Twitter, in applying strikes to plaintiff's
19 account, took "coordinated steps...in furtherance of a conspiracy in which each Defendant had a
20 planned, assigned, and specialized role"). For example, the opposition argues that OEC's use of
21 "a dedicated portal Twitter created" was tantamount to a government demand to censor plaintiff's
22 speech. *Id.* at 3. Plaintiff's conclusory allegations that Twitter applied its own content-
23 moderation policies at the behest of, or due to a conspiracy with, governments is unsupported by
24 specific factual allegations, and this "disentitles them to the presumption of truth." *Ashcroft v.*
25 *Iqbal*, 556 U.S. 662, 681 (2009). The complaint does not allege that the Secretary of State's
26 office played any role in the creation of the Partner Support Portal. To the contrary, an email
27 appended to the complaint makes clear that the Partner Support Portal was created by Twitter
28 alone, that at some point Twitter decided to extend participation in the Portal to state elections

officials (including OEC), and that Twitter asked defendant National Association of Secretaries of State (NASS) to help it publicize that fact. Compl. Ex. 2, 1, ECF No. 1-2. Although plaintiff contends that the Secretary of State’s reports of mis- and disinformation “[p]resumably” received “priority” treatment from Twitter, Compl. ¶ 33, ECF No. 1, the complaint fails to allege facts that would establish that using the Partner Support Portal entitled OEC—or any other state or local elections official using the Partner Support Portal, for that matter—to any influence over Twitter’s independent content-moderation decisions. Whether a post should be labeled as “disputed” is determined by the application of specific criteria developed by Twitter in its civic integrity policy. *See* State’s Request for Jud. Notice (RJN), Ex. A, 3–5, ECF No. 59-1. Any user can report policy violations, *id.* at 5–6, and whether to act on those reports rests solely with Twitter. Thus, taking as true the allegation that OEC allegedly used the Partner Support Portal to report false or misleading election information to Twitter, Compl. ¶¶ 32–33, that still would not constitute an act in furtherance of a conspiracy.

Further, the complaint alleges no facts to support its inferential leap that OEC’s stated reason for doing so—to comply with its legitimate statutory mandate under Elections Code section 10.5—is pretextual, and that OEC’s actual purpose was to conspire with private actors to suppress conservative speech. Contrary to plaintiff’s claims of “myriad [sic] direct communications demonstrating extensive communication,” Opp. 4, the complaint alleges no interaction between any defendants that plausibly suggests such intent. Indeed, while the complaint cites various public documents from the Secretary of State’s Office, the *only* alleged direct communication between OEC and Twitter concerning plaintiff was to flag his “audit every California ballot” post. The conclusory nature of plaintiff’s assertions regarding the extent and purpose of collaboration between OEC and the other defendants renders them too hypothetical and implausible to support an inference that the State Defendants’ actions caused the termination of plaintiff’s Twitter account. *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011).²

² The three cases cited by plaintiff regarding the “fairly traceable” prong of the standing analysis are not instructive here beyond their general acknowledgment that, in order for a multi-step chain of causation to support standing, the connection between each link must be stronger than “tenuous” or “hypothetical.” Opp. 3. None of their alleged harms is predicated on the

1 Because this defect is inherent to plaintiff's claims and cannot be corrected by amendment, the
2 complaint should be dismissed without leave to amend for want of standing.

3 **II. PLAINTIFF CANNOT ESTABLISH THAT TWITTER'S PRIVATE CONDUCT IS FAIRLY**
4 **ATTRIBUTABLE TO THE STATE**

5 As explained in the State Defendants' opening memorandum, plaintiff cannot obtain relief
6 for his claims under 42 U.S.C. § 1983 and 42 U.S.C. § 1985 without first establishing that the
7 alleged infringements resulting from the suspension of his Twitter account could be attributable to
8 the State. Plaintiff has failed to do so.

9 As an initial matter, plaintiff argues without basis that the State Defendants have somehow
10 "conceded" that the alleged constitutional violations—that is, the measures taken by Twitter to
11 label plaintiff's posts as "disputed," and to suspend and later terminate his Twitter account—
12 satisfy the first prong of the "fair attribution" analysis under *Lugar v. Edmonson Oil Co.*, 457
13 U.S. 922 (1982). *Lugar* held that conduct allegedly causing the deprivation of a federal right is
14 "fairly attributable" to a state if it is (1) "caused by the exercise of some right or privilege created
15 by the State or by a rule of conduct imposed by the State or by a person for whom the State is
16 responsible," *id.* 37–38, and (2) the party alleged to have caused the deprivation is a state actor.
17 Contrary to plaintiff's argument, the State Defendants' opening memorandum makes clear that
18 the harms asserted by plaintiff resulted from Twitter's independent enforcement of its content-
19 moderation policies, as distinct from any right, privilege, or rule established by the State. *See*,
20 *e.g.*, State Mem. in Supp. of Mot. to Dismiss ("State Mem.") 5, ECF No. 59-1 (discussing
21 Twitter's civic integrity policy), *id.* 7 ("Twitter alone had the power to determine to label of the
22 post as disputed and apply a strike to plaintiff's account"); *id.* 8 (all complaint allegations of

23 existence of a conspiracy under which the actions of one defendant were attributed to another, or
24 to a third party not before the court. *See Maya*, 658 F.3d at 1060 (finding plaintiff had standing to
25 challenge defendants' failure to disclose lending practices which, if true, directly caused plaintiff
26 to purchase home at inflated price); *Barnum Timber Co. v. U.S. Env't Prot. Agency*, 633 F.3d 894
27 (9th Cir. 2011) (holding plaintiff alleged sufficient causal connection between agency's
28 designation of creek as "impaired" by pollution and the diminished value of plaintiff's creekside
property to maintain standing); *Ocean Advocs. v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 860
(9th Cir. 2005) (finding causal link between alleged conduct (planned construction of extension to
oil tanker dock) and its claimed harm (increased ship traffic and risk of oil spills)). The basis on
which each case found sufficient allegations of causation for standing purposes is therefore
distinguishable from the instant challenge alleging Twitter acted as an "arm of the OEC." Opp. 3.

1 disciplinary actions against Plaintiff “are attributed to Twitter”); *see also* RJN Ex. A. Twitter’s
2 authority to moderate content posted on its platform does not flow from Elections Code section
3 10.5, nor is it a power traditionally held by the State. *Manhattan Cmty. Access Corp. v. Halleck*,
4 139 S. Ct. at 1934 (“A private entity . . . who opens its property for speech by others is not
5 transformed by that fact alone into a state actor”); *Howard v. Am. Online Inc.*, 208 F.3d 741, 754
6 (9th Cir. 2000). Regardless, even if the State Defendants had not specifically addressed the first
7 prong of the *Lugar* analysis, this would not “concede[]” anything. Opp. 3. Whereas a party
8 opposing a motion or other request for relief can waive a point by failing to address it, a
9 defendant does not waive or concede an argument not raised affirmatively in a motion to dismiss.

10 With respect to the second *Lugar* prong, which is dispositive, the opposition makes clear
11 that plaintiff cannot overcome the strong presumption that Twitter is not a state actor under either
12 the “joint action” or “nexus” tests. Addressing the “nexus” test, plaintiff relies on the complaint’s
13 defective, conclusory allegations of conspiracy to suggest that this case is on similar footing to
14 cases like *Dennis v. Sparks*, 449 U.S. 24, 28 (1980), which held that that a private actor engaged
15 in a “corrupt conspiracy” with an official actor (there, bribing a judge to enter an injunction)
16 could be acting under color of state law. Opp. 4. Here, however, plaintiff has failed to plead the
17 elements of a conspiracy, State Mem. 15, and his reliance on the same inadequate conspiracy
18 allegations to demonstrate a nexus between OEC’s exercise of its responsibilities under section
19 10.5 and Twitter’s independent acts to enforce its own terms of use is misplaced.

20 Looking to other circumstances in which courts have found a close nexus for state action
21 purposes, plaintiff fares no better. The Ninth Circuit has identified the following factors as
22 relevant to the establishment of a nexus: (1) the organization is mostly comprised of state
23 institutions; (2) state officials dominate decision making of the organization; (3) the
24 organization’s funds are largely generated by the state institutions; and (4) the organization is
25 acting in lieu of a traditional state actor. *Villegas v. Gilroy Garlic Festival Ass’n*, 541 F.3d 950
26 (9th Cir. 2008). The complaint fails to allege that Twitter meets any of these factors.

27 Plaintiff also comes up short under the “joint action” test,” which requires a showing that a
28 state has “so far insinuated itself into a position of interdependence with [Twitter] that it must be

1 recognized as a joint participant in the challenged activity.” *Gorenc v. Salt River Project Agric.*
2 *Improvement & Power Dist.*, 869 F.2d 503, 507 (9th Cir. 1989) (quoting *Burton v. Wilmington*
3 *Parking Auth.*, 365 U.S. 715, 725 (1961)). “Mere passive acquiescence in the direction of state
4 officials generally is not sufficient,” *Taylor v. List*, 880 F.2d 1040, 1048 (9th Cir. 1989); rather,
5 the private and government actors must have specifically agreed to “violate constitutional rights.”
6 *See Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983).

7 The joint action authorities on which plaintiff relies confirm that allegations that would
8 demonstrate the requisite levels of “cooperation and interdependence” are lacking from the
9 complaint. For example, in *Tsao v. Desert Palace, Inc.*, private security guards at a casino were
10 found to act under color of state law under the “joint action” test where the local police
11 department had delegated the authority to issue citations to appear in court. Because the guards
12 were trained by local police, could obtain private arrest records from local police, and had
13 authority to compel cited persons to appear in court, they were found to be acting under color of
14 state law. 698 F.3d at 1140. Here, however, plaintiff has not alleged that state officials have
15 trained Twitter’s employees or vested them with the authority to carry out a government function
16 that Twitter would otherwise lack the authority to do. Rather, Twitter’s private authority to
17 moderate content posted to its platform flows from Twitter’s agreement with all of its users that it
18 may do so as an express condition of their use. Twitter exercises no authority from the state, nor
19 do state officials play any role in how Twitter chooses to exercise its discretionary enforcement
20 power. Indeed, the allegations regarding the successive strikes applied to plaintiff’s Twitter
21 account—with which, the complaint concedes, OEC had nothing to do, Compl. ¶¶ 84–89—
22 confirm that Twitter carries out its enforcement activities quite independently of OEC’s actions.
23 As such, the complaint lacks the indicia of cooperation and interdependence needed to establish
24 joint action.

25 Because the complaint fails to plead facts that would show Twitter’s conduct is fairly
26 attributable to the State, its federal claims should be dismissed without leave to amend.

III. PLAINTIFF FAILS TO ESTABLISH THAT OEC'S MITIGATION OF ELECTION MISINFORMATION IS NOT GOVERNMENT SPEECH

The State Defendants' moving papers establish that the complaint fails to state free speech claims under the State and Federal constitutions because to find a violation of either would necessarily abridge the government's ability to speak freely. In opposition, plaintiff attempts to portray the State Defendants' actions as the "censorship" and "remov[al]" of speech, while maintaining that these actions do not implicate any government speech. Opp. 5. This distinction cannot hold. The sole allegation in the complaint concerning plaintiff's Twitter account attributed to any State Defendant is that an unnamed OEC employee contacted Twitter to flag a single post by plaintiff. That flag was an inherent expression of the Secretary of State's views that the post in question is misleading and would interfere with election administration. Compl. ¶ 76.

Plaintiff does not dispute that "the Free Speech Clause has no application" to expressive conduct by the government. Nor could he. See *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009) (collecting cases); *id.* ("[I]t is not easy to imagine how government could function if it lacked this freedom"); *Delano Farms Co. v. Cal. Table Grape Comm'n*, 4 Cal. 5th 1204, 1210 (2018). Instead, plaintiff argues that his "audit every California ballot" post was not misleading, and therefore the "flag" must have been an attempt to "censor" him. That is a speculative leap, not a factual allegation that must be taken as true. Further, whether plaintiff agrees with OEC's views of the post has no bearing on the fact that OEC's identifying it as misleading, and then explaining why to Twitter, is itself a form of expressive conduct on the part of the Secretary that is not subject to First Amendment scrutiny. Cf. *Keller v. State Bar of Cal.*, 496 U.S. 1, 12–13 (1990) ("If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.").

Because plaintiff has failed to establish that the complaint states a free speech claim under either the State or U.S. Constitutions, both claims warrant dismissal.

IV. THE COMPLAINT FAILS TO ALLEGE THAT SECTION 10.5 HAS BEEN ENFORCED DISCRIMINATORILY BASED ON PLAINTIFF'S POLITICAL AFFILIATION

The State Defendants have established the complaint fails to identify a discernible suspect class that was allegedly denied equal protection, alleging only that plaintiff was targeted for “his expression of the opinion that California . . . should audit its elections to protect against voter fraud.” State Mem. 12. Plaintiff’s opposition attempts to clarify the ambiguity in his pleading by arguing that plaintiff’s protected status is that of one who makes “conservative requests for transparency in election processes rather than the same calls from self-identified political liberals.” Opp. 7 & Compl. ¶ 83; *compare with* Compl. ¶¶ 2, 4, 66, 138–148 (alleging that plaintiff’s speech was “disfavored” and targeted for “seek[ing] greater government accountability” without reference to his political persuasions). Plaintiff’s argument confirms that the factual predicate for his equal protection claim is his speech criticizing state government, and not membership in any suspect class. Thus, the Equal Protection Clause is not implicated, and the claim must be dismissed. *AIDS Healthcare Found. v. Los Angeles Cnty.*, No. CV 12–10400 PA (AGRx), 2013 WL 12134048, at *8 (C.D. Cal. Mar. 18, 2013) (noting a majority of circuits have held that “allegations that a plaintiff was treated differently in retaliation for the exercise of First Amendment rights do not implicate the Equal Protection Clause”).

Even if plaintiff’s equal protection allegations were not grounded in the First Amendment, the complaint would still fail to state a claim because it does not allege sufficient facts to establish that OEC implemented section 10.5 to discriminate against political conservatives who support increased transparency in elections.³ The complaint pleads no specific facts that would indicate that OEC declined to flag posts by liberal commentators calling for election transparency. *Wayte v. United States*, 470 U.S. 598, 608 (1985) (holding that selective enforcement claims “require petitioner to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose”). Plaintiff cites *Iqbal*, 556 U.S. at 678, for the

³ The complaint’s dearth of factual allegations regarding the State Defendants’ purportedly selective application of section 10.5 lends further support to the State Defendants’ argument that the equal protection claim should be evaluated under a “class-of-one” theory. *See* State Mem. 12.

1 proposition that it is sufficient for pleading purposes to identify the suspect and non-suspect
2 classifications without supporting allegations that, if true, would establish differential treatment.
3 Opp. 7 n. 1. Contrary to plaintiff’s argument, simply alleging that “Defendants focused their
4 speech censorship efforts on conservative requests for transparency in elections processes rather
5 than the same calls from self-identified political liberals,” without further factual detail, does not
6 pass muster under *Iqbal*. 556 U.S. at 678 (“Although for the purposes of a motion to dismiss we
7 must take all of the factual allegations in the complaint as true, we are not bound to accept as true
8 a legal conclusion couched as a factual allegation,” citations and quotation marks omitted). Thus,
9 the equal protection claim, which should be dismissed without leave to amend.

10 **V. PLAINTIFF HAS NO DUE PROCESS INTEREST IN HIS TWITTER ACCOUNT**

11 Plaintiff’s opposition fails to establish that a due process interest could ever attach to a
12 private social media company’s content-moderation decisions. And even if it could, plaintiff fails
13 to establish any protected liberty or property interest in the account itself.

14 Plaintiff contends that he has a business interest in the continued operation of his Twitter
15 account that arises from his “‘reasonable expectation of entitlement deriving from existing
16 rules . . . such as state law.’” Opp. 8, quoting *Wedges/Ledges of Cal., Inc. v. Phoenix, Ariz.*, 24
17 F.3d 56, 62 (9th Cir. 1994). A reasonable expectation forms where the law or rule in question
18 supplies “‘an articulable standard’ sufficient to give rise to a legitimate claim of entitlement.”
19 *Wedges/Ledges of Cal., Inc.*, 24 F.3d at 63 (recognizing expectation of entitlement of license to
20 operate arcade games arising from city ordinance requiring city treasurer to issue licenses based
21 solely on whether the game is a “game of skill,” as defined by the ordinance) (quoting *Parks v.*
22 *Watson*, 716 F.2d 646, 657 (9th Cir. 1983)).

23 The state law giving rise to plaintiff’s asserted expectation of entitlement is an 11-word
24 statute, enacted in 1872, providing simply that “[t]he good will of a business is property and is
25 transferable.” Opp. 8, citing Cal. Bus. & Prof. Code § 14102. To the extent this statute supplies
26 an “articulable standard” giving rise to a claim of entitlement, the entitlement attaches to a
27 “business,” meaning “a professional, commercial or industrial enterprise with assets,” as distinct
28 from an individual person. See *In re Marriage of McTiernan & Dubrow*, 133 Cal. App. 4th 1090,

1 1098–1099 (2005). *In re Marriage of McTiernan* declined to recognize a due process interest in
2 the petitioner’s career as a film director, despite his demonstrable professional success as
3 reflected in the gross revenues of his films, as well as his expectation in the “continued patronage
4 of his services” as a director, because section 14102 endows the capacity to generate goodwill
5 only to a “business,” and not a “person doing business.” *Id.* at 1098 (“No California case has held
6 that a natural person, apart and distinct from a ‘business,’ can create or generate goodwill.”).
7 Plaintiff’s former Twitter account was associated with him as an individual and is not itself a
8 business. If the expectation of a director’s future patronage from moviegoers does not amount to
9 business goodwill, by extension, neither would the expectation of future patronage of plaintiff’s
10 followers on Twitter, even taking as true the complaint’s allegations that plaintiff’s popularity on
11 social media led him to be offered media appearances and speaking opportunities. Compl. ¶ 93.
12 Because plaintiff’s Twitter account is not capable of creating goodwill, Plaintiff has no property
13 interest in continued access to his account.

14 Plaintiff also contends that the defendants’ actions deprived him of his property interest in
15 pursuing his chosen occupation. Opp. 8 (citing *Benigni v. City of Hemet*, 879 F.2d 473, 478 (9th
16 Cir. 1989)). As the State Defendants have already demonstrated, there is no procedural due
17 process right to continue one’s occupation. State Mem. 13. The *Benigni* case upon which
18 plaintiff relies concerns a substantive due process claim alleging denial of the right to pursue
19 one’s chosen application. The complaint here does not attempt to state a substantive due process
20 claim, but rather frames plaintiff’s injury as arising from the lack of notice and an opportunity to
21 be heard before the suspension of his account. Compl. ¶¶ 149–158. Further, plaintiff could not
22 plead a substantive due process claim without allegations establishing that he is “unable to pursue
23 an occupation” as a political commentator—on any media platform—by reason of the termination
24 of his Twitter account. Here, however, the complaint alleges that plaintiff has more than two and
25 half million followers across multiple social medial platforms, not including Twitter, and that he
26 has appeared over 75 times on national television news programs in 2020 and 2021. Compl. ¶¶ 9,
27 70. As such, plaintiff has failed to establish that a property interest in one’s private vocation can
28 support a procedural due process claim as a matter of law.

1 Finally, plaintiff's claimed liberty interest in his ability to use Twitter, premised on the
2 alleged impairment of his free speech rights, is derivative of plaintiff's failed free speech claims,
3 and should be dismissed alongside them without leave to amend.

4 **VI. PLAINTIFF'S VAGUENESS CLAIM FAILS BECAUSE PLAINTIFF CANNOT ESTABLISH**
5 **THAT SECTION 10.5 GOVERNS PUBLIC CONDUCT**

6 Plaintiff's opposition fails to establish that section 10.5 of the Elections Code is void for
7 vagueness. It argues that the statute does not define what it means to "counteract false or
8 misleading information," and thus provides no notice of what it prohibits. Opp. 9. But as the
9 State Defendants' motion explains, section 10.5 of the Elections Code cannot be challenged as
10 vague because it does not regulate public conduct. Rather, it guides the exercise of OEC's
11 discretion in carrying out its mandate, which includes, as relevant here, "assess[ing] . . . false or
12 misleading information regarding the electoral process" and "mitigat[ing] the false or misleading
13 information." Cal. Elec. Code, § 10.5(c)(8); see *United States v. Beckles*, __ U.S. __, 137 S. Ct.
14 886, 895 (2017) (holding that the U.S. Sentencing Guidelines could not be challenged as vague
15 because, in establishing advisory ranges to guide courts in the application of criminal sentencing,
16 they did not "bind or regulate the primary conduct of the public," citations and quotations
17 omitted). Because section 10.5 does not regulate the conduct of plaintiff or any other private
18 citizen, there can be no risk that it will be arbitrarily enforced against plaintiff or deter speech.⁴

19 Although plaintiff does not dispute that section 10.5 is directed at OEC, he contends that
20 section 10.5 is nevertheless vague because it poses an "obvious, inherent danger" in allowing
21 "unbridled government discretion." Opp. 9. As the Supreme Court observed in *Beckles*, it "ha[s]
22 never suggested that unfettered discretion can be void for vagueness." *Beckles*, 137 S. Ct. at 895.
23 Further, plaintiff cannot fairly complain to lack notice of the obvious outcome from the exercise
24 of OEC's authority under section 10.5. The prospect that OEC would identify social media posts
25 as false or misleading in the course of executing its responsibility to "mitigate false or misleading
26 information" is self-evident. Plaintiff's defective vagueness claim should be dismissed without

27 ⁴ Because section 10.5 does not proscribe speech, plaintiff's contention that the statute
28 requires greater specificity than vagueness challenges outside of the First Amendment context is
unavailing. Opp. 9 (quoting *Lane v. Salazar*, 911 F.3d 942, 950 (9th Cir. 2018).)

1 leave to amend.

2 **VII. PLAINTIFF IS NOT ENTITLED TO RELIEF UNDER SECTION 1985 FOR ENGAGING IN**
3 **“DISFAVORED” CONDUCT**

4 Section 1985 does not apply to plaintiff, and the opposition fails to establish otherwise.
5 Plaintiff contends that the State Defendants’ actions were motivated by class-based animus
6 against politically conservative speakers. But the complaint makes clear that the alleged animus
7 was aimed specifically at “individuals who questioned election processes and outcomes,” with
8 whose views the State Defendants “disagreed.” As the Supreme Court has recognized, a “class”
9 whose shared characteristic is “a desire to engage in conduct that the § 1985(3) defendant
10 disfavors” does not suffice to establish class-based animus for section 1985 purposes—
11 “[o]therwise, innumerable tort plaintiffs would be able to assert causes of action under § 1985(3)
12 by simply defining the aggrieved class as those seeking to engage in the activity the defendant has
13 interfered with.” *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 269 (1993)
14 (dismissing claim alleging anti-abortion protesters engaged in conspiracy under section 1985 in
15 part because “persons seeking abortion” did not constitute a class for section 1985 purposes).

16 Plaintiff relies incorrectly on *Life Insurance Co. of North America v. Reichardt*, 591 F.2d
17 499 (9th Cir. 1979), for the proposition that political affiliation can be a suspect or quasi-suspect
18 classification under section 1985. *Reichardt*, an equal protection case filed on behalf of all
19 female purchasers of disability insurance, considered whether sex was a suspect classification. It
20 made no findings regarding political affiliation as a suspect class status beyond citing two cases
21 from outside the Circuit to establish that section 1985 was not limited strictly to race-based
22 classifications. *Id.* 505. Further, as plaintiff himself is the only conservative critic of election
23 processes and outcomes whose speech is identified in the complaint as having been targeted,
24 *Reichardt* is also distinguishable as a putative class action.

25 For these reasons, plaintiff’s claim under section 1985 fails and should be dismissed.

26 **VIII. THE FIVE INDIVIDUAL DEFENDANTS SHOULD BE DISMISSED ON QUALIFIED**
27 **IMMUNITY GROUNDS**

28 Plaintiff’s opposition fails to rebut the State Defendants’ argument that the five defendants

1 named in their personal capacities are entitled to qualified immunity. Acknowledging that he
2 cannot prove a “clearly established” constitutional right by relying on analogous precedent,
3 plaintiff contends instead that analogous authority is not necessary where the alleged
4 constitutional violation “is so beyond the pale and patently absurd that no reasonable person
5 would consider it constitutional.” Opp. 11-12, citing *Villareal v. City of Laredo*, No. 20-40359,
6 2021 WL 5049281 (5th Cir. Nov. 1, 2021), and *Carey v Nevada Gaming Control Bd.*, 279 F.3d
7 873 (9th Cir. 2002). This already-high standard becomes harder still to satisfy when, as here, the
8 alleged constitutional infringement is attributable to the acts of a third party (here, Twitter), rather
9 than a public official. See *Zaloga v. Borough of Moosic*, 841 F.3d 170, 177 (3d Cir. 2016) (“[I]t
10 has never been established that a governmental official who does not himself retaliate but instead
11 pressures another individual to retaliate . . . can be held personally liable”). Under such
12 circumstances, the “defendant’s conduct must be of a particularly virulent character. It is not
13 enough that defendant speaks critically of plaintiff or even that defendant directly urges or
14 influences the third party to take adverse action. Rather, defendant must ‘threaten’ or ‘coerce’ the
15 third party to act.” *McLaughlin v. Watson*, 271 F.3d 566, 573 (3d Cir. 2001) (dismissing First
16 Amendment retaliation claim on qualified immunity grounds). Here, the complaint alleges no
17 such threats or coercion, which sharply distinguishes *Metro Display Advertising Inc. v. City of*
18 *Victorville, et al.*, 143 F.3d 1191 (9th Cir. 1998), in which city councilmembers expressly
19 threatened to terminate a transit operator’s contract if it did not remove pro-union advertisements
20 that the councilmembers acknowledged they could not take down themselves on account of “First
21 Amendment problems.” *Id.* at 1196.

22 Plaintiff’s opposition to qualified immunity rests solely upon the broad supposition that
23 “viewpoint discrimination is so fundamental a constitutional principle that qualified immunity
24 will not protect a government official engaged in it.” But the Supreme Court has “repeatedly told
25 courts . . . not to define clearly established law at a high level of generality” such as this. *Ashcroft*
26 *v. al-Kidd*, 563 U.S. 731, 742 (2011) (“The general proposition, for example, that an unreasonable
27 search or seizure violates the Fourth Amendment is of little help in determining whether the
28 violative nature of particular conduct is clearly established.”). By the same token, plaintiff’s

1 observation that viewpoint discrimination by the government violates the First Amendment sheds
2 no light on whether reporting misleading information about elections to a third-party social media
3 platform clearly establishes a violation of that right.

4 Plaintiff has failed to identify any constitutional infirmity in Elections Code section 10.5, or
5 the State Defendants' implementation of it, that meets this exacting standard. Section 10.5, as it
6 relates to Plaintiff's claims, directs state elections officials to take three actions: (1) to "[a]ssess
7 . . . false or misleading information regarding the electoral process," (2) "mitigate the false or
8 misleading information," and (3) "educate voters, especially new and unregistered voters, with
9 valid information." Cal. Elec. Code § 10.5(c)(8). Reporting false or misleading information to
10 Twitter is not so "patently violative of fundamental constitutional principles," *Carey*, 279 F.3d at
11 881, that a reasonable OEC employee would have understood not to do so—especially when any
12 Twitter user can flag a false or misleading post, and that doing so in no way obligates Twitter to
13 take any further action in response. *See* State Mem. at 7-8, 10-11. Plaintiff's allegations are thus
14 distinct from those in *Villareal v. City of Laredo*, in which a citizen journalist arrested for
15 questioning a police officer about the identity of local victims under the authority of a state law
16 criminalizing the solicitation of non-public information from public employees that had never
17 previously been enforced. 2021 WL 5049281, at *2.

18 Because plaintiff cannot state claims of viewpoint discrimination or First Amendment
19 retaliation—much less violations of "clearly established" constitutional rights—all five State
20 Defendants named in their personal capacities should be dismissed from this action.

21 **IX. PLAINTIFF DOES NOT DISPUTE SECRETARY WEBER'S SOVEREIGN IMMUNITY**
22 **FROM SUIT UNDER THE STATE CONSTITUTION AND ANY CLAIM FOR DAMAGES**

23 Plaintiff's opposition papers do not dispute that the Eleventh Amendment bars his claim
24 under the Free Speech clause of the California constitution, along with any claim for damages,
25 against Secretary Weber. State Mem. 17. Accordingly, these claims should be dismissed.

26 **CONCLUSION**

27 For the foregoing reasons and those in the State Defendants' opening memorandum,
28 plaintiff's complaint should be dismissed without leave to amend.

Dated: December 1, 2021

Respectfully submitted,

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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION**

ROGAN O'HANDLEY,

Plaintiff,

v.

ALEX PADIILLA, in his personal
 capacity; SKDKNICKERBOCKER,
 LLC, a Delaware company; PAULA
 VALLE CASTANON, in her personal
 capacity; JENNA DRESNER, in her
 personal capacity; SAM MAHOOD, in
 his personal capacity; AKILAH
 JONES; in her personal capacity;
 SHIRLEY N. WEBER, in her official
 capacity as California Secretary of
 State; TWITTER, INC., a Delaware
 corporation; NATIONAL
 ASSOCIATION OF SECRETARIES
 OF STATE, a professional nonprofit
 organization,

Defendants.

Case No. 2:21-cv-07063-CRB

**DEFENDANT SKDKNICKERBOCKER'S
 REPLY IN SUPPORT OF MOTION TO
 DISMISS PLAINTIFF'S COMPLAINT**

Date: December 16, 2021
 Time: 10:00 a.m.
 Ctrm: Video Conference Only
 Judge: Honorable Charles R. Breyer

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1 In this case, aggrieved citizen Rogan O’Handley claims that Defendant SKDKnickerbocker
2 (“SKDK”), a private company, violated his constitutional rights when Twitter suspended his
3 account for repeated violations of its internal user policy. The Complaint does not allege that
4 SKDK—a communications company who contracted with the California Office of Election
5 Security to create and administer a voter information campaign, *see* Compl. ¶ 45—controlled,
6 participated in, or even knew about Twitter’s decision. It does not allege that SKDK developed,
7 implemented, or enforced Twitter’s policy. It does not allege that SKDK communicated with
8 Twitter about his Tweets, asked anyone to remove O’Handley’s Tweet or Twitter access, or goaded
9 O’Handley into making any of the five Tweets that ultimately led Twitter to suspend him.

10 Why, then, are we here? Because one morning in November of 2020, SKDK emailed
11 California’s Office of Elections Cybersecurity (“OEC”) a document entitled “Misinformation Daily
12 Briefing: 11/13” that listed articles from *The New York Times*, *Forbes*, CNN, Breitbart, ABC News,
13 NBC 4, The Daily Breeze, Fox News, and Sputnik News, trending internet searches from Quora,
14 several Tweets from various users, and a single Tweet from O’Handley:

15 [@DC_Draino](#) tweeted, "Audit every California ballot Election fraud is rampant nationwide and we all know California is one of the culprits Do it to
16 protect the integrity of that state's elections."

17 Compl. Ex. 6. SKDK listed O’Handley’s Tweet in a single line, as one of 21 separate discussions
18 relating to the subject of election misinformation. *See id*; *see also* Compl. ¶ 74.¹ On this gossamer
19 thread, O’Handley claims that SKDK violated a wide variety of his constitutional and statutory
20 rights, but his claims fail as a matter of law.

21 As a threshold jurisdictional matter, all claims against SKDK should be dismissed for lack
22 of standing. This court lacks Article III jurisdiction for two independent reasons: (1) because
23 O’Handley alleges no cognizable injury-in-fact, and (2) because his alleged injuries resulted from

24 ¹ O’Handley does not respond to or even acknowledge SKDK’s point that he has included
25 a doctored image of SKDK’s email in his Complaint. Mot. 3 n.1 (citing Compl. ¶ 74). Although
26 misleadingly edited to make it appear as if SKDK sent an email with a standalone message about
27 just O’Handley’s Tweet, Exhibit 6 to the Complaint contains the full page and makes clear that
28 O’Handley’s Tweet was just one of 21 items listed, including links to news articles published by
reputable news outlets. *See* Compl. Ex. 6. It was included without comment, other than the generic
heading “California.” *Id.*

1 intervening acts taken by him and independent third parties, which are not fairly traceable to SKDK.
2 His response does not meaningfully engage these arguments or explain why the court has
3 jurisdiction over his claims against SKDK.

4 Even if O’Handley had alleged facts sufficient to establish standing, he fails to plead any
5 cognizable claims against SKDK. Robust constitutional guarantees of free speech, equal protection,
6 and due process were designed to shield citizens against overreach by the government itself, not by
7 private companies. Although O’Handley insists that SKDK’s status as a private contractor renders
8 all subsequent foreseeable aftereffects as state action, courts have repeatedly rejected this argument.
9 Even if he could clear that essential hurdle, the Complaint’s allegations still do not present any
10 deprivation of his free speech, equal protection, or due process rights by SKDK. His civil
11 conspiracy claim fails because his Complaint fails to allege even a single factual allegation that, if
12 true, would support the inference that SKDK had a meeting of the minds with other Defendants to
13 deprive him of his rights. All claims against SKDK should be dismissed.

14 **I. All claims against SKDK should be dismissed for lack of standing.**

15 All claims against SKDK should be dismissed because O’Handley fails to satisfy the injury-
16 in-fact and traceability requirements of Article III standing. To have standing, a plaintiff must show
17 they have “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the
18 defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v.*
19 *Robins*, 578 U.S. 330, 338 (2016). Where there are multiple defendants, a plaintiff must allege
20 Article III standing as to each named defendant, for each claim. *See Wash. Env’t Council v. Bellon*,
21 732 F.3d 1131, 1139 (9th Cir. 2013); *see also Golden Gate Transactional Indep. Serv., Inc. v.*
22 *California*, No. CV18-08093, 2019 WL 4222452, at *7 (C.D. Cal. May 1, 2019). The Complaint’s
23 allegations fail to establish that O’Handley satisfies the injury-in-fact and traceability requirements
24 for his claims against SKDK.

25 **A. The Complaint does not establish that O’Handley was actually injured**
26 **by any specific action by SKDK.**

27 The Complaint fails to allege that O’Handley was actually injured by any of SKDK’s
28 actions. An injury in fact must be “concrete and particularized” and must be established with the

1 “manner and degree of evidence required at the successive stages of the litigation.” *Lujan v. Defs.*
2 *of Wildlife*, 504 U.S. 555, 560-61 (1992). The crux of the Complaint is that O’Handley was injured
3 by Twitter’s decision to remove his Tweets and ultimately suspend his account. Compl. ¶¶ 108,
4 135, 139, 152, 169. The Complaint alleges a variety of injuries resulting from Twitter’s suspension,
5 including loss of income and influence. Compl. ¶¶ 91-94; *see also* Compl. ¶¶ 3, 71, 82, 92-94 (citing
6 loss of his 440,000 Twitter followers). But SKDK is not Twitter. It did not suspend O’Handley’s
7 account. SKDK’s sole act was to send an email to OEC that included one of O’Handley’s Tweets
8 in a list of 21 links to discussions of election information. Compl. ¶¶ 56-58; *see also* Compl. Ex. 6.
9 O’Handley does not fully explain how SKDK’s email caused him a legally actionable injury, nor
10 does he even acknowledge that SKDK has First Amendment rights of its own to communicate with
11 government officials without fear of the civil liability O’Handley now seeks to inflict through this
12 Court. Mot. 5; *see E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38
13 (1961) (recognizing the right of petition falls in the Bill of Rights and noting that “[i]n a
14 representative democracy such as this . . . the whole concept of representation depends upon the
15 ability of the people to make their wishes known to their representatives”).

16 Instead of showing that SKDK caused his ban from Twitter, O’Handley tries to argue
17 instead that SKDK caused him to receive a “strike,” and that the strike itself was somehow a
18 cognizable injury of its own. He now claims that his injury is “not limited to his ultimate removal
19 from Twitter, as the strikes issued against his account also serve to chill protected speech.” Opp’n
20 2 (citing Compl. ¶¶ 56-57, 68, 74). But O’Handley fails to show how a strike chills speech or could,
21 by itself, constitute an Article III injury-in-fact. He further undercuts his own claim by alleging that
22 his number of Twitter followers *increased* after the issuance of his first disciplinary strike. Compl.
23 ¶ 71. He does not explain how his speech could be “chilled” by a strike when the size of his audience
24 actually expanded afterward. If O’Handley wanted to allege that the strike, standing alone and apart
25 from the ban, was a discrete Article III injury of its own, then he should have done that in the
26 Complaint itself—not in an opposition to a motion to dismiss. *See Lee v. City of Los Angeles*, 250
27 F.3d 668, 688 (9th Cir. 2001) (“[W]hen the legal sufficiency of a complaint’s allegations is tested
28 by a motion under Rule 12(b)(6), ‘[r]eview is limited to the complaint.’”).

1 Even if O’Handley had alleged that a single strike chilled his speech, he could not establish
2 that SKDK is liable for the strike. At bottom, the legal injury O’Handley described in the Complaint
3 is Twitter’s suspension of his account, and the Complaint does not and cannot explain how SKDK’s
4 email caused it. O’Handley has failed to allege that SKDK caused him any cognizable injury-in-
5 fact, and his claims against SKDK must be dismissed.

6 **B. The Complaint does not establish that O’Handley’s purported injuries**
7 **are fairly traceable to SKDK.**

8 O’Handley’s claimed injury—his suspension from Twitter—is not fairly traceable to
9 SKDK. Courts have been clear that allegations that “rest on speculation about the decisions of
10 independent actors” do not satisfy the traceability element of standing. *Clapper v. Amnesty Int’l*
11 *USA*, 568 U.S. 398, 414 (2013).

12 According to the Complaint, at least *ten* separate intervening events—by three independent
13 actors other than SKDK, and four actions by O’Handley himself—took place between SKDK’s
14 email and the Twitter suspension:

- 15 1. An unnamed OEC employee flagged the Tweet to Twitter.
- 16 2. Twitter determined that the Tweet violated Twitter’s internal
17 guidelines and issued a first disciplinary strike against
18 O’Handley.
- 19 3. O’Handley published another Tweet that violated Twitter’s
20 policies.
- 21 4. Twitter issued a second disciplinary strike.
- 22 5. O’Handley published another Tweet that violated Twitter’s
23 policies.
- 24 6. Twitter issued a third disciplinary strike.
- 25 7. O’Handley published another Tweet that violated Twitter’s
26 policies.
- 27 8. Twitter issued a fourth disciplinary strike and locked
28 O’Handley’s account for seven days.
9. O’Handley published another Tweet that violated Twitter’s
policies.
10. Twitter suspended O’Handley’s account.

26 O’Handley insists that the attenuated causal link does not matter because the actions were
27 all “reasonably foreseeable” results of SKDK’s email, and thus actionable as a conspiracy. Opp’n
28 2, 5. Even setting aside the fatal deficiencies in the conspiracy claim, *see infra* at 9-10, a plaintiff

cannot use a fact-free conspiracy claim as a glue to attach the actions of others to a defendant. O’Handley alleges five causes of action against SKDK: violations of the First Amendment, Free Speech under the California Constitution, Equal Protection, Due Process, and Conspiracy to Interfere with Civil Rights. Compl. ¶¶ 101-58, 167-76. But “standing is not dispensed in gross.” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). O’Handley must demonstrate standing for each claim he alleges. *Id.* Although a conspiracy claim may “enlarge the pool of responsible defendants by demonstrating their causal connections to the violation,” it does not “enlarge the nature of the claims asserted by the plaintiff.” *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 935 (9th Cir. 2012). O’Handley has no standing to bring his constitutional claims against SKDK because SKDK’s single action—the inclusion of a single Tweet in a briefing to OEC about election misinformation—is too far attenuated from any of his alleged constitutional injuries. *Wash. Env’t Council*, 732 F.3d at 1142 (“The line of causation between the defendant’s action and the plaintiff’s harm must be more than attenuated.”).

O’Handley’s citations to *Barnum*, *Ocean Advocates*, and *Maya* only further undermine his position. *Barnum Timber Co. v. EPA*, 633 F.3d 894, 901 (9th Cir. 2011); *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 860 (9th Cir. 2005); *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011). In *Barnum*, the court made clear that a causal link must be more than “tenuous or abstract” and held that a plaintiff satisfied the traceability requirement only where it “alleged specific facts plausibly explaining causality and supported by competent declarations”—a far cry from the bare allegations here. *Barnum*, 633 F.3d at 899, 901. In *Ocean Advocates*, the court explained that causation “cannot be too speculative” and held traceability satisfied only where the plaintiff had alleged increased risk of environmental harm as a direct result of defendants’ planned construction project. *Ocean Advocates*, 402 F.3d at 860. Finally, *Maya* emphasized that “[i]n cases where a chain of causation ‘involves numerous third parties’ whose ‘independent decisions’ collectively have a ‘significant effect’ on plaintiffs’ injuries, the Supreme Court and this court have found the causal chain too weak to support standing at the pleading stage.” *Maya*, 658 F.3d at 1070 (citing *Allen v. Wright*, 468 U.S. 737, 759 (1984), *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)). Further, when the decisions of third

1 parties are “sufficiently uncertain,” that uncertainty “break[s] the chain of causation between the
2 plaintiffs’ injury and the challenged . . . action.” *Allen*, 468 U.S. at 759. Here, no fewer than ten
3 intervening events and three independent actors stand between SKDK’s email and O’Handley’s
4 Twitter suspension. Because that is not sufficient to satisfy the traceability requirement,
5 O’Handley’s claims against SKDK should be dismissed for lack of Article III jurisdiction. *Maya*,
6 658 F.3d at 1070.

7 **II. All claims against SKDK should be dismissed for failure to state a cognizable**
8 **cause of action.**

9 Even if the Court had jurisdiction over this case, it should still dismiss O’Handley’s claims
10 against SKDK for failure to state a claim. The allegations are unsupported by the facts alleged in
11 the Complaint and unmoored from the law.

12 **A. SKDK’s email cannot be fairly characterized as state action.**

13 O’Handley’s claims under the First and Fourteenth Amendments, Section 1983, and the
14 California Constitution each fail because those provisions do not apply to private actors like SKDK,
15 but only against the government or those acting under color of state law. That SKDK was a state
16 contractor does not help O’Handley, who fails to confront or engage with the cases particularly
17 addressing government contractors.

18 O’Handley ignores the differences between the state action analyses under the First and
19 Fourteenth Amendments and Section 1983 that SKDK pointed out in its motion to dismiss, *see*
20 Mot. 6-10, and collapses the inquiries into the two-step test discussed in *Lugar v. Edmondson Oil*
21 *Co.*, 457 U.S. 922 (1982). Under *Lugar*, a plaintiff must show (1) that “the claimed constitutional
22 deprivation resulted from ‘the exercise of some right or privilege created by the State or by a rule
23 of conduct imposed by the state or by a person for whom the State is responsible,’” and (2) “whether
24 the party charged with the deprivation could be described in all fairness as a state actor.” *Naoko*
25 *Ohno v. Yuko Yasuma*, 723 F.3d 984, 994 (9th Cir. 2013) (citing *Lugar*, 457 U.S. at 937).²

26 ² O’Handley is not correct. *See Collins v. Womancare*, 878 F.2d 1145, 1148 (9th Cir. 1989)
27 (explaining that “Section 1983’s under-color-of-state-law requirement and the fourteenth
28 amendment’s ‘state action’ requirement are closely related” but not the same). As explained in the
Motion, the Complaint does not establish state action under any of the applicable tests. Mot. 6-10.

1 But SKDK is not a state actor under *Lugar* either. O’Handley fails the first half of the *Lugar*
2 test because he does not show that SKDK’s action—flagging his Tweet to OEC as a potential source
3 of election misinformation—is traceable to a right, privilege, or rule of conduct imposed by a
4 government official. O’Handley fixates on the fact that SKDK provided daily briefings in
5 accordance with a contract with OEC, and argues that the contract transformed SKDK’s email into
6 governmental action. Opp’n 2-3. But the Supreme Court has emphasized that private acts “do not
7 become acts of the government by reason of their significant or even total engagement in
8 performing public contracts.” *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982).

9 O’Handley does not respond to or engage with *Rendell-Baker*, which is highly relevant to
10 this case. In *Rendell-Baker*, a private high school received funds from the state and, in turn, was
11 obligated to comply with a variety of regulatory and contractual requirements. *Id.* at 841. Several
12 teachers alleged that their constitutional rights were violated by wrongful terminations and
13 theorized that the contractual and monetary relationship transformed the school’s personnel
14 decisions into state action. *Id.* at 834. The Court disagreed and dismissed the case, observing that
15 although many aspects of school governance were governed by the state, the specific decisions to
16 discharge the teachers were not “compelled or even influenced by any state regulation.” *Id.* at 841.
17 So too here. O’Handley does not argue that the briefing itself somehow deprived him of rights; he
18 claims that it was SKDK’s specific choice to include his Tweet in that briefing that purportedly
19 deprived him of his rights. Compl. ¶ 74. The Complaint does not allege that OEC coerced,
20 encouraged, or required SKDK to include O’Handley’s Tweet, or any other specific content. Like
21 the personnel decisions in *Rendell-Baker*, SKDK’s specific complained-of action was “not
22 compelled or even influenced by any state regulation,” and so no state action is present. 457 U.S.
23 at 840; *see also Blum v. Yaretsky*, 457 U.S. 991, 1008 (1982) (holding that, although the state
24 required a nursing home to perform periodic medical assessments, the assessments themselves did
25 not constitute state action because they “ultimately turn[ed] on medical judgments made by private
26 parties according to professional standards that are not established by the State”).

27 Although that ends the inquiry, O’Handley also fails the second prong of the *Lugar* test.
28 The Supreme Court has articulated four tests for determining whether a private actor can be fairly

1 characterized as a state actor: “(1) the public function test; (2) the joint action test; (3) the state
2 compulsion test; and (4) the governmental nexus test.” *Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir.
3 2002). O’Handley argues that his conspiracy claim satisfies the joint action and nexus tests, but his
4 allegations do not come close to meeting the bar. Those tests require “a sufficiently close nexus
5 between the state and the private actor so that the action of the latter may be fairly treated as that
6 of the State itself,” or such a close level of government “interdependence with the private party” to
7 the point where it is “a joint participant in the enterprise.” *Rawson v. Recovery Innovations, Inc.*,
8 975 F.3d 742, 748 (9th Cir. 2020), *cert. denied*, No. 20-1287, 2021 WL 4507633 (U.S. Oct. 4,
9 2021). Specifically, that “require[s] a substantial degree of cooperation,” *Franklin*, 312 F.3d at 445,
10 with respect to the “particular decision challenged,” *Mathis v. Pacific Gas & Electric Co.*, 75 F.3d
11 498, 503-504 n.4 (9th Cir. 1996). O’Handley never alleges that any government official had
12 anything to do with SKDK’s decision to include O’Handley’s Tweet in its briefing, let alone that
13 any official substantially cooperated in that choice. Besides O’Handley’s conclusory statements,
14 which this Court need not consider, not a single alleged fact demonstrates that SKDK and
15 government actors specifically agreed to “violate constitutional rights.” *Fonda v. Gray*, 707 F.2d
16 435, 438 (9th Cir. 1983). Because the Complaint fails to plausibly allege that SKDK’s email was
17 an action of the State of California, O’Handley’s claims must be dismissed.

18 **B. The Complaint does not establish facts that, if true, would support the**
19 **remaining claims.**

20 For the plaintiff to survive a motion to dismiss, the complaint must contain “enough facts
21 to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
22 (2007). “Plausibility” requires more than a “sheer possibility that a defendant has acted
23 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). Moreover, conclusory allegations “do
24 not suffice.” *Id.* at 678. O’Handley fails to meet that standard here.

25 **Conspiracy.** O’Handley has no credible theory that SKDK’s email directly inflicted legally
26 actionable harm on him. Instead, his theory of SKDK’s liability hinges entirely on his conspiracy
27 claim. Under O’Handley’s theory, SKDK’s email *indirectly* harmed him by forming the first
28 domino in a chain of events that led to his ultimate legal injury—his eventual suspension from

1 Twitter. He presents conclusory allegations that SKDK, OEC, NASS, various members of the
2 California government, and Twitter intentionally orchestrated these events to silence him. Compl.
3 ¶¶ 3, 69, 98-99; *see also* Opp’n 2, 4.

4 But these allegations do not present a valid conspiracy claim. To state a conspiracy claim
5 under Section 1985, “a complaint must allege (1) a conspiracy, (2) to deprive any person or a class
6 of persons of the equal protection of the laws, or of equal privileges and immunities under the laws,
7 (3) an act by one of the conspirators in furtherance of the conspiracy, and (4) a personal injury,
8 property damage or a deprivation of any right or privilege of a citizen of the United States.”
9 *Gillespie v. Civiletti*, 629 F.2d 637, 641 (9th Cir. 1980) (citing *Griffin v. Breckenridge*, 403 U.S. 88,
10 102-03 (1971)). To be liable for conspiracy, each participant “must at least share the common
11 objective of the conspiracy.” *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539,
12 1540–41 (9th Cir. 1989) (en banc). “A mere allegation of a conspiracy without factual specificity
13 is insufficient.” *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1039 (9th Cir. 1991).

14 O’Handley’s Complaint and response are heavy on rhetoric and light on facts; his actual
15 allegations about SKDK’s participation in that purported conspiracy are conclusory and do not meet
16 minimum pleading standards. He claims that he “was injured by the foreseeable consequences of
17 the Defendants’ conspiracy, whose objectives SKDK both agreed to and contributed overt acts
18 towards.” Opp’n 2. He cites paragraphs 56, 57, 68, and 74 of his complaint, but those paragraphs
19 offer no facts showing the existence of a conspiracy or an agreement to its supposed objectives. *See*
20 Compl. ¶¶ 56 (failing to allege that SKDK shared a common objective with other Defendants to
21 intentionally deprive anyone of their constitutional rights), ¶ 57 (same), ¶ 58 (same), ¶ 59 (same).
22 Further, the single alleged “overt act” by SKDK—emailing the briefing to OEC—involved no other
23 Defendants and did not even include a request that O’Handley’s Tweet be removed. *See* Compl.
24 Ex. 6. Without any non-conclusory allegations that SKDK had a meeting of the minds with the
25 other Defendants with the shared goal of depriving him of his constitutional rights, O’Handley has
26 failed to plead a conspiracy under Section 1985.

27 O’Handley’s conspiracy claim also fails for a separate, independent reason: SKDK’s email
28 violated none of O’Handley’s substantive rights, and thus cannot be a basis for a conspiracy claim.

Infra at 10-12. “Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates.” *Great Am. Fed. S & L Ass’n v. Novotny*, 442 U.S. 366, 372 (1979). Thus, if a plaintiff’s “allegations are insufficient to support a claim based on a violation of his constitutional rights,” then “his allegations of a conspiracy to violate these constitutional rights do not state a claim.” *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517, 523-24 (9th Cir. 1994). Because O’Handley does not adequately plead that SKDK’s email inflicted constitutional harm on him, *infra* at 10-12, his conspiracy claim likewise fails.

Freedom of Speech. O’Handley’s argument for liability under the federal and state free speech guarantees also fails. Consistent with federal interpretations, California courts have emphasized that “[a] person’s free speech rights under the federal and state constitutions are not infringed unless there is state action.” *Yu v. Univ. of La Verne*, 196 Cal. App. 4th 779, 790 (2011); *see also Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 26 Cal. 4th 1013, 1031 (2001) (plurality op.) (“Neither the text of California’s free speech clause nor California case law reveals an intent to depart from the bedrock principle” of requiring state action) (cleaned up). But SKDK is not a state actor. *Supra* at 6-8.³

Moreover, the Complaint fails to establish that SKDK’s email did—or even plausibly *could*—violate his federal or state speech rights. O’Handley passionately, if wrongly, argues why *Twitter* should be considered a state actor and why *Twitter* purportedly violated his speech rights. Opp’n 8. But he fails convincingly to argue why *SKDK* violated those rights. Here, again, he leans on his conspiracy claim, arguing that the deprivation of rights was a “reasonably foreseeable result of the conspiracy” and thus SKDK is liable for *Twitter*’s actions. *Id.* His speech claim thus rises and falls on his conspiracy claim. Because his conspiracy claim fails, *infra* at 9-10, his speech claim fails, too.

³ O’Handley disputes the state-action requirement by relying on a case that pre-dates the holding in *Golden Gateway*. *See* ECF No. 69 at 13 n.6 (citing *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 492 (2000)). He does not mention *Yu* at all, or explain why the California Supreme Court would have denied review if it felt that the Court of Appeals had wrongly interpreted California law on such a profoundly important constitutional question. *See Yu*, 196 Cal. App. 4th at 790 (citing *Golden Gateway* for proposition that state action is required) (review denied Sept. 14, 2011).

As further explained in the Motion, government can constitutionally characterize speech, even with unfavorable labels, as long as it does not burden or silence the speech. *See* Mot. 11 (citing *Meese v. Keene*, 481 U.S. 465, 478, 480 (1987)). Without any allegation that SKDK actually prohibited, chilled, burdened, penalized, or silenced any speech on behalf of the State, O’Handley’s free speech claim must be dismissed.

Equal Protection. The Equal Protection Clause forbids the government from “deny[ing] to any person within its jurisdiction the equal protection of the laws.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Setting aside the fact that SKDK is not the government, O’Handley’s claim fails because he does not allege that he is a member of an identifiable group that was treated differently or intentionally discriminated against—nor that the treatment lacked a rational basis. *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).

Although O’Handley’s Complaint appears to plead a “class-of-one” equal protection claim, Mot. 12-13, his response again resorts to a post-hoc re-write of the Complaint. He now asserts that the Complaint “alleges that SKDK conspired to deprive him of his constitutional rights based on his conservative political affiliation.” Opp’n 13. But O’Handley alleged in the Complaint that he suffered discrimination “based on his viewpoint.” Compl. ¶ 142. He fails to say how this places him within a federally protected class or even a readily identifiable group, and this failure puts him at odds with binding precedent. *See United Bhd. of Carpenters & Joiners of Am. v. Scott*, 463 U.S. 825, 834-36 (1983) (noting that political, non-racial conspiracies are likely not actionable); *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985) (holding that an alleged class did not suffice where there was no “governmental determination that such a class merits special protection”). O’Handley’s Complaint falls far short of his obligation to show that SKDK specifically and intentionally discriminated against him or any federally protected class, let alone that SKDK did so under the guise of the government. *Barren*, 152 F.3d at 1194. And even setting aside those critical failures, SKDK’s action would still pass constitutional muster because the email was sent in furtherance of a rational, even compelling, state interest: ensuring the integrity of the state’s elections. Compl. ¶ 64 (noting that OEC’s goal was “to increase voter awareness about election misinformation online and provide official, trusted election resources”); *Burson v. Freeman*, 504

1 U.S. 191, 199 (1992) (recognizing a state’s interest in protecting the integrity of elections). This
2 claim should be dismissed.

3 **Procedural Due Process.** O’Handley’s due process claim fails because a Twitter account
4 is not a constitutionally protected property interest. *See* Compl. ¶¶ 150-51. His arguments to the
5 contrary have been repeatedly rejected, including by this very circuit. *See, e.g., WMX Techs., Inc.*
6 *v. Miller*, 197 F.3d 367, 376 (9th Cir. 1999). Even if a Twitter account could serve as a property
7 interest for procedural due process purposes, O’Handley still cannot establish that SKDK was
8 responsible for his Twitter suspension given that ten intervening actions by independent actors—
9 including four actions taken by O’Handley himself—led to that suspension. *Supra* at 4-6. His claim
10 fails and must be dismissed.

11 **CONCLUSION**

12 For the reasons stated above, the Court should dismiss all claims against SKDK.
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1 Dated: December 1, 2021

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

REPLY OF DEFENDANT NATIONAL ASSOC. OF
SECRETARIES OF STATE IN SUPPORT OF ITS
MOTION TO DISMISS

CASE NO. 3:21-cv-07063-CRB
ER-167

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I. INTRODUCTION

National Association of Secretaries of State’s motion to dismiss explained why this case should be dismissed on both jurisdictional and substantive grounds. Plaintiff’s opposition fails to rebut the explanations and authorities given. This Court should dismiss.

NASS is not subject to the jurisdiction of this Court. Plaintiff’s opposition does not address, and thereby concedes, the lack of general jurisdiction. Plaintiff’s opposition argues there is specific jurisdiction on “purposeful availment” grounds, but he does not allege facts sufficient to establish such availment – much less present any evidence controverting NASS’s declaration establishing a lack of California contacts. NASS is not a California resident, and the purposeful availment requirement severely restricts jurisdiction over nonresidents. Contrary to Plaintiff’s arguments, sending emails to California does not establish purposeful availment or California jurisdiction. Plaintiff argues that jurisdiction is proper because his claim involves social media, and “the location of virtually all social media platforms, including Twitter, is in California.” (Docket No. 67, p. 5:11.) Under Plaintiff’s theory, California has jurisdiction over anything that has to do with social media. That untenable proposition is supported by no case or other authority.

Even if there were personal jurisdiction, NASS cannot be liable for allegedly violating Plaintiff’s Constitutional rights because NASS is a private actor, not a state actor. Plaintiff tries to establish a conspiracy or joint action primarily by putting some interesting spins on his own allegations, arguing they say things they do not. No matter the spin, the fact remains that all NASS allegedly did was pass along, via an email to its members, information about a portal for reporting election mis/disinformation to Twitter. NASS did not create the portal. NASS is not even copied on any the reports regarding Plaintiff’s speech set forth in the complaint. One email from a private entity copying and pasting information about a reporting portal

1 sent at the request of another private entity is insufficient to establish state action or
2 a conspiracy to violate Plaintiff's Constitutional rights.

3 **II. FACTS AS THEY ARE PLED, AND NOT AS REINVENTED**

4 Plaintiff's opposition attempts to change the facts alleged in the complaint
5 conveniently in his favor. Despite the fact that his complaint states otherwise, as do
6 his oppositions to the other defendants' motions to dismiss, Plaintiff now claims (and
7 only in his opposition to NASS's motion to dismiss) that NASS worked with or
8 coordinated with Twitter to "create" a "Partner Support Portal." (Docket No. 67, pp.
9 1:4-5, 2:6-7, 6:11, 9:10-11.) The complaint and its attached exhibits, however, make
10 it clear that NASS played **no role** in creating the portal. Instead, they show that
11 NASS passed on the portal information to its members as requested by Twitter.

12 While Plaintiff needs to make it appear as if NASS played a role in creating
13 the portal to salvage his case against NASS, this need, however, great, simply cannot
14 make the facts or his allegations into something they are not. Plaintiff needs to show
15 that NASS somehow engaged with Twitter, a California based company, to create
16 the portal at issue to convince this Court it has specific jurisdiction over NASS where
17 none exists. Creating facts to try to dispute the motion is improper.

18 The complaint alleges that "Twitter asked NASS to let its members know **it**
19 **[Twitter] created** a separate dedicated way for election officials to 'flag concerns
20 directly to Twitter'." (Docket No. 2, ¶ 28 (emphasis added).) Exhibit 2 attached to
21 the complaint contains the following statement in the email from NASS: "Twitter
22 also asked me to let you guys know a couple of items...copy/pasted below:...(2) We
23 [Twitter] are onboarding state and local election officials onto Twitter's Partner
24 Support Portal..." (Docket No. 2, Ex. 2.)

25 Plaintiff asserts the same in his opposition to Twitter's motion to dismiss,
26 claiming that "Twitter established the "Partner Support Portal" and created "direct
27 channels of communication" for the OEC to report speech it deemed

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1 “misinformation.”¹ (Docket No. 69, pp. 1:25-26 and 5:9-10.) Further, in his
2 opposition to the State Defendants’ motion to dismiss, Plaintiff states that “[b]y
3 using a dedicated portal Twitter created....” (Docket No. 68, p. 3:10-11.)

4 Try as he might, Plaintiff will never be able to establish that any defendant
5 other than Twitter created that portal. Twitter’s own motion to dismiss makes clear
6 that Twitter created the portal. (Docket No. 60, p. 3:5-6.) Therefore, Plaintiff’s
7 attempt to deem NASS a “co-creator” is disingenuous at best. NASS **did not** create
8 the Twitter portal but at most allegedly merely passed on information about the
9 portal to its members. NASS was not privy to any of the communications on the
10 portal. NASS played no role in determining what was reported via the portal. There
11 is no allegation that any of NASS’s members in California actually used these portals
12 to report issues with Plaintiff’s political speech. NASS is not even copied on any the
13 reports or emails regarding Plaintiff’s speech set forth in the complaint.

14 Plaintiff’s claims arise from the alleged suppression of speech by others.
15 NASS had no control over what was done once it members utilized the portal
16 provided in the email. NASS could not foresee that simply sending such an email
17 would result in the “unilateral activity” of others, which in turn resulted in Plaintiff’s
18 alleged injuries.

19 **III. PLAINTIFF FAILED TO SHOW HOW THIS COURT HAS**
20 **PERSONAL JURISDICTION OVER NASS.**

21 Plaintiff concedes that this Court does not have general jurisdiction over
22 NASS by not even addressing the issue in his opposition. Plaintiff instead focuses
23 his arguments on specific personal jurisdiction. Plaintiff’s opposition makes clear,
24

25 ¹ Inconsistently with what he argues against NASS, Plaintiff spends an entire
26 section in his opposition to Twitter’s motion to dismiss claiming that Twitter
27 partnered with the OEC to create the Partner Support Portal. (Docket No. 69, pp. 3-
5.)

1 however, that he is incapable of carrying his burden of establishing specific
2 jurisdiction in this Court.

3 Plaintiff relies heavily on *Mavrix Photo, Inc. v. Brand Technologies, Inc.*
4 647 F.3d 1218 (9th Cir. 2011), but that decision is readily distinguishable. There,
5 Mavrix Photo, a Florida company with California ties, filed a lawsuit in the Central
6 District of California against Brand Tech, an Ohio corporation, for copyright
7 infringement. Brand allegedly posted celebrity photos taken by Mavrix on Brand's
8 website without Mavrix's permission. *Id.* at 1223. Brand moved to dismiss for lack
9 of personal jurisdiction. The district court denied Mavrix's request for leave to
10 conduct jurisdictional discovery and granted the motion to dismiss.

11 The Ninth Circuit reversed, because Brand's numerous ties to California were
12 sufficient to establish specific jurisdiction. *Id.* at 1227-1228. Those California ties
13 included the fact that Brand makes money from third-party advertisements for jobs,
14 hotels, and vacations in California. Brand's website also featured a "Ticket Center,"
15 which linked to the website of a third-party vendor that sells tickets to nationwide
16 events including events in California. Brand had agreements with several California
17 businesses including a California internet advertising agency and a California
18 wireless provider who designs and hosts on its servers a version of celebrity-
19 gossip.net accessible to mobile phone users. Also, a California firm designed
20 Brand's website and performed site maintenance. Further, Brand entered into a
21 "link-sharing" agreement with a California-based national news site. Thus, even
22 though Brand had no offices, real property, or staff in California, and was not
23 licensed to do business in California, and paid no California taxes, its ties to
24 California were numerous. *Id.* at 1222, 1227.

25 Nothing comparable is alleged as to NASS, much less in evidence.

26 Plaintiff and *Mavrix Photo* cite *Calder v. Jones*, 465 U.S. 783 (1984), which
27 requires that the defendant must have (1) committed an intentional act, (2) expressly

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1 aimed at the forum state, (3) causing harm that the defendant knows is likely to be
2 suffered in the forum state. *Id.* at 1228. However, courts have been warned not to
3 focus too narrowly on this third “effects” prong.

4 Subsequent cases have struggled somewhat with *Calder*'s import, recognizing
5 that the case cannot stand for the broad proposition that a foreign act with
6 foreseeable effects in the forum state will always give rise to specific
7 jurisdiction. We have said that there must be “something more”.... We now
8 conclude that “something more” is what the Supreme Court described as
9 “express aiming” at the forum state.”
10 *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1156 (9th Cir. 2006)

11 There was no issue with the first prong of the test in *Mavrix*; rather the focus
12 was on the second and third prongs. As regards the second prong, the Court of
13 Appeals found that Brand used *Mavrix*'s copyrighted photos as “part of its
14 exploitation of the California market for its own commercial gain.” *Mavrix Photo*,
15 *supra*, 647 F.3d at 1229. The court noted that “Brand makes money by selling
16 advertising space on its website to third-party advertisers: the more visitors there are
17 to the site, the more hits that are made on the advertisements; the more hits that are
18 made on the advertisements, the more money that is paid by the advertisers to Brand.
19 A substantial number of hits to Brand's website came from California residents.” *Id.*
20 at 1230. In sum, Brand operated a popular website “with a specific focus on
21 California.” *Id.* The economic loss suffered by *Mavrix* in California was foreseeable
22 because a significant numbers of Californians would have bought the magazines
23 where *Mavrix*'s photos would have been featured just to see the photos. Instead, they
24 saw them on Brand's website, thereby destroying the California-based value. *Id.* at
25 1231-1232.

26 Plaintiff's reliance on *Mavrix* is insufficient to establish jurisdiction over
27 NASS here. The facts are not even remotely similar. The business at issue in *Mavrix*
28 is not at all the type of “business” conducted by NASS. NASS is a non-profit,
nonpartisan professional organization for public officials. It serves as a medium for

the exchange of information between states and fosters cooperation in the development of public policy. It does not solicit business or operate a website where hits are important. Thus, Plaintiff's reliance on website cases is unavailing.

More like this are cases involving membership companies such as NASS. For example, in *Szabo v. Med. Info. Bureau*, 127 Cal.App.3d 51 (1981), the plaintiff brought suit in California against MIB, Inc. (formerly known as Medical Information Bureau), and several life insurance companies under the Federal Fair Credit Reporting Act. MIB, a non-profit membership corporation made up of approximately 750 life insurance companies, was formed to arrange for the interchange of information between members. MIB's principal office was located in Boston, Massachusetts, so MIB brought a motion to quash service of process. The evidence introduced by plaintiff in opposition to the motion was an affidavit by one of plaintiff's attorneys to the effect that ten years ago he worked for a consulting firm which designed computer programs for several California insurance companies, and, in the course of that employment, he learned that California life insurance companies were using information obtained from MIB as a basis for denying or rating insurance. The trial court found this insufficient to establish jurisdiction and granted the motion to quash. *Id.* at 53.

The California Court of Appeal affirmed because "the only contact [MIB] has with California arises from the fact that its members are life insurance companies located throughout the country, including California." *Id.* at 54.

From the evidence before the trial court it appears that MIB did not have sufficient contacts with California such as to comply with the due process requirements of fair play and substantial justice. The contacts it has are all collateral, to wit, the fact that it has as members, insurance companies which do business in the state. These member insurance companies can be compared to the existence of Volkswagen repair centers throughout the country, which was rejected as a basis for jurisdiction in *World-Wide Volkswagen Corp. v. Woodson*.

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1
2 *Id.* at 55.

3 *Szabo* cited multiple cases from around the country that reached the same
4 result.

5 In *Midwest Fur Producers Ass'n v. Mutation Mink B. Ass'n.*, 102 F.Supp. 649
6 (D.Minn.1951), a trade association headquartered in Wisconsin was not
7 amenable to suit in Minnesota even though members were located in
8 Minnesota and the Association's activities benefited members in Minnesota.
9 In *Elizabeth Hospital, Inc. v. Richardson*, 167 F.Supp. 155, aff'd 269 F.2d 167
10 (8th Cir. 1958), cert. denied, 361 U.S. 884, [] (1959), a national medical
11 association headquartered in Illinois was held not amenable to suit in
12 Arkansas even though it had a local member association in that state. In
13 *People v. Brotherhood of Painters, Etc.* (1916) 218 N.Y. 115, 112 N.E. 752,
14 it was held that an international union organized as an unincorporated
15 association and headquartered in Indiana was not amenable to suit in New
16 York even though a local union which was a member of the international
17 union was located in New York.

18 *Id.* at 54-55.

19 Thus, while Plaintiff can cite to all the internet-based cases he likes, the fact
20 remains that they are inapplicable to NASS. NASS did not use the internet to solicit
21 business in California or directly from Plaintiff from a website. NASS simply sent
22 an email to its membership with a message from Twitter that contained a portal for
23 reporting election mis/disinformation.

24 Plaintiff gets closer to the proper argument when he cites *Amazon.Com, Inc.*
25 *v. National Association of College Stores, Inc.*, 826 F.Supp.2d 1242 (W.D. Wash.
26 2011.) Closer, but no cigar: there are glaring differences with this case. Washington-
27 based Amazon brought action against not-for-profit trade association National
28 Assoc. of College Stores ("NACS"), representing the campus retailing industry,
seeking a declaration that Amazon's use of certain textbook advertising claims did
not violate the Lanham Act as NACS claimed in its letters to Amazon. NACS moved
to dismiss for lack of subject matter jurisdiction and lack of personal jurisdiction.

-11-

REPLY OF DEFENDANT NATIONAL ASSOC. OF
SECRETARIES OF STATE IN SUPPORT OF ITS
MOTION TO DISMISS

CASE NO. 3:21-cv-07063-CRB
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1 The district court denied the motion. (*Id.* at 1246-1248.)

2 The *Amazon* court found that the Washington had specific jurisdiction based
3 on NACS’s actions, which included sending letters to Amazon and initiating a
4 challenge against Amazon’s advertising claims before the National Advertising
5 Division of the Council of Better Business Bureaus (“NAD”).

6 [U]nder the *Calder* effects test, NACS’s actions relate to Washington because
7 (1) NACS acted intentionally when it initiated its challenge to Amazon’s
8 advertising claims in the NAD (2) NACS expressly aimed its actions at
9 Washington by individually targeting Amazon, the Washington-based
10 plaintiff; and (3) the effects of NACS’s challenge to Amazon’s continuing use
11 of its advertising claims are primarily felt in Washington, where Amazon is
12 headquartered. [] Second, the lawsuit arises from NACS’s forum-related
activities because, but for NACS’s initiation of the NAD proceeding, Amazon
would have had no need for a judicial declaration of its right to continue to
use its advertising claims.

13 *Id.* at 1255.

14 NASS’s actions are nothing like those of NACS in *Amazon*. NASS did not
15 initiate any type of proceeding against a California entity or Plaintiff, thereby
16 causing Plaintiff’s injuries in California. NASS did not “target” anyone, much less
17 Plaintiff. NASS sent an email with information about a portal created by Twitter to
18 its members at Twitter’s request. California was not targeted. NASS simply sent an
19 email to all of its 48 Secretary of State members and nothing more. Such “contact”
20 is insufficient to establish specific jurisdiction over NASS in this Court.

21 **IV. NASS CANNOT BE HELD LIABLE FOR ANY OF**
22 **PLAINTIFF’S ALLEGED INJURIES BECAUSE NASS DID**
23 **NOT CONSPIRE TO CAUSE PLAINTIFF HARM, AND NASS**
WAS NOT A STATE ACTOR.

24 Plaintiff’s contention that NASS does not take issue with the alleged first
25 prong of a ‘two-prong test’ in *Lugar v. Edmondson Oil Co., Inc.* (1982) 457 U.S.
26 922, is incorrect. *Lugar* described a two-part “*approach*” to the question of whether
27 the conduct allegedly causing the deprivation of a federal right may be fairly

1 attributable to the State:

2 First, the deprivation must be caused by the exercise of some right or privilege
3 created by the State or by a rule of conduct imposed by the state or by a person
4 for whom the State is responsible....Second, the party charged with the
5 deprivation must be a person who may fairly be said to be a state actor. This
6 may be because he is a state official, because he has acted together with or has
7 obtained significant aid from state officials, or because his conduct is
8 otherwise chargeable to the State. Without a limit such as this, private parties
9 could face constitutional litigation whenever they seek to rely on some state
10 rule governing their interactions with the community surrounding them.

11 Although related, these two principles are not the same. They collapse into
12 each other when the claim of a constitutional deprivation is directed against a
13 party whose official character is such as to lend the weight of the State to his
14 decisions. (Citation omitted). The two principles diverge when the
15 constitutional claim is directed against a party without such apparent
16 authority, i.e., against a private party.

17 *Id.* at 937.

18 Where the second part of the approach is not met, there can be no
19 constitutional violation or “deprivation [] caused by the exercise of some right or
20 privilege created by the State or by a rule of conduct imposed by the state or by a
21 person for whom the State is responsible.” *Id.* at 922, 937. Plaintiff’s contention in
22 his opposition that “NASS does not contest that Mr. O’Handley has met his burden
23 under prong one” (Docket No. 67, p. 8:8) is therefore incorrect. Because Plaintiff
24 cannot establish that NASS was a state actor, his complaint fails to state any valid
25 claims against NASS under either the federal or California constitutions.

26 **A. NASS has not willfully engaged in any conspiracy to violate
27 Plaintiff’s Constitutional rights.**

28 Plaintiff incorrectly argues that the pleadings “plausibly allege that NASS
conspired with Defendants to deprive individuals of their constitutional rights.”
(Docket No. 67, p. 8:26-27.) (Notably, Plaintiff does not contend NASS conspired
to deprive *him* of *his* Constitutional rights.) In support of this bold and incorrect

statement, Plaintiff cites to paragraph 99 of his complaint, but it reads as follows:

Upon information and belief, discovery will show Twitter's stated reasons for suspending Mr. O'Handley were pretextual. Twitter's real reasons for suspending Mr. O'Handley do not stem from a violation of Twitter's terms of service, but from the content of his speech raising concerns about election administration and integrity, specifically concerns related to the work of then-California Secretary of State Alex Padilla. The trigger for Twitter's censorship of Mr. O'Handley was its coordination and conspiracy with other Defendants to silence the protected speech of many Americans.

Paragraph 99 contains (1) facts against other defendants and (2) a legal conclusion at the end. By citing to this paragraph for support, Plaintiff seems to be saying “because I said the defendants conspired, it must be so, the court has to accept the allegations as true.” This ignores the familiar and well-established precept that a court does not accept as true legal conclusions couched as factual allegations. “While we do accept all of the factual allegations in the complaint as true, [] we do not accept legal conclusions in the complaint as true, even if ‘cast in the form of factual allegations.’” *Lacano Invs., LLC v. Balash*, 765 F.3d 1068, 1071 (9th Cir. 2014) (citation omitted). Plaintiff’s conclusory complaint is bereft of truly factual allegations sufficient to establish a conspiracy.

Likewise, Plaintiff directs this Court to Exhibit 2 attached to his complaint in support of his conspiracy claim, but the exhibit is to the contrary. In that exhibit, NASS passed along the portal information to all of its members as requested by Twitter. NASS makes no directives about the portal and in fact tells its members that they are free to use the CIS (“Center for Internet Security) tool instead. “Up to you!” (Docket No. 2, Ex. 2.) That is a far cry from any coordination or conspiracy, or from a meeting of the minds with Twitter or anyone else that all reporting must be done through the Twitter portal, or that Plaintiff’s speech be squelched.

As in his jurisdictional arguments, Plaintiff “spins” the facts alleged in his

complaint to try to show conspiracy. His opposition contends that “NASS gave California’s OEC guidance regarding how to report mis-disinformation directly to social media companies such as Twitter.” (Docket No. 67, p. 9:15-16.) Plaintiff cites to paragraph 31 of his complaint in support of this contention, but it states instead:

NASS wanted election officials to have NASS’s email guidance regarding how to report “mis/disinformation” directly to social media companies “handy” directly prior to election day as election officials “prepare[d] for battle.” A true and correct copy of Maria Benson’s November 2, 2020, email, as obtained through a public record request, is attached to this complaint as Exhibit 4. (Docket No. 1, p. 8:18-22.)

As pointed out in NASS’s motion, nowhere does Exhibit 4 reference election officials getting “prepared for battle.” Also, this paragraph makes no reference to the OEC, much less to NASS giving the OEC guidance on making reports about election mis/disinformation. The spin Plaintiff puts on his own factual allegations is enough to make one dizzy.

Regardless of the spin, the alleged facts are simply that NASS sent an email with Twitter’s portal information to all of its members, one of which is the California Secretary of State. NASS was not a “willful participant in joint action with the State or its agents.” *Dennis v. Sparks*, 449 U.S. 24, 27 (1980).² NASS is alleged to have passed on information about Twitter’s portal, and nothing more. NASS’s actions, as evidenced in the exhibits attached to Plaintiff’s complaint, simply do not demonstrate the necessary animus to rise to the level of a conspiracy or anything

² Plaintiff quotes *Dennis* as stating a conspiracy exists when a defendant was a “willful participant” in “an agreement or meeting of the minds to violate constitutional rights.” (Docket No. 67, p. 8:14-16.) The second part of that quotation is not from *Dennis*. NASS nevertheless agrees that it is a necessary part of conspiracy.

1 other than passing along information that could be useful to its members who work
2 in the election field.

3 **B. NASS is not a joint actor with the State.**

4 The only test pursuant to which Plaintiff deems NASS a “state actor” is the
5 joint action test. Plaintiff argues that NASS “affirmed, authorized, encouraged and
6 facilitated the plan to have Secretaries of State and the OEC, report disfavored tweets
7 directly to social media.” (Docket No. 67, p. 10:19-20.) Putting aside the legal
8 conclusions and rhetoric, where are the actual facts that establish that NASS
9 encouraged any person or entity to report “disfavored tweets?” What are “disfavored
10 tweets?” The alleged actions of NASS are actually very simple. Regardless of the
11 nefarious adjectives and adverbs Plaintiff uses to characterize it, the only relevant
12 fact is that NASS sent its members, including the California Secretary of State, an
13 email with a portal created by Twitter, a private entity, for reporting election
14 mis/disinformation pursuant to a request from Twitter. That’s it. That’s all she wrote.

15 Plaintiff attempts to argue that NASS’s actions are distinguishable from those
16 in *Polk v. Yee*, 481 F. Supp. 3d 1060, 1066 (E.D. Cal. 2020) because they were more
17 than an “administrative action” but that is exactly what the email NASS sent was,
18 and it was sent on behalf of a **private entity**, to wit Twitter. NASS is a non-profit,
19 nonpartisan professional organization for secretaries of state that serves as a medium
20 for the exchange of information, including regarding elections. (Reynolds Dec. ¶¶ 3
21 and 6.) Elections are under the authority of the secretary of state in many states.
22 Sending emails to its members about how to report election mis/disinformation is
23 part of the administrative tasks NASS’s members expect it to perform.

24 In trying to distinguish NASS’s actions from those of the union in *Polk*,
25 Plaintiff once again cites to legal conclusions he somehow believes become facts
26 simply because they are alleged. Plaintiff claims “[f]or the same reason that NASS
27 and OEC “conspired” with OEC [sic] and Twitter, they were also “interdependent,”

28 -16-

REPLY OF DEFENDANT NATIONAL ASSOC. OF
SECRETARIES OF STATE IN SUPPORT OF ITS
MOTION TO DISMISS

CASE NO. 3:21-cv-07063-CRB
ER-182

1 “deeply intertwined,” and “jointly responsible for O’Handley’s constitutional
2 injuries.” (Docket No. 67, p. 9:29-10:2.) Nefarious non-factual adjectives are no
3 substitute for facts. The reason Plaintiffs does not allege any actual facts establishing
4 joint action between the state and NASS is because there are none.

5 **V. CALIFORNIA’S LIBERTY OF SPEECH CLAUSE CAN ONLY**
6 **BE VIOLATED BY A STATE ACTOR, NOT A PRIVATE**
7 **ENTITY LIKE NASS.**

8 Plaintiff wrongly contends *Golden Gateway Center v. Golden Gateway*
9 *Tenants Assn*, 26 Cal.4th 1013 (2001) is not precedential law establishing a state
10 action requirement before California’s free speech clause can be violated. Plaintiff
11 instead cites to *Gerawan Farming, Inc. v. Lyons*, 24 Cal.4th 468 (2000) for the
12 proposition that California’s Liberty Free Speech Clause “runs against the world,
13 including private parties as well as governmental actors.” (Docket No. 67, p. 11:3-
14 7.) He is wrong; the *Gerawan* statement was dicta; and this exact issue has already
15 been addressed by this very district.

16 In *Campbell v. Feld Ent. Inc.*, No. 12-CV-4233-LHK, 2014 WL 1366581, at
17 *6–8 (N.D. Cal. Apr. 7, 2014), the court looked at this same issue and granted a
18 motion to dismiss. Plaintiffs, members of an animal rights activism group, sued
19 circus promoters for intentionally interfering with plaintiffs’ California free speech
20 rights by preventing plaintiffs from engaging in protests and videotaping the circus
21 animals. Defendants filed a motion to dismiss based on, among other things, the lack
22 of state action on the part of the defendants. Defendants cited to *Golden Gateway* to
23 support their position. Plaintiffs pointed to *Gerawan*. The court aptly summarized
24 the positions of the parties, very similar to those before this Court, as follows:

25 Plaintiffs counter that because *Golden Gateway* was a plurality opinion, it is
26 not binding. Plaintiffs instead point to *Gerawan Farming, Inc. v. Lyons*, in
27 which the California Supreme Court stated that “article I’s right to freedom of
28 speech, unlike the First Amendment’s, is unbounded in range” and “runs

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1 against the world, including private parties as well as governmental actors.”
2 (Citation omitted.) As both the lead opinion and the dissent in *Golden*
3 *Gateway* acknowledge, however, the statement in *Gerawan* is dicta and not
4 binding on California courts. (Citation omitted.) Furthermore, because there
5 was no question that there was a state actor in *Gerawan*, the California
6 Supreme Court did not analyze the state actor limitation issue. (Citation
7 omitted.)

8 The *Campbell* court looked to other California Supreme Court cases and
9 determined that that court would likely hold that Article I, Section 2 includes a state
10 actor limitation, except where the private actor operated what amounts to a public
11 forum. “Nothing in those decisions suggests a broader application of Article I,
12 Section 2 to other private actors.” *Campbell, supra*, 2014 WL 136658 at *6-7, citing
13 *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899 (1979) (Article 1, Section 2
14 protects the reasonable exercise of speech right in privately-owned shopping
15 centers); *Fashion Valley Mall, LLC v. NLRB*, 42 Cal.4th 850, 858 (2007) (a
16 privately-owned shopping center could become a public forum if opened to the
17 public “in a manner similar to that of public streets and sidewalks”); *Ralphs Grocery*
18 *Co. v. United Food & Commercial Workers Union Local 8*, 55 Cal.4th 1083, 1093
19 (2012) (entrances and exits to a grocery shopping center do not constitute public fora
20 subject to Article I, Section 2 limitations).

21 Plaintiffs do not point to any cases, and the Court has not found any, in which
22 the California Supreme Court has explicitly extended the protection of Article
23 I, Section 2 to interference by private individuals outside of the context of a
24 private actor's ownership of property that has been opened to the public such
25 that the private property in essence becomes a public forum. The Court
26 observes that other federal district and California courts have found that a state
27 action limitation is required under Article I, Section 2. (String citations
28 omitted.)

29 Based on these precedents, **the Court agrees that under California law,**
30 **Article I, Section 2 includes a state actor limitation such that Article I,**
31 **Section 2 protects only against the interference by state actors of citizens’**

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1 **exercise of speech rights in a public forum.** In certain limited situations in
2 which a private actor opens his land to the public such that the land becomes
3 a public forum, a private actor may satisfy the state actor limitation. **Absent**
4 **this limited exception, California law does not support holding a private**
5 **actor liable under Article I, Section 2** for interference with another private
6 actor's exercise of speech rights in a public forum.

7 *Campbell, supra*, 2014 WL 136658 at *7-8 (emphasis added). There is simply no
8 basis for holding NASS, a private entity without a public forum, liable to Plaintiff
9 under California Liberty of Speech clause.

10 **VI. PLAINTIFF HAS NOT ADEQUATELY PLED A CLAIM**
11 **PURSUANT TO 42 U.S.C. § 1985(3) OR A CONSPIRACY**
12 **BETWEEN NASS AND ANY DEFENDANTS SUFFICIENT TO**
13 **ESTABLISH A CLAIM UNDER 42 U.S.C. § 1985(3).**

14 Plaintiff mistakenly argues that NASS failed to contest that Plaintiff's
15 Constitutional rights were violated. In its moving papers, NASS clearly argued that
16 "Section 1985(3) provides no substantive rights itself; it merely provides a remedy
17 for violation of the rights it designates." *Great American Fed. S & L Ass'n v.*
18 *Novotny*, 442 U.S. 366, 372 (1979). Thus, **if a plaintiff's "allegations are**
19 **insufficient to support a claim based on a violation of his constitutional rights,"**
20 **then "his allegations of a conspiracy to violate these constitutional rights do not**
21 **state a claim."** *Pelozza v. Capistrano Unified School Dist.*, 37 F.3d 517, 523-24 (9th
22 Cir. 1994)." (Docket No. 58 [Motion], pp. 25:23 – 26:1 (emphasis added).)

23 As a case Plaintiff cites points out, "§ 1985(3) requires at least one of the
24 wrongdoers in the alleged conspiracy to be a state actor. Indeed, the Supreme Court
25 has held that 'an alleged conspiracy to infringe First Amendment rights is not a
26 violation of § 1985(3) unless it is proved that the State is involved in the
27 conspiracy.'" *Pasadena Republican Club v. W. Just. Ctr.*, 985 F.3d 1161, 1171 (9th
28 Cir. 2021) (citation omitted), cert. denied, No. 20-1773, 2021 WL 4733327 (U.S.
Oct. 12, 2021) (rejecting 1985(3) claim against private association). Because

1 Plaintiff has not and cannot adequately allege a conspiracy as established in Section
 2 IIIA above, there can be no cause of action against NASS for a violation of Section
 3 1985(3) or any other Constitutional claim, and therefore, no viable cause of action
 4 against NASS.

5 **VII. THE COURT SHOULD DISMISS WITHOUT LEAVE TO**
 6 **AMEND**

7 Where “allegation of other facts consistent with the challenged pleading could
 8 not possibly cure the deficiency,” then “dismissal without leave to amend is proper.”
 9 *Benavidez v. County of San Diego*, 993 F.3d 1134, 1155 (9th Cir. 2021) (citations
 10 omitted) (affirming dismissal without leave); *Great Minds v. Office Depot, Inc.*, 945
 11 F.3d 1106, 1112 (9th Cir. 2019) (same, even where no prior amendments).

12 That is just the case here. There is no conceivable way Plaintiff could amend
 13 his complaint to overcome the evidence establishing that NASS is not subject to this
 14 Court’s jurisdiction. And Plaintiff would have to allege facts wildly inconsistent with
 15 his complaint and its attachments to have any hope of establishing a prima facie
 16 claim against NASS. The Court should dismiss without leave to amend.

17 **VIII. CONCLUSION**

18 NASS should be dismissed from this action pursuant to Rule 12(b)(2) because
 19 the Court has neither general nor specific personal jurisdiction over NASS.
 20 Plaintiff’s opposition failed to establish otherwise. On that basis alone, this motion
 21 should be granted.

22 NASS should also be dismissed pursuant to Rule 12(b)(6) because Plaintiff’s
 23 complaint fails to state a claim upon which relief can be granted. NASS is a private
 24 entity, not a government or state actor. Nothing alleged in Plaintiff’s complaint can
 25 make NASS a joint actor with the State. NASS engaged in an administrative task of
 26 sending an email to its 48 Secretary of State members with portal information
 27 provided by Twitter for the reporting of election mis/disinformation. NASS did not

28 -20-

1 conspire with any person or entity to cause Plaintiff harm and Plaintiff neither
2 adequately alleged, nor provided any evidence, otherwise. NASS is not responsible
3 for the conduct of which Plaintiff complains and therefore, all Plaintiff's claims
4 against NASS should be dismissed.

5 Respectfully submitted,

6 Dated: December 1, 2021

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7
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Attorneys for Plaintiff ROGAN O'HANDLEY

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ROGAN O'HANDLEY,

Plaintiff,

v.

ALEX PADILLA, in his personal capacity;
SKDKNICKERBOCKER, LLC, a Delaware
company; PAULA VALLE CASTAÑON, in her
personal capacity; JENNA DRESNER, in her
personal capacity; SAM MAHOOD, in his personal
capacity; AKILAH JONES; in her personal
capacity; SHIRLEY N. WEBER, in her official
capacity as California Secretary of State;
TWITTER, INC., a Delaware corporation;
NATIONAL ASSOCIATION OF SECRETARIES OF
STATE, a professional nonprofit organization;

Defendants.

Case Number: 2:21-CV-07063-CRB

**PLAINTIFF'S OPPOSITION TO
DEFENDANT TWITTER, INC.'S
MOTION TO DISMISS (FRCP Rule
12(b)(6)) [ECF 60]**

**Date: December 16, 2021
Time: 10:00 a.m.
Courtroom: 6, 17th Floor
Judge: Hon. Charles R. Breyer**

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 III. Mr. O’Handley has alleged plausible facts to support all his federal claims. 8

 IV. Mr. O’Handley has established a conspiracy under 42 U.S.C. 1985(3). 10

 V. Twitter’s actions violate California’s Liberty of Speech Clause 12

 VI. Neither Twitter’s First Amendment Rights, nor any rights conferred by Section 230, have any application here. 15

 A. Twitter has no cognizable First Amendment rights on the facts alleged here. 15

 B. Section 230(c)(1) has no application here. 17

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Plaintiff's Opposition to Twitter, Inc.'s
Motion to Dismiss

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SUMMARY OF ARGUMENT

Plaintiff Rogan O’Handley has alleged facts sufficient to state a plausible claim on all of his claims for relief against Defendant Twitter, Inc. (“Twitter”).

As an initial matter, Mr. O’Handley has alleged that Twitter is a state actor for purposes of his claims under 42 U.S.C. § 1983 because Twitter (1) took action pursuant to California Elections Code § 10.5 and (2) jointly acted and conspired with the California Secretary of State’s Office of Elections Cybersecurity (“OEC”) and the other Defendants to censor disfavored political speech. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *see also Mendocino Env’tl Ctr. v. Mendocino Cty.*, 14 F.3d 457, 464 (9th Cir. 1994). Specifically, Defendant NASS facilitated channels of communication between Twitter and the OEC; Defendant SKDK notified the OEC of Mr. O’Handley’s tweet, which contained constitutionally protected speech; OEC labeled Mr. O’Handley’s speech as “voter fraud” and “flagged” it to Twitter; and Twitter censored the speech, ultimately removing the tweet (and others) from its platform and banning Mr. O’Handley. Compl. ¶¶ 33–34, 74–81. All these roles were planned and orchestrated in concert by the Defendants, including Twitter, and the joint action and conspiracy are clear. Defendant Padilla described the relationship with Twitter as a “partnership” to facilitate the take down and censorship of disfavored speech, and indeed, Twitter dutifully removed 98% of the tweets “flagged” by the OEC. Compl. ¶ 64-65. On these facts, Mr. O’Handley has plausibly alleged that Twitter is a state actor for purposes of his § 1983 claims.

Moreover, Mr. O’Handley’s substantive allegations are sufficient to plausibly allege claims against Twitter. First, Twitter does not dispute that Mr. O’Handley has sufficiently alleged a First Amendment infringement claim against it.

Second, Mr. O’Handley has sufficiently alleged a due process claim because Defendants interfered with his property and liberty interest in pursuing his career as a social media influencer through his use of Twitter’s platform. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 575 n.14 (1972); *Benigni v. City of Hemet*, 879 F.2d 473, 478 (9th Cir. 1989); *see also* Cal. Bus & Prof. Code §14102.

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1 Third, Mr. O’Handley has sufficiently alleged an equal protection claim because Defendants
2 censored his conservative political speech, ignoring liberals making almost identical claims regarding
3 election maladministration. *Engquist v. Oregon Dep’t of Agric.*, 478 F.3d 985, 993 (9th Cir. 2007).

4 Fourth, Mr. O’Handley has sufficiently alleged that Defendants conspired to deprive him his
5 constitutional rights based on his conservative political affiliation, and discrimination on this basis falls
6 within the protections of § 1985(3). *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499, 505 (9th Cir.
7 1979).

8 Fifth, Mr. O’Handley has sufficiently alleged that Defendants violated the Liberty of Speech
9 Clause of the California Constitution. In *Robins v. Pruneyard Shopping Center*, the California
10 Supreme Court held that a privately owned shopping mall was a public forum under the Liberty of
11 Speech Clause. 23 Cal.3d 899, 910 (Cal. 1979) (“*Pruneyard I*”), *aff’d sub nom. PruneYard Shopping*
12 *Center v. Robins*, 447 U.S. 74 (1980) (“*Pruneyard II*”); *see also Fashion Valley Mall, LLC v. Nat’l*
13 *Labor Relations Bd.*, 42 Cal. 4th 850, 857 (Cal. 2007). In today’s digital age, Twitter is the “functional
14 equivalent” of what shopping centers were to public discourse when *Pruneyard I* was decided in 1979.
15 *Park Mgmt. Corp. v. In Def. of Animals*, 36 Cal. App. 5th 649, 664 (Ct. App. 2019) *review denied*
16 (Sept. 25, 2019). In fact, Twitter and other social media websites have displaced shopping centers as
17 the central locus of public discourse in our nation. *Packingham v. North Carolina*, 137 S. Ct. 1730,
18 1735 (2017) (“While in the past there may have been difficulty in identifying the most important places
19 . . . for the exchange of views, today the answer is clear. It is cyberspace . . . and social media in
20 particular.” (emphasis added)). Twitter is an open forum whose sole purpose is for public discourse,
21 and, given the size of Twitter’s user pool, there is no risk that Twitter’s users’ views will be ascribed
22 to Twitter itself. In any event, Twitter is free to distance itself from any of its users’ posts with which
23 it disagrees. For these reasons, Twitter is a public forum under *Pruneyard I*.

24 Finally, Twitter’s defenses—the First Amendment and 47 U.S.C. § 230(c)(1)—do not shield it
25 from liability. Because Twitter is a state actor on the facts alleged in the Complaint, any First
26 Amendment rights it may otherwise have must necessarily yield to the constitutional rights of its users.
27 *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (holding that any “Constitutional rights of owners of
28 [privately owned town]” must give way to the First Amendment rights of its citizens and visitors).

1 Twitter does not have a First Amendment right to censor Mr. O’Handley’s speech, much less to ban
2 him from its platform, anyway. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*,
3 547 U.S. 47 (2006); *Pruneyard II*, 447 U.S. 74. Allowing Mr. O’Handley to “speak” using its platform
4 is an act, not speech, and hosting the speech of millions of others is not inherently expressive. And, as
5 with Mr. O’Handley’s claim under the Liberty of Speech Clause, there is no risk that anyone browsing
6 Twitter would think that Mr. O’Handley’s tweets were Twitter’s speech. Accordingly, Twitter had no
7 constitutional right to treat Mr. O’Handley the way it did.

8 Twitter’s argument under § 230(c)(1) also fails. First, it is well-settled that § 230(c)(1) does
9 not apply to federal constitutional claims, nor does it apply to claims for injunctive or declaratory relief.
10 *Fed. Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107 (N.D. Cal. 2020); *Mainstream*
11 *Loudon v. Bd. of Trustees*, 2 F. Supp. 2d 783, 790 (E.D. Va. 1998). Section 230(c)(1) immunizes
12 internet companies such as Twitter only from claims arising from the handling of content created by
13 *third parties*—*i.e.*, third parties to the claim by the plaintiff against the internet company. *Barnes v.*
14 *Yahoo!, Inc.*, 570 F.3d 1096, 1099 (9th Cir. 2009); *Fair Housing Council of San Fernando Valley v.*
15 *Roommates.Com*, 521 F.3d 1157, 1162 (9th Cir.2008) (*en banc*). By contrast, Mr. O’Handley is
16 presenting a *first-party* claim—*i.e.*, a claim arising from the handling of content that he himself created.
17 Accordingly, Twitter’s interpretation of § 230 should be rejected.

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INTRODUCTION

In 2018, California created the OEC within the California Secretary of State’s office (“SOS”), to “assess,” “mitigate,” “monitor and counteract false or misleading [electoral] information [online].” Cal. Elec. Code § 10.5. The OEC, under the direction of Defendant Padilla, seized on the statutory phrase “mitigate [] false or misleading information” as a license to quash politically-disfavored speech, and the SOS’s office partnered with the private Defendants, including Twitter, in a conspiracy to censor speech. As OEC described its purpose: “We work[] closely and proactively with social media companies to . . . take down sources of misinformation as needed . . .” Compl. ¶ 25.

In a November 2020 Twitter post, or “tweet,” Mr. O’Handley expressed his opinion that California’s elections should be audited, an opinion that is held by many California voters. Compl. ¶¶ 72-73. SKDK labeled Mr. O’Handley’s opinion as “misinformation” to the OEC. *Id.* ¶ 74. The OEC then “flagged” the tweet as “voter fraud” to Twitter—“flag” serving as a euphemism for a request to censor the speech—and Twitter acted on it by appending commentary that Mr. O’Handley’s stated opinion was “disputed” and adding a strike to his account. *Id.* ¶¶ 33–34, 74–81. Ultimately, the tweet (and others) were removed pursuant to Defendants’ agreement to work together to stamp out conservative viewpoints, pursuant to which Twitter banned Mr. O’Handley from its platform. *Id.* ¶ 88. As set out below, the law is clear that Twitter may not conspire and act jointly with a state actor and then claim its status as a private entity shields it from liability under § 1983.

STATEMENT OF FACTS

Defendant Twitter is a social networking service with roughly 330 million monthly active users. Compl. ¶ 17. Twitter serves as the primary social platform for political commentary in the United States. Compl. ¶ 90. Mr. O’Handley is a licensed attorney and political commentator who utilized Twitter to communicate with his audience. Compl. ¶ 70. At its zenith, over 440,000 Twitter users followed Mr. O’Handley’s account. Compl. ¶ 92.

In the lead-up to the 2020 presidential election, Twitter established the “Partner Support Portal” (hereafter, the “Portal”), a dedicated reporting mechanism that enabled government officials, their agents, and other select entities to “flag speech” deemed misinformation “directly to Twitter” for removal and have their requests “bumped to the head of the queue.” Compl. ¶¶ 27-31. As a participant

1 in the Portal, the California Secretary of State, through its Office of Elections Cybersecurity (“OEC”),
2 “worked closely and proactively” with Twitter to identify expressions of disfavored political speech
3 for removal or suppression. Compl. ¶¶ 25, 32. As demonstrated through emails exchanged between
4 Twitter and OEC, and the existence of the dedicated portal itself, Twitter placed a high priority on
5 OEC’s requests for censorship, taking action on the OEC’s censorship recommendations 98% of the
6 time. Compl. ¶¶ 33-35, 64.

7 On November 12, 2020, Mr. O’Handley tweeted, “Audit every California ballot[.] Election
8 fraud is rampant nationwide and we all know California is one of the culprits[.] Do it to protect the
9 integrity of that state’s elections[.]” Compl. ¶ 72. Twitter took no action against Mr. O’Handley’s
10 expression of opinion—that is, until OEC flagged it on November 12, 2021. Compl. ¶¶ 72-77. On
11 November 17th, Twitter appended commentary to Mr. O’Handley’s tweet, asserting that his “claim”
12 was “disputed.” Compl. ¶¶ 76-81. Twitter also assessed a “strike” against his account. *Id.* Under
13 Twitter’s strike system, each strike results in progressive penalties, and an account that incurs five
14 strikes is removed. Compl. ¶ 79-80.

15 Prior to OEC directing Twitter to suppress Mr. O’Handley’s tweet, Twitter had never taken
16 disciplinary action against Mr. O’Handley’s account. Compl. ¶ 81. After the OEC identified him to
17 Twitter as a target of its “partnership,” however, Twitter began to apply a demonstrably heightened
18 level of scrutiny to Mr. O’Handley’s Twitter activity. Compl. ¶¶ 81-87. Consequently, between January
19 and February of 2021, Twitter assessed four strikes against Mr. O’Handley’s account for tweets
20 expressing innocuous political opinions. Compl. ¶¶ 84-87. On February 22, 2021, Twitter completed
21 the process instigated by OEC’s direction to suppress Mr. O’Handley’s political speech, by
22 permanently suspending his account. Compl. ¶¶ 87-89. Mr. O’Handley’s final post—which resulted in
23 his fifth strike and ban from the site—consisted of a photograph of the U.S. Capitol with the caption,
24 “Most votes in American history.” Compl. ¶ 87. Twitter has not said whether it considers that claim
25 published by Mr. O’Handley to have been “false,” “fraudulent,” or both.

26 LEGAL STANDARDS

27 To survive a Rule 12(b)(6) motion, a complaint must plead “enough facts to state a claim to
28 relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim

1 is plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable
2 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
3 (2009). When evaluating a Rule 12(b)(6) motion, the court “must presume all factual allegations of the
4 complaint to be true and draw all reasonable inferences in favor of the nonmoving party.” *Usher v. City*
5 *of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

6 ARGUMENT

7 **I. Twitter’s “partnership” with the OEC, including creating a dedicated portal to** 8 **facilitate OEC’s speech censorship and a 98% takedown rate of success, made** 9 **Twitter a joint actor with OEC.**

10 “[M]ost rights secured by the Constitution are protected only against infringement by
11 governments”; therefore, “the conduct allegedly causing the deprivation of a federal right [must] be
12 fairly attributable to the State.” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982) (internal
13 citation omitted). “The ultimate issue . . . is [whether] the alleged infringement of federal rights [is]
14 attributable to the government.” *Pasadena Republican Club v. W. Just, Ctr.*, 985 F.3d 1161, 1167 (9th
15 Cir. 2021). Yet “private behavior” may be treated as state action “if there is such a close nexus between
16 the State and the challenged action that seemingly private behavior may be fairly treated as that of the
17 State itself.” *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 297 (2000)
18 (cleaned up). *Lugar* sets forth a two-part test to resolve the question of “fair attribution.” 457 U.S. at
19 937. First, “the deprivation must be caused by the exercise of some right or privilege created by the
20 State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.” *Id.*
21 Second, “the party charged with the deprivation must be a person who may be fairly said to be a state
22 actor.” *Id.*

23 Twitter does not contest, and therefore concedes, that Mr. O’Handley’s claims meet *Lugar*’s
24 first prong—*i.e.*, that the deprivation at issue here was made “with the knowledge of and pursuant to
25 state statute,” specifically, California Elections Code § 10.5. *American Mfrs. Mut. Ins. Co. v. Sullivan*,
26 526 U.S. 40, 50 (1999) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 162 n.23 (1970)). Instead,
27 Twitter takes issue with *Lugar*’s second prong, arguing that it cannot be fairly described as a state actor.
28 This Circuit utilizes four tests to determine if a private party is a state actor: 1) the “public function”

1 test, 2) the “state compulsion” test, 3) the “nexus” test, and 4) the “joint action” test. *Lugar*, 457 U.S. at
2 939; *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020). Twitter makes just a
3 single reference to *Lugar* (ECF No. 60 7:11-12), however, and never engages with the on point and
4 relevant case law that establish it as a state actor in this circumstance.

5 **II. Twitter is fairly described as a state actor because of its undisputed “partnership”**
6 **with the OEC to censor disfavored speech.**

7 A plaintiff successfully pleads state action by alleging that state officials and private actors
8 jointly “acted in concert in effecting a particular deprivation of constitutional rights.” *Tsao v. Desert*
9 *Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012). It is a “well-accepted principle that a private party’s
10 joint participation in a conspiracy with the state provides a sufficient nexus to hold the private party
11 responsible as a governmental actor.” *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 840
12 (9th Cir. 1999) (citing *Lugar*, 457 U.S. at 941). A plaintiff may establish a conspiracy by alleging a
13 defendant was a “willful participant” in “an agreement or meeting of the minds to violate constitutional
14 rights” and that an actual deprivation of rights resulted from that agreement. *Dennis v. Sparks*, 449
15 U.S. 24, 27-28 (1980); *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002). Participants need not know
16 “exact details of the plan,” and must only share “the common objective of the conspiracy.” *Franklin*,
17 312 F.3d at 441. Agreement may be inferred on the basis of circumstantial evidence. *Mendocino Env’tl*
18 *Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1301 (9th Cir. 1999).

19 Allegations that defendants committed acts that “are unlikely to have been undertaken without
20 an agreement” support the inference of conspiracy. *Id.* “Whether defendants were involved in an
21 unlawful conspiracy is generally a factual issue and should be resolved by the jury, so long as . . . the
22 jury can infer from the circumstances that the alleged conspirators had a meeting of the minds and thus
23 reached an understanding to achieve the conspiracy’s objectives.” *Id.* at 1302 (cleaned up). Once a
24 conspiracy to violate constitutional rights is established, all conspirators may be held liable for the
25 reasonably foreseeable acts of co-conspirators. *Pinkerton v. U.S.*, 328 U.S. 640, 645 (1946); *Proffitt v.*
26 *Ridgway*, 279 F.3d 503, 507 (7th Cir. 2002) (“As a conspirator, the citizen is liable, in civil as in
27 criminal law, for the wrongful acts of the other conspirators committed within the scope of the
28 conspiracy.”). And even without evidence of a conspiracy, “[j]oint action exists where the government

1 affirms, authorizes, encourages, or facilitates unconstitutional conduct.” *Noako Ohno v. Yuko Yasuma*,
2 723 F.3d 984, 995 (9th Cir. 2013).

3 The pleadings, taken as true, contain ample allegations to plausibly establish the existence of
4 joint action for the purposes of a 12(b)(6) motion. Twitter was a willful participant in OEC’s mission
5 and was entwined with, interdependent with, cooperated with, and conspired with OEC and the other
6 Defendants. OEC cultivated a “close working relationship” with social media companies, including
7 Twitter. Compl. ¶¶ 24-25, Ex. 2. As OEC explained, “[O]ur priority is working closely with social
8 media companies to be proactive so when there’s a source of misinformation, *we* can contain it” and
9 “take down sources of misinformation as needed.” *Id.* (emphasis added). Twitter created “direct
10 channels of communication” for the OEC to report speech it deemed “misinformation,” and far from
11 being treated just like any other member of the public, OEC censorship reports were “bumped to the
12 head of the queue” with a 98% takedown success rate. Compl. ¶ 29, Ex. 3.

13 The interconnectedness of the OEC and Twitter is further demonstrated by an email exchange
14 between Defendant Sam Mahood and Twitter employee Kevin Kane on December 30, 2019. Mahood
15 “flagged” a tweet to Kane and said: “We would like this tweet taken down ASAP to avoid the spread
16 of election misinformation. Please let us know if there is anything else we can do to facilitate this
17 request.” Compl. ¶ 34. Mahood sent his email at 9:05 PM, and Kane responded before 8:00 AM the
18 next morning, which was New Year’s Eve: “*Thank you for reporting, this Tweet has been removed.*
19 *Please don’t hesitate to contact me if there is anything else we can do.*” Compl. ¶ 35 (emphasis added).
20 As efficient as this process was—the OEC spoke, and Twitter nearly immediately made it so—over the
21 next eleven months, OEC officials and NASS worked with Twitter to streamline their speech takedown
22 processes through the dedicated Twitter Portal. Compl. ¶ 36.

23 While Twitter urges, in its papers, that it has always acted independently, only “sometimes”
24 acquiescing to the OEC’s censorship requests, Defendant Padilla painted a much different picture when
25 he said that, in the 2020 election cycle, the OEC “discovered nearly 300 erroneous or misleading social
26 media posts that were identified and forward to Facebook and Twitter to review and *98 percent of those*
27 *posts were promptly removed.*” Compl. ¶ 64 (emphasis added). Indeed, there is no record of any system
28 used by Twitter for confirming, independently, that OEC-flagged posts were in fact “erroneous or

misleading.” This was, as Defendant Padilla described their relationship, a “partnership” in censorship. Compl. ¶ 65.

Thus in November 2020 the OEC used the Twitter Portal to report one of Mr. O’Handley’s tweets to its “partner” Twitter. The system worked as designed and OEC’s request to censor Mr. O’Handley’s speech jumped to the “head of the queue.” Compl. ¶¶ 65–65, 74-80. Twitter understood its role, and, as it did 98% of the time, it censored the tweet and, eventually, Mr. O’Handley entirely. *Id.* On these facts, Mr. O’Handley has provided detailed, plausible allegations by which “the jury can infer . . . that the alleged conspirators had a meeting of the minds and thus reached an understanding to achieve the conspiracy’s objectives.” *Mendocino Env’tl Ctr.*, 192 F.3d at 1301.

A. Twitter’s citation of inapplicable and distinguishable case law does not negate its role as a state actor under the *Lugar* factors.

It is telling that, to avoid the obvious conclusion that it was working hand in glove with the OEC to censor Mr. O’Handley, Twitter would prefer that the Court view it as a criminal witness or informant¹—as if it were a crime for Mr. O’Handley to express his opinion. The analogy is not merely strained; it is inapposite, as are the cases Twitter relies on, because the allegations here demonstrate that Twitter was a willing private actor that partnered with the OEC to censor speech.

Two additional authorities cited by Twitter are similarly inapposite. In *Deitrich v. John Ascugua’s Nugget*, 548 F.3d 892, 900 (9th Cir. 2008) (ECF No. 60 9:26-27), the court held that defendants who complained about political activity at their permitted event were not state actors because “merely complaining to the police does not convert a private party into a state actor.” Likewise, *Deeths v. Lucile Slater Packard Children’s Hosp. at Stanford*, No. 1:12-CV-02096-LJO, 2013 WL 6185175, *10 (E.D. Cal. Nov. 26, 2013) (ECF No. 60 9:3-14), held that supplying information to social workers

¹ ECF No. 60 7:13-14 (citing *Franklin*, 312 F.3d 423 (no state action against a daughter who witnessed a father murder a friend)); 7:14-15, 10:1-21, 12:7 (citing *Mathis v. Pac. Gas & Elec. Co.*, 75 F.3d 498 (9th Cir. 1996) (no state action against a private company who permitted a sting operation at its facility because the government had no input on the company’s decision to fire an employee)); 7:21-23 (citing *Taylor v. List*, 880 F.2d 1040 (9th Cir. 1989) (a prison guard deciding not to testify in a criminal proceeding is not a state action)); 7:23-24, 12:20 (citing *Fonda v. Gray*, 707, 707 F.2d 435 (9th Cir. 1983) (a bank permitting government investigators to review bank records is not state action)); 8:19-21 (citing *Lockhead v. Weinstein*, 24 F. App’x 80 (9th Cir. 2001) (a criminal witness’ testimony is not state action even if she is lying)).

1 is not state action. Mr. O’Handley’s allegations go far beyond merely providing information for
2 government investigations or prosecutions, however. Indeed, Twitter has the analogy backwards.

3 The allegation is not that Twitter complained to the police or cooperated by giving information
4 to social workers so authorities could take appropriate action. Here it was *the government going to*
5 *Twitter so Twitter could take “appropriate” (albeit unconstitutional) action as if it were the government*
6 *itself*. And Twitter was far from passive in this process. Besides emailing the OEC and offering its
7 services as needed, Twitter enabled the Twitter Portal and ensured that the OEC and other government
8 agencies received priority action on their censorship targets. Mr. O’Handley has more than adequately
9 alleged that Twitter acted in concert and conspired with a state agency to censor speech.

10 Twitter’s reliance on *Fed. Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107 (N.D.
11 Cal. 2020) (“*FAN*”), does not help it either. ECF No. 60 8:24-9:2. There, a Russian organization’s
12 online content was suppressed by Facebook, which ultimately shut the account down. *Id.* at 1113. There,
13 again, however, “Facebook [was] providing information to Special Counsel,” *id.*, not the other way
14 around. That decision turned on the fact that “Plaintiffs [made] no allegations that the federal
15 government or a state government had any involvement in Facebook’s removal of [the organization’s]
16 profile, page, and content.” *Id.* at 1121. Here, by contrast, Mr. O’Handley has alleged OEC *did* have
17 involvement in Twitter’s censorship of his speech. Additionally, in *FAN*, all government involvement
18 “post-date[d] the relevant conduct that allegedly injured Plaintiffs.” *Id.* at 1125. Here, the conduct pre-
19 dated the deprivation. *Compare* Compl. ¶¶ 28-29 with Compl. ¶ 76.

20 *Children’s Health Def. v. Facebook, Inc.*, No. 20-cv-05787-SI, 2021 WL 2662064 (N.D. Cal.
21 June 29, 2021) suffers a similar defect. ECF No. 60 11:27-12:7. There, Facebook took steps to censor
22 online content related to vaccines by placing information labels over disputed content, disabling the
23 content creator’s ability to dispute actions taken by Facebook, shadow-banning the organization, and
24 disabling its donation portal. *Id.* at *4-5. The court found the plaintiff’s vague claims of cooperation and
25 a letter from a member of Congress sent *after* Facebook had already started censoring the content were
26 not sufficient to establish joint action. *Id.* at *12. In contrast, the state presence here is not a single
27 Congressman, but an entire state agency, and an extensive paper trail establishes the symbiotic
28 relationship between the parties. Far from amorphous claims of cooperation or acquiescence, Mr.

O’Handley has provided evidence of direct communication from OEC to Twitter requesting speech censorship, and immediate action pursuant thereto. Additionally, Twitter’s adverse actions taken against Mr. O’Handley occurred after OEC and NASS had set up the portal with Twitter for the purposes of reporting speech, and after a specific report *about* Mr. O’Handley’s speech. *Compare* Compl. ¶¶ 28-29; Ex. 2 *with* Compl. ¶¶ 74-78. Here, the causation is direct, not attenuated.

Finally, the circumstances here are distinguishable from the other internet company cases referenced in Twitter’s Memorandum in which there is nothing like the coordination with a government agency alleged and documented here. In *Prager University v. Google LLC*, 951 F.3d 991, 997-98 (9th Cir. 2020), Prager University tried to establish its claim under the public function test, not the joint action or nexus tests. In *Howard v. AOL*, 208 F.3d 741, 754 (9th Cir. 2000), the plaintiffs argued that AOL was a public utility. And in *Kim v. Apple, Inc.*, No. 14-1034 (ABJ), 2014 WL 3056136 (D.D.C. July 7, 2014), the *pro se* litigant’s complaint did not even mention the government and was dismissed *sua sponte*. In contrast, here Mr. O’Handley has plausibly alleged that Twitter acted jointly and with such a close nexus with government that it was a state actor.

III. Mr. O’Handley has alleged plausible facts to support all his federal claims.

In what might fairly be called a drive-by footnote at ECF No. 60, 14:19-20, Twitter attempts to dispense with most of Mr. O’Handley’s § 1983 claims with one sentence arguments.² These arguments are each unavailing.

Twitter purports to dispose of Mr. O’Handley’s due process claim by asserting that he has no “protected property interest in pursuing a career as a social-media influencer or in using Twitter for his business.” *Id.* Mr. O’Handley, however, was deprived of both property *and* liberty interests without a hearing. The “right to pursue an occupation” is a recognized liberty or property interest subject to due process rights. *Benigni v. City of Hemet*, 879 F.2d 473, 478 (9th Cir. 1989). “A protected property interest is present where an individual has a reasonable expectation of entitlement deriving from existing rules.” *Wedges/Ledges of Cal., Inc. v. Phoenix, Ariz.*, 24 F.3d 56, 62 (9th Cir. 1994) (cleaned up). And in California, the “good will of a business” is a recognized property interest. Cal Bus & Prof. Code §

² Twitter does not argue that Mr. O’Handley’s First Amendment claims lack merit in the event this Court deems it a state actor.

1 14102. Mr. O’Handley had a right to pursue his occupation, and entitlement deriving from existing rules
2 from which he derived an occupational benefit, including business goodwill. Compl. ¶¶ 94, 150. There
3 are no grounds to establish a different rule for people who make their livings using social media. Indeed,
4 “social media is becoming so influential that being a social media influencer is now a profession.”
5 *Godwin v. Facebook, Inc.*, 160 N.E.3d 372, 387 (Ohio. Ct. App. 8th 2020).

6 With regard to liberty interests, “[w]hen a State would directly impinge upon interests in free
7 speech” the Supreme Court has “held that opportunity for a fair adversary hearing must precede the
8 action, whether or not the speech or press interest is clearly protected under substantive First
9 Amendment standards.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 575 n.14 (1972). That
10 includes suppressing content. *Id.* Defendants impinged on Mr. O’Handley’s free speech interests
11 without a hearing in violation of due process. Compl. ¶¶ 149–158.

12 Mr. O’Handley seeks relief under the Equal Protection Clause based upon his classification as
13 a conservative, as Defendants focused “their censorship efforts on conservative requests for
14 transparency in election processes rather than the same calls from self-identified political liberals.”
15 Compl. ¶ 83. “In an equal protection claim based upon selective enforcement of the law, a plaintiff can
16 show that a defendant’s alleged rational basis for his acts is a pretext for an impermissible motive.”
17 *Engquist v. Oregon Dep’t of Agric.*, 478 F.3d 985, 993 (9th Cir. 2007). On a motion to dismiss, a court
18 is not required “to accept [Defendants’] explanation” for differential treatment. *Id.* at 583, 590. Rather,
19 the court must determine whether there is a rational basis for the distinction alleged by the plaintiff. *Id.*
20 at 590. Here, there is no rational basis for Defendants’ censorship of conservatives but not liberals
21 making almost identical claims regarding election administration concerns.

22 Twitter states that, in a number of judicial circuits, “allegations that a plaintiff was treated
23 differently in retaliation for the exercise of First Amendment rights do not implicate the Equal Protection
24 Clause.” ECF No. 60 14:25-28 n.3 (*quoting AIDS Healthcare Found. v. Los Angeles Cnty.*, No. CV 12-
25 10400 PA (ARGx), 2013 WL 12134048, *8 (C.D. Cal. Mar. 18, 2013)). “At least twice,” however, “the
26 Supreme Court has analyzed speech-based equal protection claims that were coupled with First
27 Amendment Claims without suggesting that the claims’ common analytical predicate foreclosed one
28

claim or the other.” *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1067 (9th Cir. 2012) (citations omitted). This Court should not follow the Central District’s lead down the wrong path.

IV. Mr. O’Handley has established a conspiracy under 42 U.S.C. § 1985(3).

The elements of a § 1985(3) conspiracy under are: (1) a conspiracy; (2) “for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws”; (3) an “act in furtherance”; and (4) an injury or deprivation of rights. *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499, 502 (9th Cir. 1979) (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102-103 (1971)). Unlike § 1983, which requires the existence of state action, § 1985(3) extends to purely private action as long as one co-conspirator is a state actor. *Pasadena Republican Club*, 985 F.3d at 1171. Here, Twitter argues that Mr. O’Handley’s § 1985(3) claim should be dismissed because the Complaint does not allege (1) the existence of a conspiracy or (2) “class-based” treatment. Both of these arguments are mistaken.

First, Mr. O’Handley has alleged and shown the existence of a conspiracy, *see* Section II B 1, and the standard for a conspiracy under § 1985(3) is the same as under § 1983. *Compare Scott v. Ross*, 140 F.3d 1275, 1284-85 (9th Cir. 1998) with *Crowe v. Cnty. of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010). Thus, Mr. O’Handley has also alleged a conspiracy under § 1985(3).

Second, Mr. O’Handley has alleged the conspiracy at issue here was motivated by “class-based” animus against conservative political views. Compl. ¶ 83. A plaintiff satisfies the “class-based” requirement if either: (1) “the courts have designated the class in question a suspect or quasi-suspect classification requiring more exacting scrutiny” or (2) “Congress has indicated through legislation that the class required special protection.” *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992). Both criteria are met here. While the Ninth Circuit has not yet ruled on the question of whether political affiliation is a suspect or quasi-suspect class in general,³ it has determined that allegations of

³ Other courts have concluded that political affiliation is a suspect class. *See Abcarian v. McDonald*, 617 F.3d 931, 938 (7th Cir. 2010) (“political affiliation” is a suspect classification). Moreover, the Supreme Court has both stated in dicta that political affiliation is a suspect class, *see Am. Sugar-Ref. Co. v. State of Louisiana*, 179 U.S. 89, 92 (1900) (noting that discrimination based on “political affiliations” would be “a denial of the equal protection of the laws”), and held that it is protected in certain settings, *see Rutan v. Republican Party of Illinois*, 497 U.S. 62, 78 (1990) (holding that government employers may not “condition [] hiring decisions on political belief”); *Fusaro v. Cogan*,

1 discrimination on the basis of political affiliation require the same “exacting scrutiny” required to meet
2 the “class-based” discrimination requirement of § 1985(3). *Reichardt*, 591 F.2d at 505. In *Reichardt*,
3 the Circuit observed that discrimination based on plaintiffs’ status as either (1) “political opponents”
4 of defendants or (2) “supporters of a [different] political candidate” was sufficiently “class-based” to
5 state a claim under § 1985(3). *Id.* This observation is in line with numerous other courts, which have
6 held that political affiliation satisfies the “class-based” requirement under § 1985(3).⁴ Here, Mr.
7 O’Handley alleges that Defendants conspired to deprive him his constitutional rights based on his
8 conservative beliefs. Under *Reichardt*, this is sufficient to allege “class-based” treatment.

9 Moreover, Congress has “indicated through legislation” that political affiliation requires “special
10 protection” through scores of statutes that designate political affiliation as a protected class in a variety
11 of settings.⁵ *Sever*, 978 F.2d at 1536. These and other laws demonstrate that discrimination on the basis
12 of political affiliation is sufficient to state a claim under § 1985(3). *Id.*

13
14 930 F.3d 241, 261 (4th Cir. 2019) (“[A]n election regulation that plausibly burdens First Amendment
rights on the basis of viewpoint, political affiliation, or class should be subject to strict scrutiny.”).

15
16 ⁴ See, e.g., *McLean v. Int’l Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir. 1987) (discrimination on the
17 basis of “political beliefs or associations” is covered under § 1985(3)); *Galloway v. Louisiana*, 817
18 F.2d 1154, 1159 (5th Cir. 1987) (same); *Conklin v. Lovely*, 834 F.2d 543, 549 (6th Cir. 1987) (same);
19 *Keating v. Carey*, 706 F.2d 377, 386-88 (7th Cir. 1983) (“Republicans are a protected class” under §
20 1985(3)); *Means v. Wilson*, 522 F.2d 833, 836 (8th Cir. 1975) (§ 1985(3) claim available for
21 allegations of discrimination against political opponents); *Cameron v. Brock*, 473 F.2d 608, 610 (6th
Cir. 1973); (discrimination against “supporters of a political candidate” is covered under § 1985(3));
22 *Glasson v. City of Louisville*, 518 F.2d 899, 906 (6th Cir. 1975) (§ 1985(3) claim available for
23 allegations of discrimination on the grounds of political opinion), *overruled on other grounds by Bible*
24 *Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 236 (6th Cir. 2015).

25
26 ⁵ See, e.g., 5 U.S.C. § 2302(b)(1)(E) (prohibiting discrimination on the basis of “political affiliation” in
27 personnel decisions); 8 U.S.C. § 1231(b)(3)(A) (prohibiting removal of alien to country where his life
28 or freedom would be threatened based on “political opinion”); 18 U.S.C. § 227 (prohibiting
government employees from influencing private employment decision based on “political
affiliation”); 20 U.S.C. § 1232h(b) (providing that students shall not be requiring to disclose their or
their parents’ “political affiliation[]” in connection with federal educational programs); 29 U.S.C. §
3248 (prohibiting discrimination in program access on the basis of “political affiliation” to programs
under the Workforce Innovation and Opportunity Act); 42 U.S.C. § 5057 (prohibiting discrimination
in program access on the basis of “political affiliation” to programs under the Domestic Volunteer
Service Act); 42 U.S.C. § 9821 (same under Community Economic Development Act); 42 U.S.C. §
9849 (same under Head Start Act); 42 U.S.C. § 12635 (same under National Community Service Act).

Twitter cites *Schultz v. Sundburg* and *Dodge v. Evergreen Sch. Dist. No. 114* in support of its argument, but neither of these cases support dismissal. In *Schultz*, the Ninth Circuit held that discrimination against a “transitory coalition of state representatives” was insufficient to demonstrate “class-based” discrimination “[b]ecause there has not been any governmental determination that such a class merits special protection.” 759 F.2d 714, 718 (9th Cir. 1985). Similarly, in *Dodge*, the plaintiff framed his “class-based” allegations in terms of discrimination against “MAGA supporters,” and he “identifie[d] no congressional statutes or court decisions extending federal protection to this group.” No. 3:20-CV-05224-RBL, 2020 WL 4366054, at *5 (W.D. Wash. July 30, 2020). Here, by contrast, Mr. O’Handley has identified both case law and Congressional enactments that demonstrate allegations of discrimination based on “political affiliation” are sufficient under § 1985(3).

V. Twitter’s actions violate California’s Liberty of Speech Clause

The Liberty of Speech Clause of the California Constitution protects the right of every person to “freely speak, write and publish his or her sentiments on all subjects.” Calif. Const. art. 1 § 2(a). This clause “grants broader rights to free expression than does the First Amendment to the United States Constitution.” *Fashion Valley Mall, LLC v. Nat’l Labor Relations Bd.*, 42 Cal. 4th 850, 857 (Cal. 2007). Specifically, as relevant here, under the Liberty of Speech Clause, “private property can constitute a public forum for free speech if it is open to the public in a manner similar to that of public streets and sidewalks.” *Id.* at 858. Indeed, “[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.” *Id.* at 858-59 (quoting *Marsh v. Alabama*, 326 U.S. 501, 506 (1946)).

The seminal case involving the application of this doctrine is *Robins v. Pruneyard Shopping Center*, where the California Supreme Court held that a privately owned shopping mall was a public forum under the Liberty of Speech Clause. 23 Cal.3d 899, 910 (Cal. 1979) (“*Pruneyard I*”), *aff’d sub nom. Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (“*Pruneyard II*”). In so holding, the Court took note of “the growing importance of the shopping center” to civic life and public discourse. *Id.* at 907 and n.5; *see also Fashion Valley*, 42 Cal. 4th at 858.⁶ In evaluating whether private property

⁶ Twitter cites to the California Supreme Court’s plurality decision in *Golden Gateway Ctr. v. Golden Gateway Tenants Association* in support of its argument that “state action” is required under the Liberty of Speech Clause. 26 Cal. 4th. 1013, 1017-1035 (Cal. 2001). However, only three Justices in

1 is subject to the Liberty of Speech Clause, California courts evaluate three factors: “the nature, purpose,
2 and primary use of the property; the extent and nature of the public invitation to use the property; and
3 the relationship between the ideas sought to be presented and the purpose of the property's occupants.”
4 *Park Mgmt. Corp. v. In Def. of Animals*, 36 Cal. App. 5th 649, 664 (Ct. App. 2019), *review denied*
5 (Sept. 25, 2019) (stating that “private shopping malls . . . do not represent the outer limits of private
6 property that may be subject to [the Liberty of Speech Clause]”). Applying these factors here leads
7 inescapably to the conclusion that Twitter is a public forum under California law.

8 Indeed, just as shopping malls were when *Pruneyard I* was decided in 1979, Twitter is today
9 “the functional equivalent of a public forum.” *Id.* As the United States Supreme Court recently
10 observed, “[w]hile in the past there may have been difficulty in identifying the most important places .
11 . . for the exchange of views, today the answer is clear. It is cyberspace . . . and social media in
12 particular.” *Packingham*, 137 S. Ct. at 1735. In short, Twitter is at least as important to public discourse
13 today as shopping centers were in 1979, and likely much more so. While common areas in a shopping
14 center are incidental its primary purpose of housing retail stores, for example, Twitter’s sole purpose is
15 hosting public discourse. Indeed, the “extent and nature of the public invitation to use” Twitter’s
16 platform also counsels in favor of a holding that it is a public forum under federal Constitutional law as
17 well. *See, Ctr. for Med. Progress v. Planned Parenthood Fed’n of Am.*, No. 20 CIV. 7670 (CM), 2021
18 WL 3173804, at *9 (S.D.N.Y. July 27, 2021) (noting that Twitter is “open to the public” at all times).

19 Certainly the Court should not be swayed by Twitter’s forecasted parade of horrors threatened
20 by subjecting it to responsibility for acting as the government’s censorship enforcer. Even if Twitter is
21 deemed a public forum under the Liberty of Speech Clause, it will simply be required to abide by the
22 restraints limiting the regulation of speech that have applied to public fora for decades, rules that are

23 _____
24 that case would have held that the Liberty of Speech Clause requires “state action.” *Id.* Further, prior
25 to *Golden Gateway*, the California Supreme Court said that “state action” was not required under the
26 Liberty of Speech Clause, *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 492 (Cal. 2000)
27 (observing that the Liberty of Speech Clause “runs against the world, including private parties as well
28 as governmental actors”), and since that case was decided, no California Supreme Court case has held
otherwise. In any event, to the extent the Liberty of Speech Clause requires “state action” (and it does
not), “state action” is met when, as here, the property at issue is the “functional equivalent” of a
shopping mall for speech purposes.

1 designed to foster speech, not suppress it. *Gathright v. City of Portland*, 439 F.3d 573, 578 (9th Cir.
2 2006) (“First Amendment jurisprudence is clear that the way to oppose [allegedly] offensive speech is
3 by more speech, not censorship, enforced silence or eviction from legitimately occupied public space.”).
4 This is entirely consistent with Twitter’s own acknowledged function as a forum for social discourse,
5 discussion and debate.

6 Constitutions are written to endure; to remain relevant, they must be interpreted in the context
7 of the technological advances society has produced. Modern shopping centers would have been
8 unfathomable to Californians in 1849, yet in *Pruneyard I* the California Supreme Court held—130 years
9 later—that the principles embodied in the Liberty of Speech Clause demanded that they be considered
10 places of free public expression. While no court has held that *Pruneyard I* applies to Twitter, no court
11 has held that *Pruneyard I* does *not* apply to Twitter either. Instead, it appears that no court has decided
12 the issue either way. In this situation, courts should be especially solicitous of individual rights. *See*
13 *Packingham*, 137 S. Ct. at 1736 (cautioning that that courts “must exercise extreme caution before
14 suggesting that the First Amendment provides scant protection for access to [the Internet]”). Indeed,
15 the California Supreme Court has tacitly acknowledged this fact in its statutory interpretation, *see, e.g.*,
16 *White v. Square, Inc.*, 7 Cal. 5th 1019, 1030 (2019) (websites are covered by the Unruh Civil Rights
17 Act); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 41 n.4 (2006) (websites are “public forums” under the anti-
18 SLAPP statute). It is but a small step now to hold, 40 years later, that these same principles apply to
19 what is indisputably the public forum of our digital age. This Court should follow suit and acknowledge
20 that Twitter is a public forum under California’s progressive Liberty of Speech Clause.⁷
21
22
23
24

25 ⁷ Under the Liberty of Speech Clause, content-based restrictions on speech are subject to strict
26 scrutiny, meaning that they are invalid unless the defendant can demonstrate that they are “necessary
27 to serve a compelling state interest” and “narrowly drawn to achieve that end.” *Fashion Valley*, 42
28 Cal. 4th at 865. Twitter’s actions against Mr. O’Handley—which were based on the viewpoint
expressed his tweets, (Compl. ¶¶ 72-88, 98-99, 114-116, 120)—do not satisfy strict scrutiny. Indeed,
Twitter does not argue otherwise.

VI. Neither Twitter’s First Amendment Rights, nor any rights conferred by Section 230, have any application here.

Twitter argues that Mr. O’Handley’s claims against it are barred by the First Amendment and § 230 of the Communications Decency Act, 47 U.S.C. § 230(c)(1). Neither of these arguments has merit.

A. Twitter has no cognizable First Amendment rights on the facts alleged here.

Twitter argues that it has a First Amendment right to exclude users from its platform. But this is not a “deplatforming” case, and Mr. O’Handley has not asked this Court to order that his account be reinstated. *See* Compl. Prayer for Relief. Further, as shown in Section II, Twitter did not act as a private actor here, but a state actor, thereby choosing by its actions to limit its own First Amendment rights. *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (holding that any “Constitutional rights of owners of [privately owned town]” must give way to the First Amendment rights of its citizens and visitors);⁸ *Libin v. Town of Greenwich*, 625 F. Supp. 393, 396 (D. Conn. 1985) (“[A] state actor does not have a First Amendment right of free expression, at least in those situations in which such a right would conflict with the First Amendment rights of citizens.”).

In any event, any right Twitter may have to ban users is not grounded in a constitutional free speech right. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (“FAIR”), the Supreme Court held unanimously that private law schools had no First Amendment right not to allow campus access to military recruiters based on the law schools’ disagreement with the military’s “don’t ask don’t tell” policy. 547 U.S. 47, 70 (2006). The Court observed that the statute requiring access “regulates conduct, not speech.” *Id.* at 60. Here, too, Mr. Handley’s claims concern Twitter’s conduct, not its speech. Similarly, in *Pruneyard II*, the United States Supreme Court held that the California Supreme Court’s decision in *Pruneyard I* did not violate the shopping center owners’ First Amendment rights because the shopping center was “not limited to the personal use of [its owners]” but was instead “a business establishment that is open to the public.” 477 U.S. at 877. For this reason, “[t]he views expressed by members of the public . . . [would] not likely be identified with those of the owner.” *Id.* To the extent they could be, the owners were free to “expressly disavow any connection with the

⁸ To be clear, Mr. O’Handley does not cite *Marsh* for the proposition that Twitter is a state actor. Instead, Mr. O’Handley cites *Marsh* for the proposition that, because Twitter is a state actor, any First Amendment rights it may otherwise have must give way to Mr. O’Handley’s First Amendment rights.

1 message by simply posting signs in the area where the speakers . . . stand.” *Id.*; see also *FAIR*, 547 U.S.
2 at 60; *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022, 1059 (N.D. Cal. 2007) (requiring adoption
3 website to host user does not “compel [the website owner] to say anything”). Moreover, hosting others’
4 speech is not inherently expressive, and Twitter does not “speak” by that act any more than law schools
5 “speak” through their recruiters or owners of shopping mall “speak” through their patrons. *FAIR*, 547
6 U.S. at 63-64; *PruneYard II*, 477 U.S. at 87; *Butler*, 486 F. Supp. 2d at 1059 (“Simply ‘publishing’
7 information written by [third parties by putting it on the internet] does not suffice to transform
8 defendants’ . . . conduct into speech.” (cleaned up)); see also *Texas v. Johnson*, 491 U.S. 397, 404
9 (1989) (First Amendment applies only to expressive conduct where “an intent to convey a *particularized*
10 message was present” (emphasis added)).

11 Arguing otherwise, Twitter relies on a trio of Supreme Court cases—*Hurley v. Irish-American*
12 *Gay, Lesbian and Bisexual Group of Boston, Incorporated*, *Pacific Gas & Electric Company v. Public*
13 *Utilities Commission of California*, and *Miami Herald Publishing Company v. Tornillo*—each of which
14 is distinguishable because the parties in those cases were conveying a message that would have been
15 interfered with by the compelled hosting. Indeed, in *FAIR*, the Supreme Court distinguished each of
16 these cases on precisely these grounds. 547 U.S. at 64. In short, “[t]he First Amendment’s command
17 that government not impede the freedom of speech” does not preclude the government from taking steps
18 to ensure that private entities do not “restrict, through physical control of a critical pathway of
19 communication, the free flow of information and ideas.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S.
20 622, 657 (1994).⁹

21 Finally, Twitter should be careful what it wishes for here. As the Ninth Circuit recently held, “a
22 website that creates or develops content by making a material contribution to its creation or development

23 ⁹ Twitter’s First Amendment argument is not salvaged by its citation to a smattering of lower court
24 cases, each of which is easily distinguishable. *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30
25 (D. Del. 2007) (involving decision over what advertisements to run); *Zhang v. Baidu, Inc.*, 10 F. Supp.
26 3d 433, 443 (S.D.N.Y. 2014) (holding results of internet search engine algorithm is protected speech);
27 *La’Tierjira v. Facebook, Inc.*, 272 F. Supp. 2d 981, 991 (S.D. Tex. 2017) (discussing Texas anti-
28 SLAPP law); *NetChoice, LLC v. Moody*, No. 4:21CV220-RH-MAF, 2021 WL 2690876, at *9 (N.D.
Fla. June 30, 2021), *appeal filed sub. nom. NetChoice, LLC v. Att’y Gen.*, No. 21-12355 (11th Cir.
July 13, 2021) (preliminarily enjoining sweeping Florida statute that contained various content-based
prohibitions on social media websites).

loses § 230 immunity.” *Gonzalez v. Google LLC*, 2 F.4th 871, 892 (9th Cir. 2021) (internal quotes and citations omitted). If indeed Twitter maintains that the process of banning users or content constitutes expressive conduct, it is arguably putting forth a rationale for stripping it of any immunity under Section 230, which it nonetheless asserts as a defense below.

B. Section 230(c)(1) has no application here.

Twitter’s argument under § 230(c)(1) fares no better. Section 230(c)(1) states that “no provider . . . of an interactive computer service [(hereinafter, “ICS”)] shall be treated as the publisher or speaker of any information provided by another information content provider.” An “information content provider” refers to the third party who is “responsible . . . for the creation or development of information.” 47 U.S.C. § 230(f)(3).

As an initial matter, as the District Court for the Northern District of California recognized in *FAN*, § 230 “does not immunize a defendant from constitutional claims.” 432 F. Supp. 3d at 1116; *see also Mainstream Loudon v. Board of Trustees*, 2 F. Supp. 2d 783, 790 (E.D. Va. 1998) (observing same). *Cf. Fair Housing Council of San Fernando Valley v. Roommates.Com*, 521 F.3d 1157, 1162 (9th Cir.2008) (*en banc*) (applying § 230(c)(1) to claims under the Fair Housing Act). Moreover, § 230(c)(1) does not apply to claims “for declaratory and injunctive relief.” *Mainstream Loudon*, 2 F. Supp. 2d at 790; *see also* 47 U.S.C. § 230(3)(e) (providing that § 230 creates immunity from “liability,” not declaratory or injunctive relief). Accordingly, Mr. O’Handley’s claims for declaratory and injunctive relief survive § 230(c)(1), regardless of the legal theory.

In any event, the facts here do not come within § 230(c)(1), which protects only attempts to hold an ICS liable for claims arising from the publication of content by a third party. *Barnes v. Yahoo!, Inc.*, supports this conclusion. In *Barnes*, the plaintiff sued Yahoo under a state law negligence theory akin to defamation for failing to remove lewd photographs of her that her ex-boyfriend had posted to Yahoo’s website. 570 F.3d 1096, 1099 (9th Cir. 2009). The Ninth Circuit held that prevailing under § 230(c)(1) requires the existence of three elements: “(1) a provider . . . of an [ICS] (2) whom a plaintiff seeks to treat . . . as a publisher or speaker (3) of information provided by another information content provider.” *Id.* at 1101-02 (emphasis added). As for the third element, it was undisputed that the content at issue was provided by a third party to the claim by the plaintiff

1 against Yahoo—namely, the plaintiff’s ex-boyfriend. *Id.* at 1101. Accordingly, the Ninth Circuit
2 concluded that § 230(c)(1) applied. *Id.* at 1103.

3 Here, by contrast, the content at issue—O’Handley’s tweets—was not created by “another
4 content provider.” Instead, it was created by O’Handley himself. Accordingly, Twitter does not meet
5 the third element of the *Barnes* test. Unlike *Barnes*, which involved a claim by a user against an ICS
6 due to its handling of *third-party content*, O’Handley’s claim is a *first-party* claim—*i.e.*, a claim by
7 the originator of the content against the ICS. Section 230(c)(1) does not apply to first-party claims.

8 Twitter relies on *Sikhs for Justice, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1094-1095
9 (N.D. Cal. 2015) (“*Sikhs*”), for the proposition that § 230(c)(1) applies to first-party claims, but *Sikhs*
10 is inapposite for several reasons.

11 First, the claim in *Sikhs* was statutory, not constitutional. Second, not only did *Barnes* involve
12 only third-party content, the Ninth Circuit took pains to specify that its holding pertained only to
13 “third party” claims. 570 F.3d at 1101 (“By its terms, . . . section (c)(1) only ensures that in certain
14 cases an [ICS] will not be treated as the speaker or publisher of *third-party content*[.]”); *id.* (“The
15 question before us is how to determine when, for purposes of this statute, a plaintiff’s theory of
16 liability would treat a defendant as a publisher or speaker of *third-party content*.”); *id.* at 1102 (“[A]
17 plaintiff cannot sue someone for publishing *third-party content* simply by changing the name of the
18 theory from defamation to negligence.” (emphasis added)); *id.* at 1105 (“Subsection (c)(1) . . . shields
19 from liability all publication decisions . . . with respect to content generated . . . by *third parties*.”).
20 The phrase “third party content” can refer to only one thing—content created by a third party in
21 relation to a claim by the plaintiff, and not the plaintiff himself. *See e-ventures Worldwide, LLC v.*
22 *Google, LLC*, No. 2:14-cv-646, 2017 WL 2210029, *3 (M.D. Fla. Feb. 8, 2017) (interpreting *Barnes*
23 to provide that the content at issue must be created by “a different entity or person from either the
24 plaintiff or the [ICS]”); *see also Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S. Ct.
25 13, 14 (2020) (“*Malwarebytes II*”) (Thomas, J., concurring in the denial of certiorari) (observing that
26 “§ 230(c)(1) indicates that an Internet provider does not become the publisher of a piece of *third-party*
27 content . . . simply by hosting . . . that content” (emphasis added)).
28

1 Third, interpreting § 230(c)(1) to apply to first-party content would be inconsistent with the
2 background, text, and structure of § 230. Section 230(c)(1) was enacted to reverse the result in
3 *Stratton Oakmont*, which held that an internet service provider was liable to the plaintiff for content
4 posted by a third party. See *Roommates*, 521 F.3d at 1164. Interpreting § 230(c)(1) to apply to first-
5 party content would stretch § 230(c)(1) far beyond its intended purpose. Moreover, a holding that the
6 general immunity set forth in § 230(c)(1) applies to the removal of first-party content—despite the
7 fact that § 230(c)(2)(A) specifically applies to the removal of content—would violate rule that, in
8 statutory construction, the “specific governs the general.” *Long Island Care at Home, Ltd. v. Coke*,
9 551 U.S. 158, 170 (2007). This is important because the immunity granted under § 230(c)(2)(A)
10 requires a finding that the ICS acted in “good faith.” 47 U.S.C. § 230(c)(2)(A). Twitter’s overbroad
11 interpretation of § 230(c)(1) would thus impermissibly result in the “good faith” requirement
12 effectively being read out of the statute. *e-ventures*, 2017 WL 2210029, at *3 (“[I]nterpreting [§
13 230(c)(1) to apply to first-party claims] results in the general immunity in (c)(1) swallowing the more
14 specific immunity in (c)(2).”).¹⁰

15 //

16 To be sure, the Ninth Circuit has stated, in an unpublished opinion, that interpreting §
17 230(c)(1) to apply to first-party content would not render § 230(c)(2)(A) superfluous because §
18 230(c)(1) does not apply in the situation where the ICS itself “developed, [in whole or] in part, the
19 content at issue” whereas § 230(c)(2)(A) does. *Fyk v. Facebook, Inc.*, 808 F. App’x 597, 598 (9th Cir.
20 2020). This opinion is not binding, see *Pedroza v. BRB*, 624 F.3d 926, 931 (9th Cir. 2010) (holding
21 that unpublished opinions are not precedential), and it is not persuasive either. When ICSs police
22 their websites, they almost always remove harmful information created by their users, not themselves.
23 It would be extremely odd for Congress to create two immunities—one in § 230(c)(1) and the other in
24 § 230(c)(2)(A)—with different standards that apply to the exact same situation in the vast majority of
25 instances. Moreover, a “good faith” requirement is only meaningful when an ICS removes content

26
27 ¹⁰ Twitter did not invoke the § 230(c)(2)(A) here, presumably because it recognizes that it cannot
28 satisfy the “good faith” requirement. This Court should not interpret § 230 in such a manner that it
gives Twitter a way out the back door when Congress has closed the front.

1 created by someone other than itself, but according to Twitter’s interpretation of § 230, an ICS could
2 take advantage of § 230(c)(1)—thus avoiding the “good faith” requirement—in every case in which
3 the removed content was created by a user, *which is the only situation in which the “good faith”*
4 *requirement makes sense*. This absurd result simply cannot be the result Congress intended. *See*
5 *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 542–543 (1940) (“[I]nterpretations of
6 a statute which would produce absurd results are to be avoided if alternative interpretations consistent
7 with the legislative purpose are available.”).

8 Fourth, adopting Twitter’s overbroad interpretation of § 230(c)(1) would lead to other absurd
9 results that Congress cannot possibly have intended. Assume, for example, that a Black Twitter user
10 alleged that Twitter banned him from its platform because of his race. Twitter’s interpretation of §
11 230(c)(1) would result in it being immunized for the race discrimination claim. *See, e.g., Sikhs*, 144
12 F. Supp. 3d at 1094-1095 (concluding that § 230(c)(1) provided Facebook immunity from race
13 discrimination claim). Such an overbroad result cannot possibly be what Congress intended in
14 enacting § 230(c)(1). As Justice Thomas recently noted, “[b]efore giving companies immunity from
15 civil claims for . . . race discrimination, [courts] should be certain that is what [§ 230(c)(1)]
16 demands.” *Malwarebytes*, 141 S. Ct. at 18 (Thomas, J., concurring in the denial of certiorari).

17 //

18 //

19 In sum, Mr. O’Handley’s claim has nothing to do with third-party content, and, for that reason,
20 § 230(c)(1) does not apply here. ¹¹

21
22 ¹¹ The second element of the *Barnes* test, which interpreted the phrase “publisher or speaker” in §
23 230(c)(1) to mean “reviewing, editing, and deciding whether to publish or withdraw from publication
24 third-party content,” has been harshly criticized on several grounds, including that the phrase should be
25 interpreted to provide immunity when internet companies “unknowingly decline to exercise editorial
26 functions” but not when they “decide to exercise those editorial functions.” *See, e.g., Malwarebytes II*,
27 141 S. Ct. at 17-18 (Thomas, J., concurring in the denial of certiorari) (criticizing *Barnes* on this
28 ground). Indeed, the Ninth Circuit in *Barnes* admitted that its interpretation of the phrase “publisher or
speaker” might be incorrect, but it believed itself to be constrained by circuit precedent. *Barnes*, 570
F.3d at 1105 n. 11. Although this Court is bound by *Barnes*, O’Handley contends that, based on the
background, text, and structure of § 230, *Barnes* incorrectly interpreted the term “publisher or speaker”
and that § 230(c)(1) does not apply where, like here, an internet company affirmatively removes content.
O’Handley reserves the right to press that argument before the Ninth Circuit should the need arise.

1 **CONCLUSION**

2 For the foregoing reasons, the Court should deny Twitter’s Motion to Dismiss. If the Court
3 grants Twitter’s Motion in any part, O’Handley asks the Court for leave to amend to cure any
4 pleading deficiencies.

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6 Date: November 5, 2021

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27 The Court need not reach this question here in order to rule in O’Handley’s favor. Even
28 assuming *Barnes*’s interpretation of the phrase “publisher or speaker” in § 230(c)(1) was correct, that
section does not apply here because, as noted in the text, O’Handley is making a first-party claim against
Twitter based on its removal of content created by him, and § 230(c)(1) does not apply to first-part
claims. O’Handley simply makes the argument to preserve it for appellate purposes.

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ROGAN O'HANDLEY,

Plaintiff,

v.

ALEX PADILLA, in his personal capacity;
SKDKNICKERBOCKER, LLC, a Delaware
company; PAULA VALLE CASTAÑON, in her
personal capacity; JENNA DRESNER, in her
personal capacity; SAM MAHOOD, in his personal
capacity; AKILAH JONES; in her personal
capacity; SHIRLEY N. WEBER, in her official
capacity as California Secretary of State;
TWITTER, INC., a Delaware corporation;
NATIONAL ASSOCIATION OF SECRETARIES OF
STATE, a professional nonprofit organization;

Defendants.

Case Number: 3:21-CV-07063-CRB

**PLAINTIFF'S OPPOSITION TO
STATE DEFENDANTS' MOTION TO
DISMISS (FRCP Rule 12(b)(1) and
FRCP Rule 12(b)(6))
[ECF 59]**

**Date: December 16, 2021
Time: 10:00 a.m.
Courtroom: 6, 17th Floor
Judge: Hon. Charles R. Breyer**

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SUMMARY OF ARGUMENT

Plaintiff Rogan O’Handley has standing to assert his claims because he has plausibly pled a direct causal chain leading from the State’s actions to his constitutional injuries. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011). As the Complaint alleges in detail, Defendants Alex Padilla, Paula Valle, Jenna Dresner, Sam Mahood, and Akilah Jones (collectively, “Individual State Defendants”) along with the Secretary of State’s office (collectively, the “State” or the “State Defendants”) injured Mr. O’Handley by the foreseeable acts of the Defendants’ conspiracy, taken in concert to further the goals of their shared objectives.

The law treats Twitter as a state actor because it conspired with the State to censor disfavored speech. *See Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012). The Complaint includes numerous allegations, including quotes from direct communications among Defendants, coordinating the creation of a “national narrative” regarding election administration and speech censorship. Concluding that their own affirmative messaging was insufficient to promote their “national narrative,” Defendants took the unprecedented and unconstitutional step of creating a streamlined process for government officials to identify speech to be censored by social media platforms. Defendants created an online system with a portal specifically designated for state officials to submit censorship “requests” which placed government censorship requests at the “top of the queue” at Twitter. The result was a 98% takedown rate.

This conspiracy to censor speech alleges joint action and a nexus between Twitter and the State Defendants and constituted a serious breach of Mr. O’Handley’s First Amendment rights. The State’s given reasons for censoring Mr. O’Handley’s public request for an audit are illogical, and demonstrate nothing but pretext—presumably because Mr. O’Handley’s opinions implicitly criticized then Secretary of State Padilla. At the time of Mr. O’Handley’s tweet, Padilla was positioning himself as a candidate for the position he has now assumed, U.S. Senator from the State of California.

By singling out a specific classification of tweets—conservative election audit requests—for censorship, the State also violated the Equal Protection clause. California’s Office of Elections Cybersecurity (OEC) cannot discriminate by ideology. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 583, 590 (9th Cir. 2008).

1 State officials “set[] in motion” the acts which also deprived Mr. O’Handley of his property
2 and liberty interests without notice or a hearing. *Merritt v. Mackey*, 932 F.2d 1317, 1371 (9th Cir.
3 1991). Further, Elections Code §10.5 is void for vagueness as applied to Mr. O’Handley because (i)
4 its prohibitions were not clearly defined, (ii) it did not establish minimum guidelines to govern
5 enforcement, and (iii) it reached constitutionally protected expression requiring greater specificity.
6 *United States v. Wyatt*, 408 F.3d 1257, 1260 (9th Cir. 2005); *Lane v. Salazar*, 911 F.3d 942, 950 (9th
7 Cir. 2018). Mr. O’Handley did not have a reasonable opportunity to know what he was purportedly
8 prohibited from saying.

9 In addition to a conspiracy under 42 U.S.C. § 1983, Defendants also conspired under 42
10 U.S.C. § 1985(3) to censor speech that they determined would contradict their official “national
11 narrative” on election administration. Their acts in furtherance of their conspiracy included
12 correspondence to identify and block disfavored speech, creating and using a dedicated portal to
13 identify speech targeted for state censorship, and giving Padilla a reward for his prolific censorship
14 actions.

15 Finally, the Individual State Defendants are not entitled to qualified immunity. Their
16 discrimination against Mr. O’Handley for his viewpoint and retaliation against him for the content of
17 his speech on behalf of the State are so “patently violative of fundamental constitutional principles”
18 that “any person of reasonable prudence would be bound to see [the] flaws” in the Individual State
19 Defendants’ conduct here. *Care v. Nevada Gaming Control Bd.*, 279 F.3d 873, 881 (9th Cir. 2002).

20 Should the Court find the allegations supporting any count deficient, Mr. O’Handley
21 respectfully requests the Court permit leave to amend to cure any pleading defects.

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INTRODUCTION AND BACKGROUND

Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth.
- Justice Anthony Kennedy
United States v. Alvarez, 567 U.S. 709, 723 (2012).

“The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth.” *United States v. Alvarez*, 567 U.S. 709, 727 (2012). Under the First Amendment, the only permissible government response to “misinformation” is more speech, not censorship. This constitutional truth, and the State Defendants’ open disregard of it, lies at the center of this case.

In 2018, California enacted California Election Code §10.5, creating a Ministry of Truth—misleadingly christened the Office of Election Cybersecurity—within the Secretary of State’s office. OEC’s statutory mandate included authority to “counteract” “false or misleading” election information, which OEC took as both a license and invitation to quash politically disfavored speech. The OEC embraced its speech-censoring role with gusto. As the OEC explained with chilling frankness, “our priority is working closely with social media companies *to be proactive* so when there’s a source of misinformation, *we can contain it*” and “*take down sources of misinformation as needed.*” Compl. ¶ 24–25 (emphasis added). Defendant Padilla described this symbiotic relationship with social media platforms as a “partnership.” Compl. ¶ 65.

In furtherance of this “partnership,” and as a part of Defendants’ goal to “create a more national narrative” concerning election integrity, Defendants built a dedicated reporting channel (“Twitter Portal”) to route the State’s censorship “requests” to Twitter with totalitarian efficiency. The Twitter Portal bumped OEC requests “to the head of the [censorship] queue,” and 98% of the OEC reported posts were “promptly removed.” Compl. ¶¶ 29, 64. Defendants’ definition of “misinformation” was expansive, including not only factual claims, but also politically inconvenient opinions. Compl. ¶ 72. Practically speaking, OEC labeled opinions that could harm Democrats, including Padilla and Defendant SKDK’s client Joe Biden, as “misinformation.” Compl. ¶ 2, 72.

Such “misinformation” flashed across the screen of one of SKDK’s thought police on November 12, 2020, when Mr. O’Handley implicitly criticized Defendant Padilla’s handling of

1 California elections in a tweet suggesting that California’s 2020 general election should be audited. *Id.*
2 Up until that time, Twitter had never sanctioned Mr. O’Handley. Compl. ¶ 81. Although some liberals
3 also took to Twitter to urge election transparency, Defendants focused their speech censorship efforts
4 on conservatives because of the implicit political messages in their speech, and Mr. O’Handley was
5 now in their sights. Compl. ¶ 83. SKDK swiftly forwarded Mr. O’Handley’s comment to the OEC as
6 “misinformation”; OEC, in turn, branded it “voter fraud” and passed it on to Twitter; and Twitter duly
7 retaliated against Mr. O’Handley for his speech, both by appending a public label on the tweet claiming,
8 absurdly, that Mr. O’Handley’s opinion was “disputed,” and issuing a “strike” against his Twitter
9 account. Compl. ¶¶ 75-80. Mr. O’Handley now became a person of intense interest to Twitter’s speech
10 monitors, who soon issued strikes against his account for the temerity of suggesting a commission on
11 the 2020 election to restore confidence in election integrity. In short order Mr. O’Handley was banned
12 from Twitter as a direct result of Defendants’ focused, coordinated political censorship program.
13 Compl. ¶¶ 81, 83, 84-89.

14 As Justice Brandeis stated in *Whitney v. California*, “[i]f there be time to expose through
15 discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be
16 applied is more speech, not enforced silence.” 274 U.S. 357, 377 (1927), *overruled in part on other*
17 *grounds by Brandenburg v. Ohio*, 395 U.S. 444 (1969). The State violated this bedrock principle of
18 our constitutional order, however, when under the guise of protecting a gullible public from election
19 misinformation, it conspired with Defendants to censor Mr. O’Handley’s disfavored opinions.

20 LEGAL STANDARDS

21 A plaintiff must establish Article III standing to assert his claims, including proof of injury-in-
22 fact, causation, and redressability. Fed. R. Civ. Pro. 12(b)(1); *Allen v. Wright*, 468 U.S. 737, 750
23 (1984). To survive a Rule 12(b)(6) motion, a complaint must only plead “enough facts to state a claim
24 to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 570 (2007).
25 Plausible means “factual content that allows the court to draw the reasonable inference that the
26 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court
27 “must presume all factual allegations of the complaint to be true and draw all reasonable inferences in
28 favor of the nonmoving party.” *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

ARGUMENT

I. There is a direct causal link between the State's actions and Mr. O'Handley's injuries.

To show an injury in fact, a defendant need not be the injury's "sole source" or "proximate cause" as long as the link is "not tenuous or abstract." *Barnum Timber Co. v. EPA*, 633 F.3d 894, 901 (9th Cir. 2011); *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 845, 860 (9th Cir. 2005). A "causation chain does not fail simply because it has several 'links,' provided those links are not hypothetical or tenuous and remain plausible." *Maya*, 658 F.3d at 1070 (citation omitted).

Mr. O'Handley was directly injured by the foreseeable acts of Defendants' conspiracy, whose objectives the State and Individual State Defendants, along with Twitter, all orchestrated, agreed to, and contributed overt acts to further. Compl. ¶¶ 56–57, 68, 74. By using a dedicated portal Twitter created to streamline state censorship submissions for priority action to "flag" Mr. O'Handley's post, which was a mere expression of opinion that could not even be "false" or "fraudulent," the State and Individual State Defendants were doing nothing less than instructing Twitter to "take down" tweets, which Twitter did 98% of the time. Acting as the arm of the OEC, Twitter punished Mr. O'Handley for his speech by issuing a strike against his Twitter account. Compl. ¶¶ 72–78. These were not "independent decisions," but coordinated steps taken in furtherance of a conspiracy in which each Defendant had a planned, assigned, and specialized role. Penalizing Mr. O'Handley for his expressed viewpoint caused an injury in fact, and there is a direct causal chain between the State's actions and the injury.

II. Twitter is a state actor.

"[M]ost rights secured by the Constitution are protected only against infringement by governments," so "the conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936–37 (1982) (internal citation omitted). *Lugar*'s two-part "fair attribution" test asks (1) whether the deprivation was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person whom the State is responsible," and (2) whether "the party charged with the deprivation ... may be fairly said to be a state actor." *Id.* at 937. The State does not contest, and therefore concedes, that Mr. O'Handley's claims meet *Lugar*'s "state policy" prong as it acted pursuant to California

1 Elections Code § 10.5. *See* ECF No. 59 8-10. Instead, the State argues Twitter cannot fairly be described
2 as a state actor under the “public function,” “state compulsion,” “nexus,” or “joint action” tests. *Rawson*
3 *v. Recovery Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020). Here, however, the joint action and
4 nexus tests are met.

5 The presumption that private conduct does not constitute governmental action may be
6 overcome by demonstrating state officials and private actors jointly “acted in concert in effecting a
7 particular deprivation of constitutional rights.” *Tsao*, 698 F.3d at 1140. It is a “well-accepted principle
8 that a private party’s joint participation in a conspiracy with the state provides a sufficient nexus to
9 hold the private party responsible as a governmental actor.” *Sutton v. Providence St. Joseph Medical*
10 *Ctr.*, 192 F.3d 826, 840 (9th Cir. 1999) (citing *Lugar*, 457 U.S. at 941). Conspiracy is a fact issue and
11 is shown if a defendant was a “willful participant” in “an agreement or meeting of the minds to violate
12 constitutional rights” and that an actual deprivation of rights resulted from that agreement. *Dennis v.*
13 *Sparks*, 449 U.S. 24, 27-28 (1980); *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002). All conspirators
14 may be held liable for the reasonably foreseeable acts of co-conspirators. *Pinkerton v. U.S.*, 328 U.S.
15 640, 645 (1946); *Proffitt v. Ridgway*, 279 F.3d 503, 507 (7th Cir. 2002) (“As a conspirator, the citizen
16 is liable, in civil as in criminal law, for the wrongful acts of the other conspirators committed within
17 the scope of the conspiracy.”). And even absent a conspiracy, “[j]oint action exists where the
18 government affirms, authorizes, encourages, or facilitates unconstitutional conduct.” *Noako Ohno v.*
19 *Yuko Yasuma*, 723 F.3d 984, 995 (9th Cir. 2013). Similarly, “close nexus/joint action” exists when the
20 scheme is “complex and deeply intertwined.” *Rawson*, 975 F.3d at 750.

21 The fact that no social media company has ever been treated as a state actor under § 1983 might
22 be relevant if any plaintiff had ever filed a complaint alleging facts, and documentation to support those
23 allegations, that were remotely like the ones Mr. O’Handley does here. The public-private
24 “partnership” detailed in the pleadings here, however, is unprecedented. The facts alleged and
25 documented in the Complaint include a myriad of direct communications demonstrating extensive
26 coordination; Twitter providing the government with special platform access and responsiveness not
27 available to the general public; and a 98% success rate for the State’s demands for speech censorship.

28 //

1 The State’s analysis glosses over the joint action/nexus tests, and the avalanche of supporting
2 claims, with a conclusory, one-sentence denial stating the complaint lacks allegations of “significant”
3 involvement. ECF 59:15. If these interactions aren’t “significant,” however it is hard to imagine what
4 would be: The OEC, in its own words, “work[ed] closely and proactively with social media companies
5 to...take down sources of misinformation,” and all the Individual State Defendants agreed to this
6 conspiracy and committed acts in furtherance of it because it was, *according to the State’s brief*, part
7 of their job description. ECF 59 11:3; Compl. ¶ 23-25. For example, Defendant Mahood, together with
8 Defendant Paula Valle, “requested” that Twitter take down a tweet “ASAP.” Compl. ¶ 34. Twitter
9 responded only hours later (on a holiday) that “this Tweet has been removed” and—demonstrating
10 Twitter’s virtually complete obeisance—and “Please don’t hesitate to contact me if there is anything
11 else we can do.” Compl. ¶ 35. Defendant Akilah Jones was tasked with tracking SKDK’s work, created
12 a template to make SKDK’s misinformation briefings clearer, and regularly identifying what speech
13 social media companies should censor. This speech-monitoring and censorship “partnership,” in the
14 word used by Defendant Padilla, was so effective that he proudly took credit for it when Defendant
15 NASS gave him an award for it.

16 Each and every Individual State Defendant played a role in coordinating with social media
17 companies to censor Mr. O’Handley’s speech, including the transformation—by virtue of their
18 flagging Mr. O’Handley’s first “offending” tweet to Twitter through the portal—of Mr. O’Handley
19 from a Twitter user with no strikes to, very soon thereafter, a former, and permanently banned, ex-user.
20 Compl. ¶¶ 77-81. Twitter willingly and knowingly participated in this coordinated government
21 program to censor private political speech, and this is state action.

22 **III. Mr. O’Handley takes issue with the State’s censorship of his speech, not its own.**

23 The State’s only defense against Mr. O’Handley’s claims of viewpoint discrimination and First
24 Amendment retaliation is that State speech is also at issue here. It is not, and the State’s argument is a
25 red herring.

26 Mr. O’Handley never suggests that the State cannot communicate its own message, and he
27 makes no claim here of a right to interfere with that speech. What he does claim is that the First
28 Amendment and the California Liberty of Speech Clause *prevent the State from acting to remove Mr.*

1 O’Handley’s speech from the public discourse because of the viewpoint expressed. The facts here
2 establish that the State conspired with the other Defendants to censor and retaliate against Mr.
3 O’Handley’s disfavored speech. OEC and the Individual State Defendants’ own admissions repeatedly
4 demonstrate the truth of Mr. O’Handley’s allegations about what they did to silence him. *See* Compl.
5 ¶ 24–25 (“We work closely and proactively with social media companies to...take down sources of
6 misinformation.”), 26–35, 64–65.

7 These facts belie the State’s claim that its censorship of Mr. O’Handley is justified to mitigate
8 “misinformation that could suppress voter turnout or disrupt the orderly administration of elections.”
9 ECF 57 3:5-7 (emphasis added). Opinions about election audits, or even audits themselves, do not
10 suppress voter turnout or disrupt the orderly administration of elections. They are after-the-fact,
11 independent examinations of voting records to ensure the accuracy of the vote. Second, Mr. O’Handley
12 tweeted his comment on November 12, 2020—more than a week *after* the November 3, 2020, election.
13 For this reason alone, his expression of an opinion *could not* have suppressed turnout or disrupted the
14 administration of an election that took place in the past. And finally, Mr. O’Handley’s tweet was,
15 indeed, the expression of an *opinion*. The State asserts that its actions were reasonable because Mr.
16 O’Handley’s statement was false or misleading, but it does not say how, because Mr. O’Handley
17 expressed no concrete fact *to* combat.

18 The fact is simply that the State censored Mr. O’Handley’s speech because it disapproved of
19 his viewpoint. The State’s reasoning smacks of pretext and is anathema to this Nation’s bedrock free
20 speech principles.

21 **IV. Defendants discriminated against Mr. O’Handley based on his perceived association**
22 **with an ideological group and applied Elections Code § 10.5 differently to conservative**
23 **speakers than to self-identified liberals.**

24 Mr. O’Handley seeks relief under the Equal Protection Clause based upon his classification as
25 a conservative. “In an equal protection claim based upon selective enforcement of the law, a plaintiff
26 can show that a defendant’s alleged rational basis for his acts is a pretext for an impermissible motive.”
27 *Engquist*, 478 F.3d at 993. “The first step in equal protection analysis is to identify the...classification
28 of groups.” *Country Classic Dairies, Inc. v. Montana, Dep’t of Commerce Milk Control Bureau*, 847
F.2d 593, 596 (9th Cir. 1988). “To accomplish this, a plaintiff can show that the law is applied in a

1 discriminatory manner or imposes different burdens on different classes of people.” *Freeman v. City of*
2 *Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995). Defendants focused “their censorship efforts on
3 conservative requests for transparency in election processes rather than the same calls from self-
4 identified political liberals.” Compl. ¶ 83. This allegation, taken as true for the purposes of this motion,
5 identifies both a disfavored and a favored classification.¹

6 Rational basis review is appropriate for cases of differential treatment based upon a political or
7 ideological classification. *See, e.g., Lazy Y*, 546 F.3d at 583, 588 (discrimination based upon ties to
8 conservationists); *Abcarian v. McDonald*, 617 F.3d 931, 938 (7th Cir. 2010) (stating “political
9 affiliation” is the appropriate basis for an Equal Protection claim). Additionally, on a motion to dismiss,
10 a court is not required “to accept [the Defendants’] explanation” for differential treatment. *Lazy Y*, 546
11 F.3d at 590. Rather, the court reviews whether there is a rational basis for the distinction alleged by the
12 plaintiff. *Id.* at 590. Here, there is no rational basis for the Defendants’ censorship of conservative, but
13 not liberal, calls for election transparency. Compl. ¶ 83; *Guillemard-Ginorio v. Contreras-Gomez*, 585
14 F.3d 508, 529 (1st Cir. 2009) (“government officials may not sanction a citizen because of his political
15 affiliation”).

16 The State Defendants also argue that the claim cannot move forward because “the ‘class-of-one’
17 doctrine does not apply to forms of state action that ‘by their nature involve discretionary
18 decisionmaking.’” ECF NO. 59 12: 23-25 (citing *Towery v. Brewer*, 672 F.3d 650, 660 (9th Cir. 2012)).
19 Mr. O’Handley’s claims are not limited by class-of-one analysis for the reasons discussed above. *See*
20 *Lazy Y*, 546 F.3d at 592. Yet even if they were, Mr. O’Handley would still prevail as “the rational
21 relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary”
22 as were the actions against Mr. O’Handley here. *Lockary v. Kayfet*, 917 F.2d 1150, 1155 (9th Cir.
23 1990); *see also* Section III.

24 //

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27 ¹ The State complains that Mr. O’Handley did not specifically identify any such instances, but at this
28 stage of the proceedings, he is only required to provide plausible factual allegations, not specific
examples. ECF No. 59 12:8-20; *Iqbal*, 556 U.S. at 678.

V. The State set in motion the acts inflicting Mr. O’Handley’s constitutional injuries.

When a private party deprives a citizen of employment, government officials are liable if they “set[] in motion a series of acts by others which ... would cause others to inflict the constitutional injury.” *Merritt*, 932 F.2d at 1371 (internal citation omitted). Mr. O’Handley alleged that the State Defendants did this when they “intentionally solicited Twitter to suspend [his] account.” Compl. ¶¶ 152-153. Certainly these allegations, taken as true, “caused” or “set in motion” a constitutional deprivation, and, as set forth above, the actual acts in question are alleged in detail.

Because of Defendants’ conduct, Mr. O’Handley was deprived of both property and liberty interests without a hearing. With property, the “right to pursue an occupation” is a recognized liberty or property interest subject to due process rights. *Benigni v. City of Hemet*, 879 F.2d 473, 478 (9th Cir. 1989). “A protected property interest is present where an individual has a reasonable expectation of entitlement deriving from existing rules...such as state law.” *Wedges/Ledges of Cal., Inc. v. Phoenix, Ariz.*, 24 F.3d 56, 62 (9th Cir. 1994) (internal citation omitted). Further, in California, the “good will of a business” is a recognized property interest. Cal Bus & Prof. Code §14102. Mr. O’Handley’s occupation and the good will of his business were reliant upon access to Twitter, and he had a reasonable entitlement deriving from existing rules, with which the State’s censorship actions interfered. Compl. ¶¶ 94, 150.

Regarding liberty interests, “[w]hen a State would directly impinge upon interests in free speech” the Supreme Court has “held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 575 n.14 (1972). That includes suppressing content. *Id.* (“necessity of procedural safeguards before a State makes a large-scale seizure of a person’s allegedly obscene books, magazines, and so forth.”). Mr. O’Handley received no procedural safeguards here: Defendants decided what he could and could not say and executed their decision with neither notice nor a hearing.

VI. Elections Code § 10.5 is void for vagueness as-applied to Mr. O’Handley.

“[A]n enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Laws must “give the person of ordinary intelligence a

1 reasonable opportunity to know what is prohibited.” *Id.* When a statute “is capable of reaching
2 expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of
3 specificity than in other contexts.” *Lane*, 911 F.3d at 950 (quoting *VIP of Berlin, LLC v. Town of Berlin*,
4 593 F.3d 179, 186 (2d Cir. 2010)). In an as-applied challenge, a statute is void for vagueness (and thus
5 an unconstitutional deprivation of due process) if the statute (1) does not define the conduct it prohibits
6 with sufficient definiteness and (2) does not establish minimal guidelines to govern enforcement. *United*
7 *States v. Wyatt*, 408 F.3d 1257, 1260 (9th Cir. 2005) (quoting *United States v. Rodriguez*, 360 F.3d 949,
8 953 (9th Cir. 2004)).

9 Section 10.5 is void for vagueness because it grants the OEC the right to “counteract false or
10 misleading information”—terms that are not defined in the statute. OEC and the Individual State
11 Defendants nonetheless interpreted the word “counteract” as a license to censor First Amendment-
12 protected speech they deemed, in their sole discretion, to be “false or misleading.” Even if § 10.5 were
13 lawful, Mr. O’Handley had no way of knowing what it prohibited, while OEC officials had unbridled
14 discretion to determine what speech warranted action. Nor would Mr. O’Handley have any way of
15 knowing that the OEC had a special “fast track” relationship that enabled it to feed “offending” social
16 media content to Twitter for punishment. The obvious, inherent danger in this combination of ambiguity
17 and unbridled government discretion was realized in OEC’s actions to censor Mr. O’Handley’s speech.
18 *See Hunt v. City of Los Angeles*, 638 F.3d 703, 712 (9th Cir. 2011); *see also* Section III.

19 **VII. Defendants conspired to deprive Mr. O’Handley of his rights under 42 U.S.C. § 1985(3).**

20 The elements of a conspiracy under 42 U.S.C. § 1985(3) are: (1) a conspiracy; (2) “for the
21 purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal
22 privileges and immunities under the laws”; (3) an “act in furtherance”; and (4) an injury or deprivation
23 of rights. *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499, 502 (9th Cir. 1979) (quoting *Griffin v.*
24 *Breckenridge*, 403 U.S. 88, 102-103 (1971)). Unlike § 1983, which requires the existence of state action,
25 § 1985(3) extends to purely private action as long as one co-conspirator is a state actor. *Pasadena*
26 *Republican Club v. W. Just. Ctr.*, 985 F.3d 1161, 1171 (9th Cir. 2021). Here, the State Defendants argue
27 that Mr. O’Handley’s § 1985(3) claim should be dismissed because the Complaint does not allege (1)
28

1 the existence of a conspiracy or (2) “class-based” treatment. ECF No. 59 14-15. Each of these
2 arguments is mistaken.

3 First, Mr. O’Handley has alleged and shown the existence of a conspiracy, *see* Section II B 1,
4 and the standard for a § 1985(3) conspiracy is the same as under § 1983. *Compare Scott v. Ross*, 140
5 F.3d 1275, 1284-85 (9th Cir. 1998) *with Crowe v. Cty. of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010).

6 Second, Mr. O’Handley has alleged the conspiracy at issue here was motivated by “class-
7 based” animus against conservative political views. Compl. ¶ 83. A plaintiff satisfies the “class-based”
8 requirement if either: (1) “the courts have designated the class in question a suspect or quasi-suspect
9 classification requiring more exacting scrutiny” or (2) “Congress has indicated through legislation that
10 the class required special protection.” *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992).
11 Both criteria are met here. While the Ninth Circuit has not yet ruled on the question of whether political
12 affiliation is a suspect or quasi-suspect class,² it has determined that allegations of discrimination on
13 the basis of political affiliation require the same “exacting scrutiny” required to meet the “class-based”
14 discrimination requirement of § 1985(3). *Reichardt*, 591 F.2d at 505. In *Reichardt*, the Circuit
15 observed that discrimination based on plaintiffs’ status as either (1) “political opponents” of defendants
16 or (2) “supporters of a [different] political candidate” was sufficiently “class-based” to state a claim
17 under § 1985(3). *Id.* This observation is in line with numerous other courts, which have held that
18 political affiliation satisfies the “class-based” requirement under § 1985(3).³ Here, Mr. O’Handley
19

20 ² Other courts have concluded that political affiliation is a suspect class. *See Abcarian v. McDonald*,
21 617 F.3d 931, 938 (7th Cir. 2010) (“political affiliation” a suspect classification). Moreover, the
22 Supreme Court has both stated in dicta that political affiliation is a suspect class, *see Am. Sugar-Ref.*
23 *Co. v. State of Louisiana*, 179 U.S. 89, 92 (1900) (noting that discrimination based on “political
24 affiliations” would be “a denial of the equal protection of the laws”), and held that it is protected in
25 certain settings, *see Rutan v. Republican Party of Illinois*, 497 U.S. 62, 78 (1990) (holding that
government employers may not “condition [] hiring decisions on political belief”); *Fusaro v. Cogan*,
930 F.3d 241, 261 (4th Cir. 2019) (“[A]n election regulation that plausibly burdens First Amendment
rights on the basis of viewpoint, political affiliation, or class should be subject to strict scrutiny.”).

26 ³ *See, e.g., McLean v. Int’l Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir. 1987) (discrimination on the
27 basis of “political beliefs or associations” is covered under § 1985(3)); *Galloway v. Louisiana*, 817
28 F.2d 1154, 1159 (5th Cir. 1987) (same); *Conklin v. Lovely*, 834 F.2d 543, 549 (6th Cir. 1987) (same);
Keating v. Carey, 706 F.2d 377, 386-88 (7th Cir. 1983) (“Republicans are a protected class” under §
1985(3)); *Means*, 522 F.2d at 836 (§ 1985(3) claim available for allegations of discrimination against
political opponents); *Cameron*, 473 F.2d at 610; (discrimination against “supporters of a political

1 alleges that Defendants conspired to deprive him his constitutional rights based on his conservative
2 beliefs. Under *Reichardt*, this is sufficient to allege “class-based” treatment. Moreover, Congress has
3 “indicated through legislation” that political affiliation requires “special protection” through scores of
4 statutes that designate political affiliation as a protected class in a variety of settings.⁴ *Sever*, 978 F.2d
5 at 1536. These and other laws demonstrate that discrimination on the basis of political affiliation is
6 sufficient for a claim under § 1985(3). *Id.*

7 **VIII. Constitutional prohibitions on viewpoint discrimination and retaliation are clearly**
8 **established.**

9 Under *Ashcroft v. al-Kidd*, the party asserting qualified immunity must demonstrate that the
10 complaint fails to allege “(1) that the official violated a statutory or constitutional right, and (2) that the
11 right was ‘clearly established’ at the time of the challenged conduct.” 563 U.S. 731, 735 (2011). The
12 State Defendants have not met their burden, nor can they on these facts.

13 Ordinarily, a plaintiff defeats a claim of qualified immunity by citing case law arising from
14 analogous circumstances. Similar cases are “not necessary,” however, when “a general constitutional
15 rule already identified in the decisional law may apply with obvious clarity to the specific conduct in
16 question, even though the very action in question has [not] previously been held unlawful.” *Villarreal*
17 *v. City of Laredo, Texas*, No. 20-40359, 2021 WL 5049281, at *1 (5th Cir. Nov. 1, 2021) (quoting *Hope*
18 *v. Pelzer*, 536 U.S. 730, 741 (2002)). An official may be liable for enforcing a statute that is so “patently
19 candidate” is covered under § 1985(3)); *Glasson v. City of Louisville*, 518 F.2d 899, 906 (6th
20 Cir.1975) (§ 1985(3) claim available for allegations of discrimination on the grounds of political
21 opinion), overruled on other grounds by *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 236 (6th
Cir. 2015).

22 ⁴ See, e.g., 5 U.S.C. § 2302(b)(1)(E) (prohibiting discrimination on the basis of “political affiliation” in
23 personnel decisions); 8 U.S.C. § 1231(b)(3)(A) (prohibiting removal of alien to country where his life
24 or freedom would be threatened based on “political opinion”); 18 U.S.C. § 227 (prohibiting
25 government employees from influencing private employment decision based on “political
26 affiliation”); 20 U.S.C. § 1232h(b) (providing that students shall not be requiring to disclose their or
27 their parents’ “political affiliation[]” in connection with federal educational programs); 29 U.S.C. §
3248 (prohibiting discrimination in program access on the basis of “political affiliation” to programs
28 under the Workforce Innovation and Opportunity Act); 42 U.S.C. § 5057 (prohibiting discrimination
in program access on the basis of “political affiliation” to programs under the Domestic Volunteer
Service Act); 42 U.S.C. § 9821 (same under Community Economic Development Act); 42 U.S.C. §
9849 (same under Head Start Act); 42 U.S.C. § 12635 (same under National Community Service Act).

1 violative of fundamental constitutional principles” that “any person of reasonable prudence would be
2 bound to see its flaws.” *Care*, 279 F.3d at 881 (citing *Michigan v. Defillippo*, 443 U.S. 31, 38 (1979)).
3 This principle applies here where, even if the statute itself is facially valid, the OEC’s pattern of
4 enforcement—censoring and punishing private speech from public discourse because of the speech’s
5 viewpoint—is so beyond the pale and patently absurd that no reasonable person would consider it
6 constitutional. As the Fifth Circuit wrote in comparable circumstances, “[t]his is not just an obvious
7 constitutional infringement—it’s hard to imagine a more textbook violation of the First Amendment.”
8 *Villarreal*, No. 20-40359, at *1 (citing cases where courts denied qualified immunity in the absence of
9 an analogous fact pattern, but where the behavior was nonetheless so “flagrantly unconstitutional” that
10 qualified immunity did not apply).

11 Courts have long held that viewpoint discrimination is so fundamental a constitutional principle
12 that qualified immunity will not protect a government official engaged in it, even absent a prior
13 analogous factual scenario. *See, e.g., Metro Display Advert., Inc. v. City of Victorville*, 143 F.3d 1191,
14 1196 (9th Cir. 1998). The Supreme Court has stated that “[i]t is axiomatic that the government may not
15 regulate speech based on its substantive content or the message it conveys.” *Rosenberger v. Rector and*
16 *Visitors*, 515 U.S. 819, 828 (1995). The impermissibility of viewpoint discrimination is “a self-evident
17 or universally recognized truth.” *Metro Display Advert.*, 143 F.3d at 1196. “[T]he proposition should
18 be and is obvious to everyone.” *Id.* (denying qualified immunity to government official who engaged
19 in viewpoint discrimination because it is obviously unconstitutional).⁵ Here, the Individual State
20 Defendants targeted Mr. O’Handley’s speech for censorship because of its viewpoint, a universally
21 recognized constitutional violation that should be “obvious to everyone.”
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23

24 ⁵ *See also Cuviello v. City & Cnty. of San Francisco*, 940 F. Supp. 2d 1071, 1088 (N.D. Cal. 2013)
25 (denying motion to dismiss qualified immunity claim stating it was “beyond debate” that “government
26 officials may not disadvantage speakers based on their viewpoint.”); *West v. Shea*, 500 F. Supp. 3d
27 1079, 1087 (C.D. Cal. 2020) (denying motion to dismiss defendant based on qualified immunity
28 because the impermissibility of viewpoint discrimination is a “universally recognized truth”);
Apodaca v. White, 401 F. Supp. 3d 1040, 1060 (S.D. Cal. 2019) (same); *Peltier v. Sacks*, 328 F. Supp.
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2012) (same); *Dirks v. Grasso*, 449 F. App’x 589, 592 (9th Cir. 2011) (same).

CONCLUSION

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⁷ Yet even if the State Defendants had not so flagrantly violated the law, this is exactly the type of egregious example highlighted by Justice Thomas in his recent dissent from denial of cert in *Hoggard v. Rhodes* that warrants the Supreme Court revisiting its grant of qualified immunity to officials in non-emergency situations. After all, why should these officials, who had “time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?” __ U.S. __, 141 S. Ct. 2421, 2422, (2021) (Mem.) (Thomas, J., respecting denial of cert.).

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

ROGAN O'HANDLEY,

Plaintiff,

v.

ALEX PADILLA, in his personal capacity;
SKDKNICKERBOCKER, LLC, a Delaware
company; PAULA VALLE CASTAÑON, in her
personal capacity; JENNA DRESNER, in her
personal capacity; SAM MAHOOD, in his personal
capacity; AKILAH JONES; in her personal
capacity; SHIRLEY N. WEBER, in her official
capacity as California Secretary of State;
TWITTER, INC., a Delaware corporation;
NATIONAL ASSOCIATION OF SECRETARIES OF
STATE, a professional nonprofit organization;

Defendants.

Case Number: 3:21-CV-07063-CRB

**PLAINTIFF'S OPPOSITION TO
DEFENDANT NATIONAL
ASSOCIATION OF SECRETARIES OF
STATE'S MOTION TO DISMISS
(FRCP Rule 12(b)(2) and FRCP Rule
12(b)(6))
[ECF 58]**

**Date: December 16, 2021
Time: 10:00 a.m.
Courtroom: 6, 17th Floor
Judge: Hon. Charles R. Breyer**

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SUMMARY OF ARGUMENT

This Court has specific jurisdiction over the National Association of Secretaries of State (“NASS”) because NASS purposefully directed its activities toward California. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1227-32 (9th Cir. 2011). Additionally, Plaintiff’s claims arose out of or related to NASS’s activities within California. *Id.* Plaintiff pleads sufficient facts to establish both prongs of the Ninth Circuit’s test for specific personal jurisdiction.

First, NASS must be said to have 1) committed an intentional act, 2) expressly aimed at the forum state, and 3) causing harm that the defendant knows is likely to be suffered in the forum state. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006). Here, NASS (1) intentionally, (2) facilitated the Secretaries of States’ reporting of “mis/disinformation” to Twitter using a “Partner Support Portal” that NASS set up and authored “guidance” on how to report “mis/disinformation.” Compl. ¶¶ 27-32, Exs. 2-4. This (3) caused harm to Plaintiff because the California Office of Elections Cybersecurity (“OEC”) circulated this guidance and used NASS/Twitter’s Partner Support Portal to infringe on Mr. O’Handley’s rights. Compl. ¶¶ 31-33. Second, it must be said that “but for” a defendant’s activity, a plaintiff’s claims would not have arisen. *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995). Plaintiff’s claims arose out of NASS’s forum-related activities, in that, OEC reported Plaintiff’s Twitter content to Twitter using NASS’s guidance and the Partner Support Portal it helped create and highly encouraged its members to use. Compl. ¶¶ 31-32, 75.

NASS is a state actor under the two-prong *Lugar* test as NASS’s actions were taken with knowledge of, and in furtherance of, California Elections Code § 10.5 (b)(2), (c)(8), and NASS conspired with and jointly acted with the OEC, Twitter, and other Defendants to censor disfavored political speech. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *Collins v. Womancare*, 878 F.2d 1145, 1151 (9th Cir. 1989).

Finally, Mr. O’Handley sufficiently pled facts showing a conspiracy under 42 U.S.C. §1985(3). Defendants conspired to censor disfavored speech; NASS was a willing participant in that conspiracy and agreed to its aims; and Defendants, including NASS, took numerous acts in furtherance thereof, including creating in coordination with Twitter—and repeatedly and emphatically

1 encouraging its members to use—a dedicated portal to expedite speech censorship requests. Even if
2 this Court determines NASS is a private actor, because NASS did not argue that O’Handley failed to
3 plausibly plead violations of his Constitutional rights, NASS is still liable under 42 U.S.C. § 1985(3).
4 *See Pasadena Republican Club v. Western. Just. Ctr.*, 985 F.3d 1161, 1171 (9th Cir. 2021).

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INTRODUCTION

NASS spearheaded efforts to create a “national narrative” to censor disfavored political speech under the guise that conservative viewpoints calling for greater election transparency constituted “misinformation.” Compl. ¶¶ 27-31, Exs 2-4. In furtherance of that mission, NASS worked specifically with Twitter, a California resident corporation, to create a “Partner Support Portal” for secretaries of state to report private speech for censorship. NASS included OEC in this plan to censor disfavored speech, and much of that speech, predictably, came from California residents. Compl. ¶¶ 28-29, 32, Exs. 2-4.

NASS does not contest any of O’Handley’s constitutional claims. NASS nowhere suggests that O’Handley has failed to present plausible allegations of the violations of his First and Fourteenth Amendment rights, or a violation of his rights under the Liberty and Speech Clause of the California Constitution. Instead, NASS’s defense rests solely on the argument that this Court does not have personal jurisdiction over NASS, and that NASS cannot be fairly described as a state actor.

This Court does have specific jurisdiction over NASS, however, because NASS purposefully directed its activities to California. And NASS is a state actor because of its joint actions with the OEC and its willful participation in Defendants’ conspiracy to censor speech. Further, because NASS does not contest the plausibly plead violations of O’Handley’s state and federal constitutional rights, even if this Court determines NASS is a private actor, private actors are still liable for their participation in conspiracies to violate constitutional rights under 42 U.S.C. § 1985(3). This Court should deny NASS’s Motion to Dismiss.

STATEMENT OF FACTS

In 2018, California created the Office of Elections Cybersecurity (“OEC”) within the California Secretary of State’s office (“SOS”), to “assess,” “mitigate,” “monitor and counteract false or misleading [electoral] information [online].” Cal. Elec. Code § 10.5. The OEC seized on the phrase “counteract [] false or misleading information” as a license to quash politically-disfavored speech, and the SOS’s office partnered with the private Defendants and others in a conspiracy to “work[] closely and proactively with social media companies to . . . *take down sources of misinformation as needed*” Compl. ¶ 25 (emphasis added).

1 Defendant NASS is a professional organization for state Secretaries of State. Compl. ¶ 18. In
2 the lead up to the 2020 election, NASS established direct channels of communication between member
3 Secretaries of State and social media companies to “create a more national narrative” surrounding the
4 election by facilitating the removal of speech deemed “misinformation.” Compl. ¶¶ 27, 30. In a series
5 of emails sent between August 8 and November 2, 2020, NASS Director of Communications Maria
6 Benson notified members that NASS had coordinated with Twitter to create a separate dedicated portal
7 for election officials to “flag concerns directly to Twitter” that Benson assured would be “bumped to
8 the head of the queue.” Compl. ¶¶ 28-31. Benson asked members to give a “heads up” when they saw
9 “mis- or disinformation” on social media. Compl. ¶ 30. As a NASS member, the California Secretary
10 of State’s office participated in this portal through its Office of Elections Cybersecurity (“OEC”).
11 Compl. ¶¶ 31-33.

12 Plaintiff, Rogan O’Handley is a licensed attorney and political commentator. Compl. ¶ 70. On
13 November 12, 2020, Mr. O’Handley authored a Twitter post stating: “Audit every California ballot[.]
14 Election fraud is rampant nationwide and we all know California is one of the culprits[.] Do it to protect
15 the integrity of that state’s elections[.]” Compl. ¶ 72. In response to Mr. O’Handley expressing a
16 political opinion implicitly critical of then-Secretary of State Alex Padilla’s handling of the 2020
17 election, OEC utilized the portal established and promoted by NASS to label Mr. O’Handley’s post,
18 implausibly and absurdly, “voter fraud” and “flag” it to Twitter—“flag” serving as a euphemism for a
19 censorship instruction. Compl. ¶¶ 33–34, 61, 74-76. Twitter took prompt action upon OEC’s directive,
20 appending commentary that asserted Mr. O’Handley’s claim was “disputed” and adding a strike to Mr.
21 O’Handley’s account. Compl. ¶¶ 76-80. Under Twitter’s strike system, each strike results in progressive
22 penalties, and an account that incurs five strikes is removed permanently. *Id.*

23 Prior to OEC using the portal created and promulgated by NASS to instigate the censorship of
24 O’Handley’s post, Twitter had never taken disciplinary action against Mr. O’Handley’s account. Compl.
25 ¶¶ 61, 81. Having now labeled him as a spreader of “misinformation,” however, Twitter began to apply
26 a demonstrably heightened level of scrutiny to Mr. O’Handley. Compl. ¶¶ 81-87. Within a few months,
27 Twitter imposed an additional four strikes on Mr. O’Handley’s tweets. Compl. ¶¶ 84-89. Upon issuing
28 the fifth strike, Twitter permanently suspended Mr. O’Handley’s account. Compl. ¶¶ 87-89.

1 Twitter serves as the primary social channel for American political commentary. *Id.* ¶ 90. As a
2 full-time political commentator with over 440,000 Twitter followers, Twitter’s ban had a direct and
3 detrimental impact on Mr. O’Handley’s job. *Id.* ¶¶ 91-94.

4 Praising the success of OEC’s censorship efforts, NASS awarded the California Secretary of
5 State’s office its annual IDEAS (“Innovation, Dedication, Excellence & Achievement in Service”) Award
6 for 2020, stating that OEC’s censorship program constituted “significant state contributions to
7 the mission of NASS.” Compl. ¶¶ 63-65. According to the California Secretary of State’s application
8 for the award, social media companies removed 98% of the nearly 300 instances of “misinformation”
9 reported by OEC through the dedicated portal promoted and established by NASS. Compl. ¶ 64.

10 LEGAL STANDARD

11 Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a plaintiff must establish Article
12 III standing to assert his claims, including proof of injury-in-fact, causation, and redressability. *Allen*
13 *v. Wright*, 468 U.S. 737, 750 (1984). Rule 12(b)(1) attacks can be either facial, confining the court’s
14 inquiry to allegations in the complaint, or factual, permitting the court to look beyond the complaint.
15 *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). For facial attacks, courts accept the jurisdictional
16 allegations in the complaint as true. *See Whisnant v United States*, 400 F.3d 1177, 1179 (9th Cir. 2005).

17 To survive a Rule 12(b)(6) motion, a complaint must plead “enough facts to state a claim to
18 relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007). Plausible
19 means “the plaintiff pleads factual content that allows the court to draw the reasonable inference that
20 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The
21 court “must presume all factual allegations of the complaint to be true and draw all reasonable
22 inferences in favor of the nonmoving party.” *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir.
23 1987).

24 ARGUMENT

25 I. This Court has Personal Jurisdiction Over NASS.

26 This Court has specific jurisdiction over NASS. Courts in the Ninth Circuit analyze specific
27 jurisdiction under a three-prong test:

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(1) The non-resident defendant must *purposefully direct his activities* or consummate some transaction with the forum or resident thereof; *or* perform some act by which he *purposefully avails himself* of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Mavrix Photo, 647 F.3d at 1227–28. A plaintiff “bears the burden of satisfying the first two prongs,” and if the plaintiff is successful, the defendant is “to set forth a compelling case that the exercise of jurisdiction would not be reasonable.” *Id.* at 1228 (citation omitted).

A. The Complaint’s allegations describe purposeful direction.

Under the first prong, a plaintiff must establish that the defendant either purposely availed itself of the privilege of conducting activities in the state, or purposely directed its activities toward the state. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). For constitutional claims, this circuit has applied the “Calder test” pursuant to *Calder v. Jones*, 465 U.S. 783 (1984). *Yahoo!*, 433 F.3d at 1206. That test questions whether 1) a defendant “committed an intentional act, 2) “expressly aimed at the forum state,” and 3) “causing harm that the defendant knows is likely to be suffered in the forum state.” *Id.* (quoting *Schwarzenegger* 374 F.3d at 803). “[T]he ‘brunt’ of the harm need not be suffered in the forum state,” meaning that “it does not matter that even more harm might have been suffered in another state.” *Id.* at 1207.

For example, in *Mavrix Photo*, 647 F.3d at 1225, the court found specific jurisdiction despite the defendant having “no offices or staff in California, [] not [being] registered to do business in the state, ha[ving] no registered agent for service of process, and pay[ing] no state taxes” but “allow[ing] other entities to solicit business by taking advantage of [defendant’s] existing use base.” Specific jurisdiction was found because a “substantial number of hits to [defendant’s] website came from California residents,” which demonstrated the defendant’s knowledge about its California user base, which it exploited for its own gain. *Id.* at 1226.

In another example, an Ohio non-profit trade association had “3,000 member stores serving colleges, universities, and grade-schools” in the United States and internationally. *Amazon.com, Inc. v. National Ass’n of College Stores, Inc.*, 826 F.Supp.2d 1242, 1246 (W.D. Wash. 2011). There, the non-profit sent a letter to Amazon concerning what it believed to be anti-competitive advertisements near their stores and, eventually, sought to involve Amazon in an arbitration type proceeding. *Id.* at 1247.

Amazon declined to participate in the dispute resolution process and instead filed a declaratory judgement action in Washington federal court. *Id.* at 1251. The non-profit claimed the Court lacked personal jurisdiction to hear the case. *Id.* at 1248. The district court found personal jurisdiction because, among other reasons, the non-profit “expressly aimed its actions at Washington by individually targeting Amazon” and “the effects of [the non-profit’s] challenge to Amazon’s continuing use of its advertising claims were primarily felt in Washington, where Amazon was headquartered.” *Id.* at 1254-55.

Here, as in *Marvix*, NASS furthered its efforts to “create more national narrative” and the “mission of NASS” by creating “direct channels of communication” between secretaries of state, including California’s OEC, and California-based Twitter. Compl. ¶¶ 27, 30, 63, 66-68. Given that the location of virtually all major social media platforms, including Twitter, is California, NASS knew that a “substantial number” or amount of the censorship of social media use would originate in California, and that Twitter and other social media companies would act on censorship directives in this State. Like the non-profit in *Amazon.com*, NASS had members across the country, but demonstrated its “aim” at California by “individually” engaging with both Twitter and OEC, both located in California. The “effects” have been “primarily felt” in California, where both Twitter and OEC are located. Accordingly, by specifically targeting both Twitter and OEC, NASS has purposely availed itself of the privilege of conducting activities in the state of California.

NASS cites *Asahi Metal Industries Co. v. Superior Court of California*, 480 U.S. 102 (1987), to argue that California has no jurisdiction over it because NASS does not have bank accounts, offices, agents, or employees in California, nor has it directed any of its advertising specifically toward California.¹ ECF No. 58 14:18-25. The crux of *Asahi*’s holding, however, was that the “placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state.” *Id.* at 112. Here, NASS did far more than merely releasing a product into the populace with no foresight of where it would land. Rather, NASS specifically coordinated with both Twitter and OEC, both located in California, to engage them on their “mission” to “create a national

¹ It is not clear what kind of “advertising” an association of state secretaries of state would direct at any given state, so this factor should be entitled to no weight.

1 narrative” and to censor “mis/disinformation.” Compl. ¶¶ 26-33, Exs 2-4. This was far more intentional,
2 specific, and directed to California.

3 Similarly, NASS’s cite to *PREP Tours, Inc. v. American Youth Soccer Organization*, 913 F.3d
4 11 (1st Cir. 2019), does not help it. There, a youth soccer organization in California had emails, phone
5 calls, and a text message to get a “price quote” for a “possible trip,” where it was communicated that
6 there were other destinations that were possible. *Id.* at 15. PREP Tours sued the youth soccer
7 organization in Puerto Rico alleging a violation in tort for a failure to negotiate in good faith. *Id.* The
8 court found the parties did not have “the kind of ongoing and close-working relationship” to create a
9 “substantial connection.” *Id.* at 23.

10 Contrast this with the actions of NASS. NASS did far more than send a few inquiring emails.
11 NASS actually set the ball in motion, creating a “Partner Support Portal” in partnership with Twitter,
12 and then repeatedly encouraging its membership to join the portal, giving its members guidance and
13 direction on portal use, using the portal to itself request speech censorship on behalf of its members,
14 and serving as a liaison between Twitter and its members. Compl. ¶¶ 31-33. NASS also affirmed that
15 the reporting of social media content furthered their “mission” by awarding OEC for their efforts,
16 lauding OEC’s speech censorship accomplishments which it facilitated. Compl. ¶¶ 63-65, Exs 7-8. This
17 is far different from the open-ended inquiry discussed in *PREP Tours*.

18 **B. The claim arises out of or relates to NASS’s forum-related activities.**

19 The Ninth Circuit uses a “‘but for’ test to determine whether a particular claim arises out of
20 forum-related activities and thereby satisfies the second requirement for specific jurisdiction.”
21 *Ballard*, 65 F.3d at 1500. “The question, therefore, is this: but for [defendant’s] contacts
22 with...California, would [plaintiff’s] claims...have arisen?” *Id.* Thus, for example, in *Amazon.com*,
23 “but for [the non-profit’s] initiation...Amazon would have had no need for a judicial declaration of its
24 right....” 826 F.Supp.2d at 1255. In *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir.
25 1998) for example, a defendant who had registered domain names on the internet with the name of
26 the plaintiff’s own trademarks injured the plaintiff in California, and “but for” defendant’s conduct,
27 the injury would not have occurred.

28 Here, “but for” NASS “spearhead[ing] efforts” to create a “national narrative” and by helping

1 to build “direct channels of communication” between OEC and Twitter to “flag concerns directly to
2 Twitter” through the creation of a NASS’s “Partner Support Portal,” OEC would not have been able to
3 so easily report and quickly censor Mr. O’Handley’s speech. *See* Compl. ¶¶ 26-33. California is the
4 world epicenter of social media conglomerates. Without NASS’s efforts within California to create the
5 social media relationships, structures, and culture by which private companies such as Twitter would
6 join with government to censor speech, it could not have happened. Regrettably, it did.

7 NASS claims, nonetheless, that all it did was send some emails to the other Defendants in this
8 action. ECF No. 58 17:7-15 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)).
9 In *World-Wide Volkswagen*, Oklahoma did not have jurisdiction over a New York car dealer when
10 that car was later involved in an accident. *See generally* 444 U.S. 286. This, the Court ruled,
11 constituted “unilateral activity of those who claim some relationship with a nonresident defendant,”
12 which “cannot satisfy the requirement of contact with the forum state.” *Id.* at 298.

13 The allegations against NASS are not “unilateral” activity, however. NASS did not merely send
14 an email into the ether, with no control over the destination. Rather, the allegations show regular back-
15 and-forth communications between NASS and California resident OEC, and between NASS and
16 California Resident Twitter, regarding speech censorship on Twitter. Compl. ¶¶ 26-33, Exs. 2-4. The
17 emails are not the activity, but the smoking gun proving the activity: a memorialization of the ongoing
18 coordination between the Defendants directed at and involving California’s government, businesses,
19 and even its citizens.

20 **II. NASS conspired with the other Defendants to violate federal constitutional rights.**

21 “State action may be found if, there is such a close nexus between the State and the challenged
22 action that seemingly private behavior may be fairly treated as that of the State itself.” *Lugar*, 457 U.S.
23 at 922 (cleaned up). Under *Lugar*’s two-step state action analysis, the plaintiff must show (a) that the
24 alleged deprivation of rights is fairly attributable to a state policy, and (b) that a private party may be
25 fairly described as a state actor. *Id.* at 937; *Collins*, 878 F.2d at 1151. NASS does not contest *Lugar*’s
26 first prong, instead claiming that it cannot be fairly described as a state actor under *Lugar*’s second
27 prong.
28

The presumption that private conduct does not constitute governmental action may be overcome, however, by demonstrating state officials and private actors jointly “acted in concert in effecting a particular deprivation of constitutional rights.” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012). If a plaintiff satisfies *Lugar* prong one, the Supreme Court has established four tests to determine whether a private defendant may be deemed a state actor under prong two: (1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test. *Lugar*, 457 U.S. at 937; *Rawson v. Recovery Innovations, Inc.* 975 F.3d 742, 747 (9th Cir. 2020). Here, NASS does not contest that Mr. O’Handley has met his burden under prong one, and, as shown below, NASS is a state actor under the joint action and nexus tests.

1. NASS willfully engaged in Defendants’ conspiracy to violate constitutional rights.

It is a “well-accepted principle that a private party’s joint participation in a conspiracy with the state provides a sufficient nexus to hold the private party responsible as a governmental actor.” *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 840 (9th Cir. 1999) (citing *Lugar*, 457 U.S. at 941); *see also Price v. Hawaii*, 939 F.2d 702, 708-09 (9th Cir. 1991). A conspiracy exists when a defendant was a “willful participant” in “an agreement or meeting of the minds to violate constitutional rights” and that an actual deprivation of rights resulted. *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980). Participants need not know “exact details of the plan,” but must share “the common objective of the conspiracy.” *Crowe v. Cty. of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010). Agreement may be inferred from circumstantial evidence, such as the actions of the defendants. *Mendocino Env’tl Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1301 (9th Cir. 1999). A showing that defendants committed acts that “are unlikely to have been undertaken without an agreement” may support the inference of conspiracy. *Id.* “Whether defendants were involved in an unlawful conspiracy is generally a factual issue and should be resolved by the jury . . .” *Id.* at 1302 (cleaned up). Once a conspiracy to violate constitutional rights is established, all conspirators may be held liable for the reasonably foreseeable acts of co-conspirators. *Pinkerton v. United States*, 328 U.S. 640, 645 (1946).

The pleadings plausibly allege that NASS conspired with Defendants to deprive individuals of their constitutional rights. Compl. ¶ 99. Defendants had a meeting of the minds, as evidenced by the e-mails between NASS, OEC, and Twitter showing that NASS communicated with OEC regarding a

1 “mis/disinformation reporting channel” and “how to report mis/disinformation.” Compl. Exs. 2-3. And
2 one internal NASS email states, “Twitter asked me to let you guys know...[about] training on creative
3 and effective content strategies on Twitter in advance of the U.S. Election” and “onboarding state and
4 local election officials onto Twitter’s Partner Support Portal.” Compl. Ex. 2.

5 NASS took other actions in furtherance of the conspiracy. In its capacity as a membership
6 organization composed of high ranking government officials, it “spearheaded” conspiracy efforts by
7 creating “direct channels of communication between Secretaries of States’ staff and social media
8 companies”—including, again, Twitter in San Francisco—“to facilitate the quick take-down of speech
9 deemed ‘misinformation.’” Compl. ¶¶ 26-27. In fact, NASS served as an intermediary between Twitter
10 and OEC. Compl. ¶¶ 28-29, Exs. 2-3. This included working with Twitter to create a dedicated method
11 for elected officials to “flag concerns,” or identify censorship targets, “directly to Twitter.” Compl. ¶
12 28, Ex. 2. NASS worked to get reports by a Secretary of State’s office, such as OEC, “bumped to the
13 head of the queue” At Twitter. Compl. ¶ 29, Ex. 3. NASS asked its members—government officials,
14 including Defendant Padilla—to give it a “heads up” when they saw mis/disinformation so it could
15 “create a more national narrative.” Compl. ¶ 30, Ex. 4. NASS also gave California’s OEC guidance
16 regarding how to report mis/disinformation directly to social media companies such as Twitter. Compl.
17 ¶ 31, Ex. 4. Finally, OEC circulated NASS’s guidance and used the portal that NASS set up to report
18 Mr. O’Handley’s tweet. Compl. ¶¶ 31-33, Ex. 4.

19 **2. NASS jointly acted with the State and other Defendants to censor political speech.**

20 Under Ninth Circuit law, private parties can also be state actors under a blended “close
21 nexus/joint action” test. *Rawson*, 975 F.3d at 748-750. Even without evidence of a conspiracy, “[j]oint
22 action exists where the government affirms, authorizes, encourages, or facilitates unconstitutional
23 conduct” and there is “interdependence” with a private party. *Noako Ohno v. Yuko Yasuma*, 723 F.3d
24 984, 996 (9th Cir. 2013). Joint action is found where “the state significantly involves itself in the private
25 parties’ actions and decisionmaking,” is “deeply intertwined” with the actions of private parties, and
26 the state and private parties are “jointly responsible.” *Rawson*, 975 F.3d at 750-53. Under § 1983, a
27 “substantial degree of cooperative action” shows state action. *Sable Comme’ns of Cal. Inc. v. Pacific*
28 *Tel. & Tel. Co.*, 890 F.2d 184, 189 (9th Cir. 1989). For the same reasons that NASS and OEC

1 “conspired” with OEC and Twitter, they were also “interdependen[t],” “deeply intertwined,” and
2 “jointly responsible” for O’Handley’s constitutional injuries. NASS “affirmed, authorized,
3 encouraged, and facilitated” OEC’s system to report social media posts that the Defendants did not
4 like, as evidenced by their awarding OEC for their censorship efforts. Compl. ¶ 64. NASS is wrong
5 that “there is no allegation that the California Secretary of State used these portals....” ECF No. 58
6 21:19-20; *see* Compl. ¶¶ 32, 61. To the contrary, NASS instructed OEC on how to report to Twitter,
7 and OEC received and distributed those instructions, and utilized the portal for its censorship. *Id.*;
8 Compl. Ex. 4. Similarly, NASS argues that it “did not tell the California Secretary of State to report
9 Plaintiff’s tweets.” ECF No. 58 21:19-22. But NASS recognizes that OEC’s efforts “contribut[e] to the
10 mission of NASS.” Compl. Ex. 8. Similarly, OEC “affirmed, authorized, encouraged, and facilitated”
11 NASS’s efforts by their use of the portal set up by NASS to report social media content and by
12 circulating their guidance. Compl. ¶¶ 31-33, Ex. 4.

13 NASS primarily relies on *Polk v. Yee*, 481 F.Supp.3 1060 (E.D. Cal. 2020), which involved a
14 state agency deducting dues on behalf of a union. ECF No. 58, 20:23-21:15. There, the union was not
15 a state actor because the state’s involvement was akin to an “administrative task.” *Id.* at 1067 (citing
16 *Belgau v. Inslee*, 359 F. Supp. 3d 1000 (W.D. Wash. 2019)). The Court observed that the “plaintiffs
17 have not alleged the State Defendants affirm[], authorize[], encourage[], or facilitate[]....” *Id.* at 1068
18 (quoting *Noako Ohno*, 723 F.3d at 996). But, as previously stated, NASS has affirmed, authorized,
19 encouraged and facilitated the plan to have Secretaries of State, including OEC, report disfavored
20 tweets directly to social media. The facts alleged here satisfy the very factors that were lacking in *Polk*.

21 **III. California’s Liberty of Speech Clause does not include a state actor requirement.**

22 There is no state actor requirement under California’s Liberty of Speech Clause. NASS cites to
23 the plurality opinion in *Golden Gateway Cntr. v. Golden Gateway Tenants Assn.*, 26 Cal.4th 1013
24 (2001) (ECF No. 58 25:5-20), to suggest otherwise, but the concurring opinion creating the fourth vote
25 for the prevailing party in that case specifically *did not join* the state action portion of the plurality
26 opinion. *Id.* at 1042 (“by proposing to reach the state action issue...the lead opinion says more than it
27 needs to, and more than is supported by our prior decisions.”). There were not four votes on the
28

1 California Supreme Court for the plurality’s view that the California constitution required state action.
2 If anything, there were four votes against it.

3 Instead, the last major direction provided by the California Supreme Court garnering a majority
4 came in *Gerawan Farming, Inc. v. Lyons*, 24 Cal.4th 468, 492 (2000), decided by four justices and
5 therefore carrying more precedential weight than the plurality opinion in *Golden Gateway*. In *Gerawan*
6 *Farming* the court confirmed that the California Liberty of Speech Clause’s scope “runs against the
7 world, including private parties as well as governmental actors.” *Id.* at 492. This echoes the court’s
8 earlier reasoning and holding in *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899 (1979), where
9 the court found a private shopping center was bound by article I, section 2 because the plaintiffs were
10 “rightfully on [the] premises because the premises are open to the public during shopping hours.” *Id.*
11 at 905. California courts have not designated a specific test for state action under its Constitution. But,
12 because article I, section 2 applies “against the world, including private parties” California’s state actor
13 requirement is arguably less stringent than the federal one. Thus, for the same reasons that NASS is a
14 state actor under the federal standard, there is even more legal basis to find that it is a state actor under
15 California law.

16 **IV. Mr. O’Handley has pled a conspiracy under 42 U.S.C. § 1985(3).**

17 The elements of a § 1985(3) conspiracy are: (1) a conspiracy; (2) “for the purpose of depriving . .
18 . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities
19 under the laws”; (3) an “act in furtherance”; and (4) an injury or deprivation of rights. *Life Ins. Co. of*
20 *North America v. Reichardt*, 591 F.2d at 502 (9th Cir. 1979) (*quoting Griffin v. Breckenridge*, 403 U.S.
21 88, 102-103 (1971)). Unlike § 1983, which requires the existence of state action, § 1985(3) extends to
22 purely private action as long as one co-conspirator is a state actor. *Pasadena Republican Club*, 985
23 F.3d at 1171.

24 Here, for the reasons thoroughly discussed in Section II, Mr. O’Handley has alleged all the elements
25 of a conspiracy. He has alleged that Defendants conspired to censor speech for the purpose of depriving
26 conservative speaker’s equal protection under the law, Defendants took many acts in furtherance such
27 as creating a Twitter portal to facilitate speech censorship, OEC is a state actor, and O’Handley was
28 injured by having his speech censored.

1 NASS's sole argument under 42 U.S.C. § 1985(3) is that "if a plaintiff's 'allegations are insufficient
2 to support a claim based on a violation of his constitutional rights,' then 'his allegations of a conspiracy
3 to violate those constitutional rights do not state a claim.'" ECF No. 58, 25:25-28 (quoting *Peloza v.*
4 *Capistrano Unified School Dist.*, 37 F.3d 517, 523-24 (9th Cir. 1994)). But nowhere does NASS
5 provide *any* argument that O'Handley has failed to allege a violation of his Constitutional rights, and
6 by that failure, NASS has conceded the point that Mr. O'Handley has stated viable claims for violations
7 of his First and Fourteenth amendment rights. Compl. Counts I, III, and IV. Even if NASS were found
8 to be a private actor for the purposes of 42 U.S.C. §1983 (which Plaintiff does not concede for the
9 reasons discussed in Section II above), as a private actor NASS is liable under 42 U.S.C. § 1985(3) for
10 violations of O'Handley's First and Fourteenth Amendment rights because of its participation in
11 Defendants' conspiracy to censor speech.

12 CONCLUSION

13 For the reasons discussed herein, this Court should deny NASS's Motion to Dismiss. In the
14 alternative, O'Handley requests leave to amend his complaint to cure any perceived pleading defects
15 as determined by the Court.

16
17 Date: November 5, 2021

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Attorneys for Plaintiff ROGAN O'HANDLEY

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

ROGAN O'HANDLEY,

 Plaintiff,

 v.

ALEX PADILLA, in his personal capacity;
 SKDKNICKERBOCKER, LLC, a Delaware
 company; PAULA VALLE CASTAÑON, in her
 personal capacity; JENNA DRESNER, in her
 personal capacity; SAM MAHOOD, in his personal
 capacity; AKILAH JONES; in her personal
 capacity; SHIRLEY N. WEBER, in her official
 capacity as California Secretary of State;
 TWITTER, INC., a Delaware corporation;
 NATIONAL ASSOCIATION OF SECRETARIES OF
 STATE, a professional nonprofit organization;

Defendants.

Case Number: 3:21-CV-07063-CRB

**PLAINTIFF'S OPPOSITION TO
 DEFENDANT SKDKNICKERBOCKER,
 LLC'S MOTION TO DISMISS (FRCP
 Rule 12(b)(2) and FRCP Rule 12(b)(6))
 [ECF 57]**

**Date: December 16, 2021
 Time: 10:00 a.m.
 Courtroom: 6, 17th Floor
 Judge: Hon. Charles R. Breyer**

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SUMMARY OF ARGUMENT

Plaintiff Rogan O’Handley has standing because he suffered constitutional injury from Defendants’ conspiracy to censor disfavored speech, a conspiracy in which Defendant SKDKnickerbocker (“SKDK”) was a willing and active participant. Mr. O’Handley suffered actual injury when the Defendants conspired to censor, and did censor, his legally protected free speech criticizing the government. “Governmental action designed to retaliate against and chill political expression strikes at the heart of the First Amendment.” *Mendocino Env’tl Ctr. v. Mendocino Cty.*, 14 F.3d 457, 464 (9th Cir. 1994) (cleaned up); *see also, Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). SKDK alerted the Office of Elections Cybersecurity (“OEC”) of O’Handley’s tweet, OEC labeled O’Handley’s speech as “voter fraud” and “flagged” it to Twitter Inc. (“Twitter”) to censor. Compl. ¶¶ 33–34, 74–81. The causal chain between SKDK’s actions and the constitutional injury is thus direct, and not “hypothetical or tenuous.” *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011). Based on these facts, Mr. O’Handley has standing.

Mr. O’Handley’s Complaint further plausibly pleads facts sufficient for his six claims for relief. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). SKDK is a state actor under the two-prong *Lugar* test, as SKDK’s actions were taken pursuant to its contract with the OEC and under California Elections Code § 10.5 (b)(2), (c)(8); and SKDK jointly acted and conspired with the OEC and other Defendants to censor disfavored political speech. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Collins v. Womancare*, 878 F.2d 1145, 1151 (9th Cir. 1989).

The First Amendment’s “broadest protection” is for political speech, which is at the “core” of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), *superseded by statute on other grounds as stated in McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003). The California Constitution’s speech protections are even stronger. *See Robins v. Pruneyard Shopping Ctr.* 23 Cal.3d 899, 910 (Cal. 1979) (“*Pruneyard I*”), *aff’d sub nom. Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (“*Pruneyard II*”). “Speech concerning public affairs . . . is the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). “Governmental action designed to retaliate against and chill political expression strikes at the heart of the First Amendment.” *Mendocino Env’tl Ctr.*, 14 F.3d at 464 (cleaned up). Defendants’ conspiracy to censor disfavored political speech as part of a government-

1 corporate conspiracy is anathema to the First Amendment and to the California Constitution’s Liberty
2 of Speech Clause.

3 Defendants violated the Equal Protection Clause by selecting “a particular course of action . . .
4 because of . . . its adverse effects on an identifiable group”—in this case, political conservatives—
5 without a rational basis. Compl. ¶ 83; *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)
6 (cleaned up); *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 583, 588 (9th Cir. 2008). Defendants also
7 selectively enforced the law against conservatives, using the law as “a pretext for an impermissible
8 motive.” *Lazy Y*, 546 F.3d at 591.

9 SKDK, through its participation in the conspiracy, denied Mr. O’Handley due process because
10 it “set[] in motion a series of acts by others which . . . would cause others to inflict the constitutional
11 injury” in this case by depriving Mr. O’Handley of property and liberty interests without a hearing.
12 *Merritt v. Mackey*, 932 F.2d 1317, 1371 (9th Cir. 1991) (internal citation omitted).

13 Finally, Mr. O’Handley has shown Defendants conspired to deprive him of his constitutional
14 rights based on his conservative political affiliation, and discrimination on the basis of political
15 affiliation falls within the protections of § 1985(3). *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499,
16 505 (9th Cir. 1979). For these reasons, Defendant SKDK’s motion to dismiss should be denied entirely,
17 or Mr. O’Handley should be granted leave to amend to cure any perceived pleading defects.

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INTRODUCTION AND BACKGROUND

Prior to the 2020 election, the State of California undertook an unprecedented, unconstitutional campaign to censor the speech of private speakers on social media platforms.¹ Under a \$35-million-dollar contract, the State outsourced an important censorship role to Defendant SKDK, who, at the same time it was acting as the State’s speech censorship bloodhound, was also serving as a political consultant for Democrat presidential candidate Joe Biden. SKDK’s state contract required it to furnish “Misinformation Daily Briefings” (“MDBs”) to OEC staff in furtherance of Defendants’ larger censorship efforts to create a “national narrative” and quash conservative viewpoints as “misinformation.” ECF No. 57 2:20-21; Compl. ¶¶ 25, 32-35, 37, 42, 57, 56-68. OEC flagged speech identified by SKDK to social media companies—through priority VIP pathways—for censorship. *Id.*

The right to criticize our government is a core constitutional right. Defendants’ exercise of government force to censor political speech, of which SKDK was an integral part, flies in the face of the ideals upon which our nation was founded, and is actionable in this Court.

LEGAL STANDARD

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a plaintiff must establish Article III standing to assert his claims, including proof of injury-in-fact, causation, and redressability. *Allen v. Wright*, 468 U.S. 737, 750 (1984). SKDK makes a facial 12(b)(1) attack, meaning complaint allegations are accepted as true. *Whisnant v. U.S.*, 400 F.3d 1177, 1179 (9th Cir. 2005).

Per Rule 12(b)(6) motion, a complaint must plead “enough facts” that a claim “is plausible on its face,” *Twombly*, 550 U.S. at 570, and “factual content that allows the court to draw the reasonable inference” that the defendant is liable. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court “must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party.” *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

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¹ Factual details of the Defendants’ relationships and conspiracy are addressed more fully in the Statement of Facts section in the concurrently filed Plaintiff’s Opposition to Defendant National Association of Secretaries of State’s Motion to Dismiss which, in the interest of judicial economy, Plaintiff incorporates here in full.

ARGUMENT

I. SKDK injured Mr. O’Handley through its active and direct participation in the conspiracy to censor protected First Amendment speech.

For an “injury in fact,” a plaintiff must establish an invasion of a legally protected interest which is concrete and particularized, and actual or imminent. *Lujan*, 504 U.S. at 560. A defendant need not be the injuries’ “sole source” or “proximate cause,” so long as the link is “not tenuous or abstract.” *Barnum Timber Co. v. EPA*, 633 F.3d 894, 901 (9th Cir. 2011); *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 845, 860 (9th Cir. 2005). A “causation chain does not fail simply because it has several links,” provided those links “remain plausible.” *Maya*, 658 F.3d at 1070.

Here Mr. O’Handley was injured by the foreseeable consequences of the Defendants’ conspiracy, whose objectives SKDK both agreed to and contributed overt acts towards. Compl. ¶¶ 56–57, 68, 74. Mr. O’Handley’s injury is not limited to his ultimate removal from Twitter, as the strikes issued against his account also served to chill protected speech. *Id.*

Mr. O’Handley utilized Twitter to publicly criticize Defendant Padilla’s oversight of California elections, suggesting that every California ballot should be audited “to protect the integrity of the state’s elections.” Compl. ¶ 72. In response, pursuant to their government contract with the very government official O’Handley’s offending tweet critiqued, SKDK labeled Mr. O’Handley’s opinion as “misinformation.” *Id.* at ¶¶ 57–61. The State then “flagged” the post to Twitter under the indicator of “voter fraud.” Compl. ¶¶ 72–78. “Flagging” a tweet to Twitter was another way of asking Twitter to “take down” a tweet. Compl. ¶ 34. Twitter complied with these “requests” from OEC an astonishing 98% of the time. Compl. ¶64 Twitter punished Mr. O’Handley for criticizing a California state official’s job performance by appending commentary asserting that Mr. O’Handley’s tweet was false and issuing a strike against his account. Compl. ¶¶ 72–78. Penalizing Mr. O’Handley for his State-disfavored speech, even absent any subsequent removal by Twitter, is an injury-in-fact. There is a direct causal connection between SKDK’s actions and the injury.

II. SKDK acted pursuant to State contract and Elections Code § 10.5 and conspired with Defendants to violate Mr. O’Handley’s federal constitutional rights.

“State action may be found if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.” *Lugar*, 540 U.S.

at 922 (cleaned up). Under *Lugar*'s two-step state action analysis, the plaintiff must show (a) that the alleged deprivation of rights is fairly attributable to a state policy, and (b) that a private party may be fairly described as a state actor. *Collins*, 878 F.2d at 1151.

A. SKDK's actions were taken pursuant to State contract, policy, and statute.

Lugar's first prong one asks "whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority." *Lugar*, 540 U.S. at 939. This "state policy" test "ensures that the alleged deprivation is fairly attributable to a state policy." *Collins*, 878 F.2d at 1151 (9th Cir. 1989); *see also Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999) (prong one met by statute requiring private collection of SSNs); *Fred Meyer, Inc. v. Casey*, 67 F.3d 1412, 1414 (9th Cir. 1995) (prong one met by constitutional provision authorizing signature gathering). "A procedural scheme created by the statute obviously is the product of state action," as is challenged conduct "ascribed to [a] government decision," and undertaken pursuant to the authority of a state official. *Lugar*, 540 U.S. at 940.

Here, OEC entered a \$35 million contract with SKDK to fulfill OEC's statutory objectives, and by contract required SKDK to provide daily briefings regarding "election-related misinformation." ECF No. 57 2:20-21; Compl ¶ 37. SKDK's actions were taken pursuant to State contract, OEC policy, and State statute. *Id.*

B. SKDK was a state actor by virtue of its participation in Defendants' conspiracy to violate constitutional rights

The presumption that private conduct does not constitute governmental action may be overcome by demonstrating state officials and private actors jointly "acted in concert in effecting a particular deprivation of constitutional rights." *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012). SKDK argues it cannot fairly be described as a state actor under the "public function," "state compulsion," "nexus," or "joint action" test. *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020). Here, however, the joint action and nexus tests apply to SKDK's acts.

1. SKDK was part of Defendants' conspiracy to violate constitutional rights

It is a "well-accepted principle that a private party's joint participation in a conspiracy with the state provides a sufficient nexus to hold the private party responsible as a governmental actor." *Sutton*,

192 F.3d at 840 (citing *Lugar*, 540 U.S. at 941); *Price v. Hawaii*, 939 F.2d 702, 708-09 (9th Cir. 1991). Conspiracy is a fact issue for a jury to decide and is shown if a defendant was a “willful participant” in “an agreement or meeting of the minds to violate constitutional rights” and that an actual deprivation of rights resulted from that agreement. *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002). All conspirators may be held liable for the reasonably foreseeable acts of co-conspirators. *Pinkerton v. U.S.*, 328 U.S. 640, 645 (1946); *Proffitt v. Ridgway*, 279 F.3d 503, 507 (7th Cir. 2002) (“As a conspirator, the citizen is liable, in civil as in criminal law, for the wrongful acts of the other conspirators committed within the scope of the conspiracy.”).

The pleadings, taken as true, plausibly allege that SKDK conspired with Defendants to deprive individuals of their constitutional rights. Compl. ¶ 99. Defendants had a meeting of the minds that they would create a “national narrative” regarding “election misinformation” by working hand-in-glove with social media companies to censor disfavored speech and punish those responsible. Compl. ¶¶ 21, 24–25, 28–32, 34–35, 57–61, 66, 74. Actions in furtherance of the conspiracy included creating a state agency to “monitor and counteract false or misleading information,” outsourcing this task to SKDK with instructions to identify social media “election misinformation,” and “working closely and proactively” with social media companies to “take down sources of misinformation.” *Id.* Defendants even created “dedicated reporting pathways” in cooperation with social media companies to facilitate their conspiracy. *Id.* at ¶ 25. Forming a confederation to censor disfavored political speech in violation of the Constitution, Defendants acted in furtherance of the conspiracy by regularly reporting and silencing speech through dedicated reporting channels at social media companies. SKDK’s role here was worth, to the Defendants, every penny of the \$35 million it was paid, and Mr. O’Handley’s constitutional injuries were the reasonably foreseeable result.

2. SKDK jointly acted with the State and other Defendants to censor political speech.

Under Ninth Circuit law, private parties may also be state actors under a blended “close nexus/joint action” test. *Rawson*, 975 F.3d at 750. Even without evidence of a conspiracy, “[j]oint action exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct” and there is “interdependence” with a private party. *Noako Ohno v. Yuko Yasuma*, 723 F.3d 984, 995 (9th Cir. 2013). Joint action is found where “the state significantly involves itself in the private parties’

actions and decisionmaking,” is “deeply intertwined” with the actions of private parties, and the state and private parties are “jointly responsible.” *Rawson*, 975 F.3d at 750-53. Under §1983, a “substantial degree of cooperative action” shows state action. *Sable Commc’ns of Cal. Inc. v. Pacific Tel. & Tel. Co.*, 890 F.2d 184, 189 (9th Cir. 1989). For the same reasons that SKDK and OEC “conspired” with OEC, they were also “interdependen[t],” “deeply intertwined,” and “jointly responsible” for O’Handley’s constitutional injuries. The OEC “affirmed, authorized, encouraged, and facilitated” SKDK’s conduct by hiring SKDK, requesting the MDBs, and working with social media companies to punish speech. Compl. ¶¶ 21, 24–25, 28– 32, 34– 35, 57– 61, 66, 74.

SKDK’s brief mentions, but does not grapple with, the joint action test, the requirements for establishing a §1983 conspiracy, or the ample case law demonstrating that a conspiracy qualifies as joint action. While SKDK’s defense is muddy, the interconnectedness, encouragement, and significant involvement of the Defendants in the conspiracy to censor speech is clear; SKDK was a state actor acting under color of state law.

III. Mr. O’Handley pleads facts sufficient to support a reasonable inference of SKDK’s liability.

Under §1983, a conspiracy “can enlarge the pool of responsible defendants by demonstrating their causal connections to the violation.” *Lacey v. Maricopa Cty.*, 693 F.3d 896, 935 (9th Cir. 2012). SKDK is liable for the reasonably foreseeable actions of its coconspirators because of its participation in the State’s plan to punish disfavored speech, and Mr. O’Handley has pled facts sufficient to draw a reasonable inference that SKDK is liable for all of his claims, either due to its own actions or the reasonably foreseeable actions of its coconspirators. See Section II B 1.

A. State action designed to retaliate against and chill political expression strikes at the heart of the First Amendment.

The First Amendment prohibits laws “abridging the freedom of speech” and provides its “broadest protection” to political speech, which is a “core” First Amendment’s concern. *Buckley*, 424 U.S. at 14. “In a republic where the people are sovereign,” this heightened protection “reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Id.* (cleaned up). “The First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative

1 selection.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (cleaned up). The government
2 “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”
3 *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (cleaned up).

4 The government may not impose content-based restrictions on political speech unless it can
5 satisfy strict scrutiny. *Buckley*, 424 U.S. at 636; *Citizens United v. Fed. Election Comm’n*, 558 U.S.
6 310, 340 (2010); *Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 745 (9th Cir.
7 2012); *see also Reed v. Town of Gilbert*, 576 U.S. 155 at 163 (2015)(noting that “[c]ontent-based laws
8 . . . are presumptively unconstitutional”). To satisfy strict scrutiny, speech restrictions must “further[]
9 a compelling interest” and be “narrowly tailored to achieve that interest.” *Citizens United*, 558 U.S. at
10 340; *Bullock*, 698 F.3d at 745. It is the government’s burden to demonstrate that its actions satisfy strict
11 scrutiny. *Citizens United*, 558 U.S. at 340; *Bullock*, 698 F.3d at 745. This test applies whether the
12 government directly censors the speech, or a state actor—that is, a private person or entity acting on the
13 state’s behalf—does the censoring. *Lee v. Katz*, 276 F.3d 550, 555 (9th Cir. 2002).

14 The government is also prohibited from retaliating for protected expression. *Perry v.*
15 *Sindermann*, 408 U.S. 593, 598 (1972); *see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429
16 U.S. 274, 287 (1977). For a First Amendment retaliation claim, plaintiff must allege: (1) he “engaged
17 in constitutionally protected activity”; (2) “the defendant's actions would chill a person of ordinary
18 firmness from continuing to engage in the protected activity”; and (3) “the protected activity was a
19 substantial motivating factor in the defendant's conduct.” *Ariz. Students’ Assn. v. Ariz. Bd. of Regents*,
20 824 F.3d 858, 867 (9th Cir. 2016) (cleaned up). “In recognizing one’s protected interest in commenting
21 on government officials’ actions, . . . state action designed to retaliate against and chill political
22 expression strikes at the heart of the First Amendment.” *CarePartners, LLC v. Lashway*, 545 F.3d 867,
23 877 (9th Cir. 2008) (cleaned up).

24 Here Mr. O’Handley alleges that Defendants violated both these prohibitions. First, Defendants
25 censored Mr. O’Handley’s political speech based on its content. It is well established that “political
26 speech” includes “discussions of candidates, structures and forms of government, the manner in which
27 government is operated or should be operated, and all such matters relating to political processes.” *Mills*
28 *v. Alabama*, 384 U.S. 214, 218-19 (1966). Specifically, the Complaint alleges that Defendants targeted

1 O’Handley’s tweets because he suggested that California should audit its 2020 election results, and that
2 the Defendants did not take similar actions against indistinguishable requests for election transparency
3 from self-identified liberal speakers. Compl. ¶¶ 3, 74-87, 108-11, 120. Based on the content of
4 O’Handley tweets, SKDK, under its contract with OEC and in concert with Twitter, acted jointly to
5 monitor O’Handley’s speech, bring disfavored utterances to Twitter’s attention, and punishing Mr.
6 O’Handley for the content of his speech. *Id.* These allegations establish that Defendants imposed
7 content-based restrictions on political speech, thus triggering strict scrutiny.

8 In fact, Defendants’ actions were not merely content-based; rather, because they were based on
9 the message O’Handley was conveying with this tweets, Compl. ¶ 83, thereby also constituting
10 viewpoint discrimination. *Reed*, 576 U.S. at 168 (“[D]iscrimination among viewpoints—or the
11 regulation of speech based on “the specific motivating ideology or the opinion or perspective of the
12 speaker”—is a “more blatant” and “egregious form of content discrimination.”). Like restrictions on
13 political speech, restrictions on speech that discriminate on the basis of viewpoint are subject to strict
14 scrutiny. *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1277 (9th Cir. 2017). Defendants do not identify
15 any “compelling interest” they might have had in suppressing O’Handley’s speech, nor do they explain
16 how their actions were “narrowly tailored” toward that end.

17 The Complaint also states a claim for First Amendment retaliation. Compl. ¶ 103. Mr.
18 O’Handley’s tweets were indisputably protected activity under the First Amendment, as political speech
19 is at the core of the First Amendment’s protections. *Mills*, 384 U.S. at 218-19; *Ariz. Students’ Ass’n*,
20 824 F.3d at 867; *see also* Compl. ¶ 113. And as a coconspirator, SKDK is liable for the foreseeable results
21 of other coconspirators’ acts; in this case, the resulting injuries from the State and Twitters’ actions to
22 censor Mr. O’Handley including the strike against his Twitter account, his eventual Twitter ban, and the
23 resulting harm to his occupation and business. Compl. ¶¶ 75–90, 93, 94. These allegations establish the
24 requisite chilling of Mr. O’Handley’s expressive rights. And far from being just a “characterization” of
25 O’Handley’s speech as SKDK argues, Defendants’ actions directly burdened *and* silenced O’Handley’s
26 speech, exactly the consequence SKDK itself admits violates the First Amendment. *Meese v. Keene*,
27 481 U.S. 465, 478, 480 (1987); ECF No. 57 11:9-15.

28 //

B. SKDK is liable for violations of the California Constitution’s Liberty of Speech Clause.

The Liberty of Speech Clause of the California Constitution provides: “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.” Cal. Const., art. I, § 2. This clause grants “broader rights to free expression than does the First Amendment to the United States Constitution.” *Fashion Valley Mall, LLC v. Nat’l Labor Relations Bd.*, 42 Cal. 4th 850, 857 (2007); *see also, Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 492 (2000).

For the reasons fully addressed in Plaintiff’s Opposition to Twitter’s Motion to Dismiss, state action is not required under the Liberty of Speech Clause. *Golden Gateway Ctr. v. Golden Gateway Tenants Association*, 26 Cal. 4th. 1013, 1036 (Cal. 2001). Even if Twitter were not a state actor (it is for the reasons discussed in Section II) the broader protections of the California Constitution require Twitter to abide by the Liberty and Speech Clause. *Robins v. Pruneyard Shopping Ctr.* 23 Cal.3d 899, 910 (Cal. 1979) (“*Pruneyard I*”), *aff’d sub nom. Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (“*Pruneyard II*”). Twitter gives individuals unrestricted access to its platform, is public in character, provides “an essential and invaluable forum for exercising the rights of free speech and petition,” and allowing Mr. O’Handley’s speech would not interfere with Twitter’s normal business operation. *Id.* Twitter “restrained” and “abridged” Mr. O’Handley’s speech by issuing a strike against his account and ultimately banning him from the site. Compl. ¶¶ 68, 74–77, 99, 141; Cal. Const., art. I, § 2. Twitter’s speech censorship under California’s Liberty of Speech Clause was a reasonably foreseeable result of the conspiracy—the conspiracy specifically aimed to censor opinions like O’Handley’s to create the desired “national narrative”—and SKDK is rightly liable for violations stemming from the conspiracy’s aims.

C. SKDK is liable for discrimination against Mr. O’Handley based on his perceived politics

The Equal Protection Clause ensures that “all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). To prevail on an equal protection claim under the “Fourteenth Amendment, a plaintiff must demonstrate that enforcement had a discriminatory effect and the [state officers] were motivated by a discriminatory purpose.” *Rosenbaum v. City & Cty. of S.F.*, 484 F.3d 1142, 1152 (9th Cir. 2007) (*citing Wayte v. United States*, 470 U.S. 598,

608 (1985)). Discriminatory “implies that the decision maker . . . selected . . . a particular course of action . . . because of . . . its adverse effects upon an identifiable group.” *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (cleaned up).

“The first step in equal protection analysis is to identify the . . . classification groups.” *Country Classic Dairies, Inc. v. Montana, Dep’t of Commerce Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988). “To accomplish this, a plaintiff can show that the law is applied in a discriminatory manner or imposes different burdens on different classes of people.” *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995). In cases of differential treatment based upon a political or ideological classification, normally rational basis review applies. *See, e.g., Lazy Y Ranch*, 546 F.3d at 583, 588 (discrimination based upon ties to conservationists). When, however, the “defendant’s alleged rational basis for his acts is a pretext for an impermissible motive,” the Court need not accept the stated motive on a motion to dismiss. *Id.* That is the case here, and the “real question” is “whether there is a rational basis” to discriminate based upon Plaintiffs’ alleged reason for discrimination. *Id.* at 590. To ultimately prove a discriminatory effect, therefore, the claimant must show that similarly situated individuals were not punished under the law. For purposes of a 12(b)(6) motion, however, a plaintiff need only plead a sufficient factual basis for his claim. *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *Twombly*, 550 U.S. at 570.

Here the Complaint alleges that Defendants’ conspiracy focused “their censorship efforts on conservative requests for transparency in election processes rather than the same calls from self-identified political liberals.” Compl. ¶ 83. SKDK singled out Mr. O’Handley’s speech because of his perceived conservative ideology. *Id.* There is no rational basis for Defendants’ censorship of conservatives who requested election audits, but not prominent, vocal, liberal voices calling for the same, unless the basis for the censorship was pretext for unlawful discrimination. Compl. ¶¶ 68, 74–77, 99, 141. There is no legitimate reason SKDK’s stated governmental interest of “protecting the integrity and accuracy of elections” would only flow to conservative voices requesting audits rather than similarly situated liberal voices absent pretext. *Id.*; ECF No. 57 13:16-18. This is not equal protection under the law. *Lazy Y Ranch*, 546 F.3d at 588.

Mr. O’Handley’s equal protection claims do not, as SKDK argues, rely on “class of one”

1 analysis, because he was discriminated against based on his classification in an identified group. *See*
2 *Lazy Y*, 546 F.3d at 592. Even if he were arguing under the class of one analysis, however, he would
3 still prevail as “the rational relation test will not sustain conduct by state officials that is malicious,
4 irrational or plainly arbitrary” as were the actions against Mr. O’Handley here. *See Lockary v.*
5 *Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990).

6 **D. The violation of Mr. O’Handley’s due process rights was a reasonably foreseeable result**
7 **of the conspiracy**

8 The procedural guarantees of the Fourteenth Amendment apply whenever the state seeks to
9 remove or significantly alter interests “comprehended within meaning of either ‘liberty’ or ‘property,’”
10 *Paul v. Davis*, 424 U.S. 693, 711 (1976), and protects a liberty or property interest in pursuing the
11 “common occupations or professions of life.” *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238–
12 39 (1957); *Chalmers v. Los Angeles*, 762 F.2d 753, 757 (9th Cir.1985).
13 “[S]ocial media is becoming so influential that being a social media influencer is now a profession.”
14 *Godwin v. Facebook, Inc.*, 160 N.E.3d 372, 387 (Ohio. Ct. App. 8th 2020). To demonstrate a violation
15 of due process rights, a plaintiff must show 1) an inability to pursue a profession and 2) “that this
16 inability is due to the actions that were clearly arbitrary and unreasonable, having no substantial relation
17 to the public health, safety, morals, or general welfare.” *FDIC v. Henderson*, 940 F.2d 465, 474 (9th
18 Cir. 1991). The fact that a private entity and not the government itself deprived the plaintiff of his
19 employment does not shield those responsible from liability where, as here, the state “set[] in motion a
20 series of acts by others which [they knew] or reasonably should [have known] would cause others to
21 inflict the constitutional injury.” *Merritt*, 827 F.2d at 1371. Additionally, California recognizes
22 business goodwill as a property interest, that is, “the expectation of continued public patronage.” Bus.
23 & Prof.Code, § 14100. Thus, when a recognized property interest is at stake, the Supreme Court has
24 held that “some kind of hearing is required at some time before a person is finally deprived of his
25 property interests.” *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 16 (1978) (cleaned up).
26 Additionally, with regard to liberty interests, “[w]hen a State would directly impinge upon interests in
27 free speech,” the Supreme Court has held that “opportunity for a fair adversary hearing must precede
28 the action, whether or not the speech or press interest is clearly protected under substantive First

Amendment standards.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 575 n. 14 (1972). That includes suppressing written content. *Id.* (discussing the “necessity of procedural safeguards before a State makes a large-scale seizure of a person’s allegedly obscene books, magazines, and so forth”).

As discussed above, Defendants’ censorship was not merely “at the will and pleasure” of Twitter, as SKDK disingenuously suggests, but was rather “caused” and “set in motion” by Defendants’ acts in furtherance of the conspiracy—including SKDK’s very active involvement. The actions SKDK set in motion ended in Twitter banning O’Handley, and impinging on his livelihood as a political commentator. Compl. ¶ 93–99. The conspiracy interfered with the business goodwill he had created with his over 440,000 Twitter followers. Compl. ¶ 71. And as Mr. O’Handley has alleged, he has every reason to believe that discovery will show that Twitter’s stated reasons for his suspension were pretextual, given that the tweets for which he was punished were innocuous. Compl. ¶ 93–99. The evidence will show, instead, that Twitter, at the behest of the OEC and SKDK, punished O’Handley for daring to criticize the job performance of the Secretary of State and aspiring U.S. Senator, Defendant Padilla.

E. Mr. O’Handley has established a conspiracy under 42 U.S.C. § 1985(3).

The elements of a § 1985(3) conspiracy are: (1) a conspiracy; (2) “for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws”; (3) an “act in furtherance”; and (4) an injury or deprivation of rights. *Reichardt*, 591 F.2d at 502 (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102-103 (1971)). Unlike § 1983, which requires the existence of state action, § 1985(3) extends to purely private action if one co-conspirator is a state actor. *Pasadena Republican Club v. Western. Just. Ctr.*, 985 F.3d 1161, 1171 (9th Cir. 2021). Here, SKDK argues that O’Handley’s § 1985(3) claim should be dismissed because the Complaint does not allege (1) the existence of a conspiracy, (2) “class-based” treatment, or (3) the existence of any cognizable injury. SKDK is mistaken in every respect.

First, O’Handley has alleged and shown the existence of a conspiracy, *see* Section II B 1, and the standard for a 1985(3) conspiracy is the same as under § 1983. *Compare Scott v. Ross*, 140 F.3d 1275, 1284-85 (9th Cir. 1998) with *Crowe v. Cty. of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010). Second, O’Handley has alleged the conspiracy at issue here was motivated by “class-based” animus

1 against conservative political views. Compl. ¶ 83. A plaintiff satisfies the “class-based” requirement if
2 either: (1) “the courts have designated the class in question a suspect or quasi-suspect classification
3 requiring more exacting scrutiny” or (2) “Congress has indicated through legislation that the class
4 required special protection.” *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992). Both
5 criteria are met here.

6 While the Ninth Circuit has not yet had the occasion to determine whether political affiliation
7 is a suspect or quasi-suspect class, numerous other courts have come to that conclusion. *See Abcarian*
8 *v. McDonald*, 617 F.3d 931, 938 (7th Cir. 2010) (“political affiliation” is a suspect classification); *see*
9 *also, American Sugar-Ref. Co. v. Louisiana*, 179 U.S. 89, 92 (1900) (discrimination based on
10 “political affiliations” would be “a denial of the equal protection of the laws”). Neither has the Ninth
11 Circuit directly found political beliefs covered by §1985(3), as have a host of other circuits. *See, e.g.,*
12 *McLean v. Int’l Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir. 1987) (discrimination on the basis of
13 “political beliefs or associations” is covered under § 1985(3)); *Galloway v. Louisiana*, 817 F.2d 1154,
14 1159 (5th Cir.1987) (same); *Conklin v. Lovely*, 834 F.2d 543, 549 (6th Cir.1987) (same); *Keating v.*
15 *Carey*, 706 F.2d 377, 386-88 (7th Cir. 1983) (“Republicans are a protected class” under § 1985(3));
16 *Means v. Wilson*, 522 F.2d at 836 (8th Cir. 1975) (§ 1985(3) claim available for allegations of
17 discrimination against political opponents); *Cameron v. Brock*, 473 F.2d 608, 610 (6th Cir. 1973);
18 (discrimination against “supporters of a political candidate” is covered under § 1985(3)); *Glasson v.*
19 *Louisville*, 518 F.2d 899, 906 (6th Cir.1975) (§ 1985(3) claim available for allegations of
20 discrimination on the grounds of political opinion), *overruled on other grounds by Bible Believers v.*
21 *Wayne Cty., Mich.*, 805 F.3d 228, 236 (6th Cir. 2015).

22 The Ninth Circuit has, however, determined that allegations of discrimination on the basis of
23 political affiliation require the same “exacting scrutiny” required to meet the “class-based”
24 discrimination requirement of § 1985(3). *Reichardt*, 591 F.2d at 505. In *Reichardt*, the Ninth Circuit
25 observed that discrimination based on plaintiffs’ status as either (1) “political opponents” of
26 defendants or (2) “supporters of a [different] political candidate” was sufficiently “class-based” to
27 state a claim under § 1985(3), and this is in line with numerous other courts which have applied
28 heightened scrutiny to discrimination based on political affiliation. *See Rutan v. Republican Party of*

1 *Illinois*, 497 U.S. 62, 78 (1990) (government employers may not “condition [] hiring decisions on
2 political belief”); *Fusaro v. Cogan*, 930 F.3d 241, 261 (4th Cir. 2019) (“[A]n election regulation that
3 plausibly burdens First Amendment rights on the basis of viewpoint, political affiliation, or class
4 should be subject to strict scrutiny.”).

5 Here Mr. O’Handley alleges that SKDK conspired to deprive him of his constitutional rights
6 based on his conservative political affiliation. Under *Reichardt*, this allegation is sufficient to allege
7 “class-based” treatment. Congress has also “indicated through legislation” that political affiliation
8 requires “special protection” through scores of statutes that designate political affiliation as a
9 protected class in a variety of settings.² *Sever*, 978 F.2d at 1536. These and other enactments
10 demonstrate that discrimination based on political affiliation is sufficient to state a claim under §
11 1985(3). *Id.*

12 Finally, SKDK’s argument that Mr. O’Handley has not alleged injury is frivolous. A
13 “deprivation of any right or privilege of a citizen of the United States” is an injury under § 1985(3).
14 As specifically pled in the Complaint and analyzed at length above, Defendants’ actions deprived Mr.
15 O’Handley of his First and Fourteenth Amendment rights. *Griffin*, 403 U.S. at 103. Mr. O’Handley’s
16 allegations are plainly sufficient to demonstrate a cognizable injury under § 1985(3).

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18 //

19 //

20 //

21 ² See, e.g., 5 U.S.C. § 2302(b)(1)(E) (prohibiting discrimination on the basis of “political affiliation”
22 in personnel decisions); 8 U.S.C. § 1231(b)(3)(A) (prohibiting removal of alien to country where his
23 life or freedom would be threatened based on “political opinion”); 18 U.S.C. § 227 (prohibiting
24 government employees from influencing private employment decision based on “political
25 affiliation”); 20 U.S.C. § 1232h(b) (providing that students shall not be requiring to disclose their or
26 their parents’ “political affiliation[]” in connection with federal educational programs); 29 U.S.C. §
27 3248 (prohibiting discrimination in employment and program access on the basis of “political
28 affiliation” to programs under the Workforce Innovation and Opportunity Act); 42 U.S.C. § 5057
(prohibiting discrimination in program access on the basis of “political affiliation” to programs under
the Domestic Volunteer Service Act); 42 U.S.C. § 9821 (same under Community Economic
Development Act); 42 U.S.C. § 9849 (same under Head Start Act); 42 U.S.C. § 12635 (same under
National Community Service Act).

1 **CONCLUSION**

2 For the reasons discussed herein, this Court should deny SKDK's Motion to Dismiss. In the
3 alternative, O'Handley requests leave to amend to cure any perceived defects in the pleading.
4

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No. 22-15071

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ROGAN O'HANDLEY,

Plaintiff-Appellant,

v.

SHIRLEY N. WEBER, in her
official capacity as SECRETARY
OF STATE,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of
California Case No. 3:21-cv-07063-CRB; Hon. Charles R. Breyer

APPELLANT'S EXCERPTS OF RECORD VOL. 3

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EXHIBIT F



Civic integrity policy

Overview

January 2021

You may not use Twitter's services for the purpose of manipulating or interfering in elections or other civic processes. This includes posting or sharing content that may suppress participation or mislead people about when, where, or how to participate in a civic process. In addition, we may label and reduce the visibility of Tweets containing false or misleading information about civic processes in order to provide additional context.

The public conversation occurring on Twitter is never more important than during elections and other civic events. Any attempts to undermine the integrity of our service is antithetical to our fundamental rights and undermines the core tenets of freedom of expression, the value upon which our company is based.

We believe we have a responsibility to protect the integrity of those conversations from interference and manipulation. Therefore, we prohibit attempts to use our services to manipulate or disrupt civic processes, including through the distribution of false or misleading information about the procedures or circumstances around participation in a civic process. In instances where misleading information does not seek to directly manipulate or disrupt civic processes, but leads to confusion on our service, we may label the Tweets to give additional context.

What is a civic process?

Twitter considers civic processes to be events or procedures mandated, organized, and conducted by the governing and/or electoral body of a country, state, region, district, or municipality to address a matter of common concern through public participation. Some examples of civic processes may include:

- Political elections
- Censuses
- Major referenda and ballot initiatives

What is in violation of this policy?

This policy addresses 4 categories of misleading behavior and content:

Misleading information about how to participate

We will label or remove false or misleading information about how to participate in an election or other civic process. This includes but is not limited to:

- misleading information about procedures to participate in a civic process (for example, that you can vote by Tweet, text message, email, or phone call in jurisdictions where these are not a possibility);

- misleading information about requirements for participation, including identification or citizenship requirements;
- misleading claims that cause confusion about the established laws, regulations, procedures, and methods of a civic process, or about the actions of officials or entities executing those civic processes; and
- misleading statements or information about the official, announced date or time of a civic process.

Suppression and intimidation

We will label or remove false or misleading information intended to intimidate or dissuade people from participating in an election or other civic process. This includes but is not limited to:

- misleading claims that polling places are closed, that polling has ended, or other misleading information relating to votes not being counted;
- misleading claims about police or law enforcement activity related to voting in an election, polling places, or collecting census information;
- misleading claims about long lines, equipment problems, or other disruptions at voting locations during election periods;
- misleading claims about process procedures or techniques which could dissuade people from participating; and
- threats regarding voting locations or other key places or events (note that our violent threats policy (<https://help.twitter.com/https://web.archive.org/web/20210112080812/https://help.twitter.com/rules-and-policies/violent-threats-glorification>) may also be relevant for threats not covered by this policy).

Misleading information about outcomes

We will label or remove false or misleading information intended to undermine public confidence in an election or other civic process. This includes but is not limited to:

- disputed claims that could undermine faith in the process itself, such as unverified information about election rigging, ballot tampering, vote tallying, or certification of election results; and
- misleading claims about the results or outcome of a civic process which calls for or could lead to interference with the implementation of the results of the process, e.g. claiming victory before election results have been certified, inciting unlawful conduct to prevent the procedural or practical implementation of election results (note that our violent threats policy may also be relevant for threats not covered by this policy).

False or misleading affiliation

You can't create fake accounts which misrepresent their affiliation, or share content that falsely represents its affiliation, to a candidate, elected official, political party, electoral authority, or government entity. Read

more about our parody, commentary, and fan account policy.

(<https://help.twitter.comhttps://web.archive.org/web/20210112080812/https://help.twitter.com/rules-and-policies/parody-account-policy>).

What is not a violation of this policy?

Not all false or untrue information about politics or civic processes constitutes manipulation or interference. In the absence of other policy violations, the following are generally not in violation of this policy:

- inaccurate statements about an elected or appointed official, candidate, or political party;
- organic content that is polarizing, biased, hyperpartisan, or contains controversial viewpoints expressed about elections or politics;
- discussion of public polling information;
- voting and audience participation for competitions, game shows, or other entertainment purposes; and
- using Twitter pseudonymously or as a parody, commentary, or fan account (<https://help.twitter.comhttps://web.archive.org/web/20210112080812/https://help.twitter.com/rules-and-policies/parody-account-policy>) to discuss elections or politics.

Who can report violations of this policy?

Accurate reporting of suspected violations of this policy requires information and knowledge specific to an election or civic process. Therefore, we enable reporting of false or misleading information about civic processes in advance of major events, for people located in the relevant countries and locations. We also work with select government and civil society partners in these countries to provide additional channels for reporting and expedited review.

For civic processes with multiple stages or parts, such as primary elections or lengthy campaigns, reporting will be enabled leading up to the first officially-sanctioned event associated with the civic process.

How can I report violations of this policy?

If the reporting option for this policy is enabled in your country at the relevant time, you can report this content in-app or on desktop.

In-app

You can report this content for review in-app as follows:

1. Select **Report Tweet** from the ∨ icon.
2. Select **It's misleading about a political election or other civic event**.
3. Select the option that best tells us how the Tweet is misleading about voting or participation in civic processes.

4. Submit your report.

Desktop

You can report this content for review on desktop as follows:

1. Select **Report Tweet** from the ∨ icon.
2. Select **It's misleading about a political election or other civic event**.
3. Select the option that best tells us how the Tweet is misleading about voting or participation in a civic process.
4. Submit your report.

What happens if you violate this policy?

The consequences for violating our civic integrity policy depends on the severity and type of the violation and the accounts' history of previous violations. In instances where accounts repeatedly violate this policy, we will use a strike system to determine if further enforcement actions should be applied. We believe this system further helps to reduce the spread of potentially harmful and misleading information on Twitter, particularly for high-severity violations of our rules.

The actions we take may include the following:

Tweet deletion

For high-severity violations of this policy, including (1) misleading information about how to participate, and (2) suppression and intimidation, we will require you to remove this content. We will also temporarily lock you out of your account before you can Tweet again. Tweet deletions accrue 2 strikes.

Profile modifications

If you violate this policy within your profile information (e.g., your bio), we will require you to remove this content. We will also temporarily lock you out of your account before you can Tweet again. If you violate this policy again after your first warning, your account will be permanently suspended.

Labeling

In circumstances where we do not remove content which violates this policy, we may provide additional context on Tweets sharing the content where they appear on Twitter. This means we may:

- Apply a label and/or warning message to the content where it appears in the Twitter product;
- Show a warning to people before they share or like the content;
- Turn off people's ability to reply, Retweet, or like the Tweet;
- Reduce the visibility of the content on Twitter and/or prevent it from being recommended;
- Provide a link to additional explanations or clarifications, such as in a Twitter Moment or relevant Twitter policies; and/or

- Turn off likes, replies, and Retweets.

In most cases, we will take all of the above actions on Tweets we label. In some instances, we'll also turn off your ability to reply, Retweet, or like the Tweet. We prioritize producing Twitter Moments in cases where misleading content on Twitter is gaining significant attention and has caused public confusion on our service. Labels applied to Tweets accrue 1 strike.

Account locks and permanent suspension

For severe or repeated violations of this policy, accounts will be permanently suspended.

Repeated violations of this policy are enforced against on the basis of the number of strikes an account has accrued for violations of this policy:

- 1 strike: No account-level action
- 2 strikes: 12-hour account lock
- 3 strikes: 12-hour account lock
- 4 strikes: 7-day account lock
- 5 or more strikes: Permanent suspension

If you believe that your account was locked or suspended in error, you can submit an appeal (<https://help.twitter.comhttps://web.archive.org/web/20210112080812/https://help.twitter.com/forms/general?subtopic=suspended>).

EXHIBIT E



Blog

[Back](#)

Company

An update following the riots in Washington, DC

By [Twitter Safety](#)

Tuesday, 12 January 2021

Following the horrific events in Washington, DC, last week, here are some of the steps we've taken to protect the conversation on our service from attempts to incite violence, organize attacks, and share deliberately misleading information about the election outcome. It's important to be transparent about all of this work as the US Presidential Inauguration on January 20, 2021, approaches.

Updated our [coordinated harmful activity policy](https://help.twitter.com/en/rules-and-policies/coordinated-harmful-activity) (<https://help.twitter.com/en/rules-and-policies/coordinated-harmful-activity>).

We've been clear that we will take strong enforcement action on behavior that has the potential to lead to offline harm. Given the violent events in Washington, DC, and increased risk of harm, we began permanently suspending thousands of accounts that were primarily dedicated to sharing QAnon content on Friday afternoon.

Many of the individuals impacted by this updated enforcement action held multiple accounts, driving up the total number of accounts impacted. Since Friday, more than 70,000 accounts have been suspended as a result of our efforts, with many

instances of a single individual operating numerous accounts. These accounts were engaged in sharing harmful QAnon-associated content at scale and were primarily dedicated to the propagation of this conspiracy theory across the service.

Our updated enforcement on QAnon content on Twitter, along with routine spam challenges, has resulted in changes in follower count for some people's Twitter accounts. In some cases, these actions may have resulted in follower count changes in the thousands.

As stipulated in this policy that we announced ahead of the 2020 US election (<https://twitter.com/TwitterSafety/status/1285726277719199746>), accounts that have Tweeted or Retweeted associated content will continue to be subject to limited visibility across search, replies, and on timelines and are prohibited from being recommended to others by Twitter. It's important that these types of accounts — that are not predominantly engaged in sharing this material — can see different perspectives in the open public conversation that Twitter uniquely provides.

Our teams are discussing ways we can empower research into QAnon and coordinated harmful activity on Twitter.

Escalated enforcement measures for our Civic Integrity Policy

During the past several weeks, misleading and false information surrounding the 2020 US presidential election has been the basis for incitement to violence around the country. We took action on these claims in line with our Civic Integrity Policy (<https://help.twitter.com/en/rules-and-policies/election-integrity-policy>).

Now that the results of the election have been officially certified by Congress, we updated our Civic Integrity policy on Friday to aggressively increase our enforcement action on these claims. The updated policy (<https://help.twitter.com/en/rules-and-policies/election-integrity-policy>) provides details about how we enforce against violations of this policy, including repeated sharing of Tweets that receive warning labels. Ultimately, repeated violations of this policy can result in permanent suspension.

Deployed tech to surface potentially harmful Tweets for urgent human review

Our teams are continuing to aggressively deploy technology to surface potentially harmful Tweets for human review in an effort to take action as quickly as possible on violative content. Using this combination of technology and human review helps our

teams work at scale during this critical time. We continue to update these tools as terminology and behaviors evolve on Twitter.

Limited engagement on labeled Tweets

On Tuesday, we limited engagement by no longer allowing any Tweets labeled for violations of our civic integrity policy to be replied to, Liked or Retweeted. People on Twitter are still able to Quote Tweet to share this content with additional context or their own perspective.

Blocked violative keywords from Search and Trends

We want Trends to promote healthy conversations on Twitter. This means, at times, we may prevent certain content from trending. There are rules (<https://help.twitter.com/en/using-twitter/twitter-trending-faqs>) for Trends, and if we identify Trends that violate these rules, we'll take enforcement action.

Since last week, we've prohibited certain terms from surfacing in Trends and Search based on the following Twitter Rules:

- Coordinated harmful activity (<https://help.twitter.com/en/rules-and-policies/coordinated-harmful-activity>)
- Civic integrity (<https://help.twitter.com/en/rules-and-policies/election-integrity-policy>)
- Hateful conduct (<https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>)
- Glorification of violence (<https://help.twitter.com/en/rules-and-policies/glorification-of-violence>)
- Violent threats (<https://help.twitter.com/en/rules-and-policies/violent-threats-glorification>)
- Sensitive media (<https://help.twitter.com/en/rules-and-policies/media-policy>)

We will also continue to prioritize reviewing and adding context (https://blog.twitter.com/en_us/topics/company/2020/2020-election-update.html) to Trends. Our goal is to help people see what's happening while ensuring that potentially confusing trends are presented with context.

Fought spam and challenged potentially inauthentic accounts

It is against the Twitter Rules to engage in spamming behavior, including bulk, aggressive, or deceptive activity. That's why we routinely deploy anti-spam challenges to accounts to fight this behavior and protect the public conversation. During these challenges, account owners must verify their authenticity through a variety of measures, such as reCAPTCHA or providing a functional email address.

As always, while accounts are undergoing these challenges, they're temporarily removed from follower counts. This, along with our updated enforcement around coordinated harmful activity, means some people may notice drops or fluctuations in their follower count.

Ahead of the inauguration, we'll continue to monitor the situation, keep open lines of communication with law enforcement, and keep the public informed of additional enforcement actions.



(<https://www.twitter.com/TwitterSafety>).

Twitter Safety

EXHIBIT D



Civic integrity policy

Overview

October 2020

You may not use Twitter's services for the purpose of manipulating or interfering in elections or other civic processes. This includes posting or sharing content that may suppress participation or mislead people about when, where, or how to participate in a civic process. In addition, we may label and reduce the visibility of Tweets containing false or misleading information about civic processes in order to provide additional context.

The public conversation occurring on Twitter is never more important than during elections and other civic events. Any attempts to undermine the integrity of our service is antithetical to our fundamental rights and undermines the core tenets of freedom of expression, the value upon which our company is based.

We believe we have a responsibility to protect the integrity of those conversations from interference and manipulation. Therefore, we prohibit attempts to use our services to manipulate or disrupt civic processes, including through the distribution of false or misleading information about the procedures or circumstances around participation in a civic process. In instances where misleading information does not seek to directly manipulate or disrupt civic processes, but leads to confusion on our service, we may label the Tweets to give additional context.

What is a civic process?

Twitter considers civic processes to be events or procedures mandated, organized, and conducted by the governing and/or electoral body of a country, state, region, district, or municipality to address a matter of common concern through public participation. Some examples of civic processes may include:

- Political elections
- Censuses
- Major referenda and ballot initiatives

What is in violation of this policy?

This policy addresses 4 categories of misleading behavior and content:

Misleading information about how to participate

We will label or remove false or misleading information about how to participate in an election or other civic process. This includes but is not limited to:

- misleading information about procedures to participate in a civic process (for example, that you can vote by Tweet, text message, email, or phone call in jurisdictions where these are not a possibility);
- misleading information about requirements for participation, including identification or citizenship requirements;
- misleading claims that cause confusion about the established laws, regulations, procedures, and methods of a civic process, or about the actions of officials or entities executing those civic processes; and
- misleading statements or information about the official, announced date or time of a civic process.

Suppression and intimidation

We will label or remove false or misleading information intended to intimidate or dissuade people from participating in an election or other civic process. This includes but is not limited to:

- misleading claims that polling places are closed, that polling has ended, or other misleading information relating to votes not being counted;
- misleading claims about police or law enforcement activity related to voting in an election, polling places, or collecting census information;
- misleading claims about long lines, equipment problems, or other disruptions at voting locations during election periods;
- misleading claims about process procedures or techniques which could dissuade people from participating; and
- threats regarding voting locations or other key places or events (note that our violent threats policy (<https://help.twitter.com/http://web.archive.org/web/2020112120745/https://help.twitter.com/rules-and-policies/violent-threats-glorification>) may also be relevant for threats not covered by this policy).

Misleading information about outcomes

We will label or remove false or misleading information intended to undermine public confidence in an election or other civic process. This includes but is not limited to:

- disputed claims that could undermine faith in the process itself, such as unverified information about election rigging, ballot tampering, vote tallying, or certification of election results; and
- misleading claims about the results or outcome of a civic process which calls for or could lead to interference with the implementation of the results of the process, e.g. claiming victory before election results have been certified, inciting unlawful conduct to prevent the procedural or practical implementation of election results (note that our violent threats policy may also be relevant for threats not covered by this policy).

False or misleading affiliation

You can't create fake accounts which misrepresent their affiliation, or share content that falsely represents its affiliation, to a candidate, elected official, political party, electoral authority, or government entity. Read more about our parody, commentary, and fan account policy.

(<https://help.twitter.comhttp://web.archive.org/web/20201112120745/https://help.twitter.com/rules-and-policies/parody-account-policy>).

What is not a violation of this policy?

Not all false or untrue information about politics or civic processes constitutes manipulation or interference. In the absence of other policy violations, the following are generally not in violation of this policy:

- inaccurate statements about an elected or appointed official, candidate, or political party;
- organic content that is polarizing, biased, hyperpartisan, or contains controversial viewpoints expressed about elections or politics;
- discussion of public polling information;
- voting and audience participation for competitions, game shows, or other entertainment purposes; and
- using Twitter pseudonymously or as a parody, commentary, or fan account (<https://help.twitter.comhttp://web.archive.org/web/20201112120745/https://help.twitter.com/rules-and-policies/parody-account-policy>) to discuss elections or politics.

Who can report violations of this policy?

Accurate reporting of suspected violations of this policy requires information and knowledge specific to an election or civic process. Therefore, we enable reporting of false or misleading information about civic processes in advance of major events, for people located in the relevant countries and locations. We also work with select government and civil society partners in these countries to provide additional channels for reporting and expedited review.

For civic processes with multiple stages or parts, such as primary elections or lengthy campaigns, reporting will be enabled leading up to the first officially-sanctioned event associated with the civic process.

How can I report violations of this policy?

If the reporting option for this policy is enabled in your country at the relevant time, you can report this content in-app or on desktop.

In-app

You can report this content for review in-app as follows:

1. Select **Report Tweet** from the ∨ icon.
2. Select **It's misleading about a political election or other civic event**.

3. Select the option that best tells us how the Tweet is misleading about voting or participation in civic processes.
4. Submit your report.

Desktop

You can report this content for review on desktop as follows:

1. Select **Report Tweet** from the ∨ icon.
2. Select **It's misleading about a political election or other civic event**.
3. Select the option that best tells us how the Tweet is misleading about voting or participation in a civic process.
4. Submit your report.

What happens if you violate this policy?

The consequences for violating our civic integrity policy depends on the severity and type of the violation and the accounts' history of previous violations. The actions we take may include the following:

Tweet deletion

The first time you violate this policy, we will require you to remove this content. We will also temporarily lock you out of your account before you can Tweet again.

Profile modifications

If you violate this policy within your profile information (e.g., your bio), we will require you to remove this content. We will also temporarily lock you out of your account before you can Tweet again. If you violate this policy again after your first warning, your account will be permanently suspended.

Labeling

In circumstances where we do not remove content which violates this policy, we may provide additional context on Tweets sharing the content where they appear on Twitter. This means we may:

- Apply a label and/or warning message to the content where it appears in the Twitter product;
- Show a warning to people before they share or like the content;
- Reduce the visibility of the content on Twitter and/or prevent it from being recommended; and/or
- Provide a link to additional explanations or clarifications, such as in a Twitter Moment or relevant Twitter policies.

In most cases, we will take all of the above actions on Tweets we label. In some instances, we'll also turn off your ability to reply, Retweet, or like the Tweet. We prioritize producing Twitter Moments in cases where misleading content on Twitter is gaining significant attention and has caused public confusion on our service.

Permanent suspension

For severe or repeated violations of this policy, accounts will be permanently suspended.

If you believe that your account was locked or suspended in error, you can submit an appeal

(<https://help.twitter.comhttp://web.archive.org/web/2020112120745/https://help.twitter.com/forms/general?subtopic=suspended>).

EXHIBIT C



Civic integrity policy

Overview

May 2020

You may not use Twitter's services for the purpose of manipulating or interfering in elections or other civic processes. This includes posting or sharing content that may suppress participation or mislead people about when, where, or how to participate in a civic process.

The public conversation occurring on Twitter is never more important than during elections and other civic events. Any attempts to undermine the integrity of our service is antithetical to our fundamental rights and undermines the core tenets of freedom of expression, the value upon which our company is based.

We believe we have a responsibility to protect the integrity of those conversations from interference and manipulation. Therefore, we prohibit attempts to use our services to manipulate or disrupt civic processes, including through the distribution of false or misleading information about the procedures or circumstances around participation in a civic process.

What is a civic process?

Twitter considers civic processes to be events or procedures mandated, organized, and conducted by the governing and/or electoral body of a country, state, region, district, or municipality to address a matter of common concern through public participation. Some examples of civic processes may include:

- Political elections
- Censuses
- Major referenda and ballot initiatives

What is in violation of this policy?

We prohibit 3 categories of manipulative behavior and content under this policy:

Misleading information about how to participate

You can't share false or misleading information about how to participate in an election or other civic process. This includes but is not limited to:

- misleading information about procedures to participate in a civic process (for example, that you can vote by Tweet, text message, email, or phone call in jurisdictions where these are not a possibility);
- misleading information about requirements for participation, including identification or citizenship requirements; and
- misleading statements or information about the official, announced date or time of a civic process.

Suppression and intimidation

You can't share false or misleading information intended to intimidate or dissuade people from participating in an election or other civic process. This includes but is not limited to:

- misleading claims that polling places are closed, that polling has ended, or other misleading information relating to votes not being counted;
- misleading claims about police or law enforcement activity related to voting in an election, polling places, or collecting census information;
- misleading claims about long lines, equipment problems, or other disruptions at voting locations during election periods;
- misleading claims about process procedures or techniques which could dissuade people from participating; and
- threats regarding voting locations or other key places or events (note that our violent threats policy (<https://help.twitter.com/https://web.archive.org/web/20200527112946/https://help.twitter.com/rules-and-policies/violent-threats-glorification>) may also be relevant for threats not covered by this policy).

False or misleading affiliation

You can't create fake accounts which misrepresent their affiliation, or share content that falsely represents its affiliation, to a candidate, elected official, political party, electoral authority, or government entity. Read more about our parody, commentary, and fan account policy.

(<https://help.twitter.com/https://web.archive.org/web/20200527112946/https://help.twitter.com/rules-and-policies/parody-account-policy>).

What is not a violation of this policy?

Not all false or untrue information about politics or civic processes constitutes manipulation or interference. In the absence of other policy violations, the following are generally not in violation of this policy:

- inaccurate statements about an elected or appointed official, candidate, or political party;
- organic content that is polarizing, biased, hyperpartisan, or contains controversial viewpoints expressed about elections or politics;
- discussion of public polling information;
- voting and audience participation for competitions, game shows, or other entertainment purposes;
- broad, non-specific statements about the integrity of elections or civic processes (such as unsubstantiated claims that an election is "rigged"); and
- using Twitter pseudonymously or as a parody, commentary, or fan account (<https://help.twitter.com/https://web.archive.org/web/20200527112946/https://help.twitter.com/rules-and-policies/parody-account-policy>) to discuss elections or politics.

Who can report violations of this policy?

Accurate reporting of suspected violations of this policy requires information and knowledge specific to an election or civic process. Therefore, we enable reporting of false or misleading information about civic processes in advance of major events, for people located in the relevant countries and locations. We also work with select government and civil society partners in these countries to provide additional channels for reporting and expedited review.

For civic processes with multiple stages or parts, such as primary elections or lengthy campaigns, reporting will be enabled leading up to the first officially-sanctioned event associated with the civic process.

How can I report violations of this policy?

If the reporting option for this policy is enabled in your country at the relevant time, you can report this content in-app or on desktop.

In-app

You can report this content for review in-app as follows:

1. Select **Report Tweet** from the ∨ icon.
2. Select **It's misleading about a political election or other civic event**.
3. Select the option that best tells us how the Tweet is misleading about voting or participation in civic processes.
4. Submit your report.

Desktop

You can report this content for review on desktop as follows:

1. Select **Report Tweet** from the ∨ icon.
2. Select **It's misleading about a political election or other civic event**.
3. Select the option that best tells us how the Tweet is misleading about voting or participation in a civic process.
4. Submit your report.

What happens if you violate this policy?

The consequences for violating our civic integrity policy depends on the severity and type of the violation and the accounts' history of previous violations. The actions we take may include the following:

Tweet deletion

The first time you violate this policy, we will require you to remove this content. We will also temporarily lock you out of your account before you can Tweet again.

Profile modifications

If you violate this policy within your profile information (e.g., your bio), we will require you to remove this content. We will also temporarily lock you out of your account before you can Tweet again. If you violate this policy again after your first warning, your account will be permanently suspended.

Permanent suspension

For severe or repeated violations of this policy, accounts will be permanently suspended.

If you believe that your account was locked or suspended in error, you can submit an appeal

(<https://help.twitter.comhttps://web.archive.org/web/20200527112946/https://help.twitter.com/forms/general?subtopic=suspended>).

EXHIBIT B

[Skip to main content](#)



Help Center

- [Using Twitter](https://help.twitter.com/en/using-twitter) (https://help.twitter.com/en/using-twitter)
- [Managing your account](https://help.twitter.com/en/managing-your-account) (https://help.twitter.com/en/managing-your-account)
- [Safety and security](https://help.twitter.com/en/safety-and-security) (https://help.twitter.com/en/safety-and-security)
- [Rules and policies](https://help.twitter.com/en/rules-and-policies) (https://help.twitter.com/en/rules-and-policies)
- Resources ▼

 - [New user FAQ](https://help.twitter.com/en/resources/new-user-faq) (https://help.twitter.com/en/resources/new-user-faq)
 - [Glossary](https://help.twitter.com/en/resources/glossary) (https://help.twitter.com/en/resources/glossary)
 - [How to get even more Twitter](https://help.twitter.com/en/resources/more-twitter) (https://help.twitter.com/en/resources/more-twitter)
 - [A safer Twitter](https://help.twitter.com/en/resources/a-safer-twitter) (https://help.twitter.com/en/resources/a-safer-twitter)
 - [Our rules](https://help.twitter.com/en/resources/rules) (https://help.twitter.com/en/resources/rules)
 - [My privacy](https://help.twitter.com/en/resources/how-you-can-control-your-privacy) (https://help.twitter.com/en/resources/how-you-can-control-your-privacy)
 - [Getting Started Guide](https://help.twitter.com/en/resources/twitter-guide) (https://help.twitter.com/en/resources/twitter-guide)



[Contact Us](https://help.twitter.com/forms.html) (https://help.twitter.com/forms.html)



1. The Twitter Rules

The Twitter Rules



1. [Help Center](https://help.twitter.com/en) ^ (https://help.twitter.com/en)
2. [General](https://help.twitter.com/en/rules-and-policies#general) ^ (https://help.twitter.com/en/rules-and-policies#general)

The Twitter Rules

Twitter's purpose is to serve the public conversation. Violence, harassment and other similar types of behavior discourage people from expressing themselves, and ultimately diminish the value of global public conversation. Our rules are to ensure all

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people can participate in the public conversation freely and safely.

Safety

Violence: You may not threaten violence against an individual or a group of people. We also prohibit the glorification of violence. Learn more about our violent threat (<https://help.twitter.com/rules-and-policies/violent-threats-glorification>) and glorification of violence (<https://help.twitter.com/rules-and-policies/glorification-of-violence>) policies.

Terrorism/violent extremism: You may not threaten or promote terrorism or violent extremism. Learn more (<https://help.twitter.com/rules-and-policies/violent-groups>).

Child sexual exploitation: We have zero tolerance for child sexual exploitation on Twitter. Learn more (<https://help.twitter.com/rules-and-policies/sexual-exploitation-policy>).

Abuse/harassment: You may not engage in the targeted harassment of someone, or incite other people to do so. This includes wishing or hoping that someone experiences physical harm. Learn more (<https://help.twitter.com/rules-and-policies/abusive-behavior>).

Hateful conduct: You may not promote violence against, threaten, or harass other people on the basis of race, ethnicity, national origin, caste, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease. Learn more (<https://help.twitter.com/rules-and-policies/hateful-conduct-policy>).

Suicide or self-harm: You may not promote or encourage suicide or self-harm. Learn more (<https://help.twitter.com/rules-and-policies/glorifying-self-harm>).

Sensitive media, including graphic violence and adult content: You may not post media that is excessively gory or share violent or adult content within live video or in profile or header images. Media depicting sexual violence and/or assault is also not permitted. Learn more (<https://help.twitter.com/rules-and-policies/media-policy>).

Illegal or certain regulated goods or services: You may not use our service for any unlawful purpose or in furtherance of illegal activities. This includes selling, buying, or facilitating transactions in illegal goods or services, as well as certain types of

regulated goods or services. [Learn more](https://help.twitter.com/rules-and-policies/regulated-goods-services) (https://help.twitter.com/rules-and-policies/regulated-goods-services).

Privacy

Private information: You may not publish or post other people's private information (such as home phone number and address) without their express authorization and permission. We also prohibit threatening to expose private information or incentivizing others to do so. [Learn more](https://help.twitter.com/rules-and-policies/personal-information) (https://help.twitter.com/rules-and-policies/personal-information).

Non-consensual nudity: You may not post or share intimate photos or videos of someone that were produced or distributed without their consent. [Learn more](https://help.twitter.com/rules-and-policies/intimate-media) (https://help.twitter.com/rules-and-policies/intimate-media).

Authenticity

Platform manipulation and spam: You may not use Twitter's services in a manner intended to artificially amplify or suppress information or engage in behavior that manipulates or disrupts people's experience on Twitter. [Learn more](https://help.twitter.com/rules-and-policies/platform-manipulation) (https://help.twitter.com/rules-and-policies/platform-manipulation).

Civic Integrity: You may not use Twitter's services for the purpose of manipulating or interfering in elections or other civic processes. This includes posting or sharing content that may suppress participation or mislead people about when, where, or how to participate in a civic process. [Learn more](https://help.twitter.com/rules-and-policies/election-integrity-policy) (https://help.twitter.com/rules-and-policies/election-integrity-policy).

Impersonation: You may not impersonate individuals, groups, or organizations in a manner that is intended to or does mislead, confuse, or deceive others. [Learn more](https://help.twitter.com/rules-and-policies/twitter-impersonation-policy) (https://help.twitter.com/rules-and-policies/twitter-impersonation-policy).

Synthetic and manipulated media: You may not deceptively share synthetic or manipulated media that are likely to cause harm. In addition, we may label Tweets containing synthetic and manipulated media to help people understand their authenticity and to provide additional context. [Learn more](https://help.twitter.com/rules-and-policies/manipulated-media) (https://help.twitter.com/rules-and-policies/manipulated-media).

Copyright and trademark: You may not violate others' intellectual property rights, including copyright and trademark. Learn more about our [trademark policy](https://help.twitter.com/rules-and-policies/twitter-trademark-policy) (<https://help.twitter.com/rules-and-policies/twitter-trademark-policy>), and [copyright policy](https://help.twitter.com/rules-and-policies/copyright-policy) (<https://help.twitter.com/rules-and-policies/copyright-policy>).

Enforcement and Appeals

Learn more about [our approach to enforcement](https://help.twitter.com/rules-and-policies/enforcement-philosophy) (<https://help.twitter.com/rules-and-policies/enforcement-philosophy>), including potential consequences for violating these rules or attempting to circumvent enforcement, as well as how to appeal.

Third-party advertising in video content

You may not submit, post, or display any video content on or through our services that includes third-party advertising, such as pre-roll video ads or sponsorship graphics, without our prior consent.

Note: we may need to change these rules from time to time in order to support our goal of promoting a healthy public conversation. The most current version is always available at <https://twitter.com/rules> (<https://twitter.com/rules>).

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[Privacy](https://twitter.com/privacy) (<https://twitter.com/privacy>)

Terms and conditions (<https://twitter.com/tos>).

English

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EXHIBIT A



Twitter Terms of Service

If you live outside the European Union, EFTA States, or the United Kingdom, including if you live in the United States, the Twitter User Agreement comprises these [Terms of Service](#), our [Privacy Policy](https://twitter.com/privacy) (<https://twitter.com/privacy>), the [Twitter Rules and Policies](https://help.twitter.com/en/rules-and-policies#twitter-rules) (<https://help.twitter.com/en/rules-and-policies#twitter-rules>), and all incorporated policies

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Twitter Terms of Service

If you live outside the European Union, EFTA States, or the United Kingdom, including if you live in the United States

These Terms of Service (“Terms”) govern your access to and use of our services, including our various websites, SMS, APIs, email notifications, applications, buttons, widgets, ads, commerce services, and our [other covered services](#)

(<https://help.twitter.com/en/rules-and-policies/twitter-services-and-corporate-affiliates>)

(<https://help.twitter.com/en/rules-and-policies/twitter-services-and-corporate-affiliates>

(<https://help.twitter.com/en/rules-and-policies/twitter-services-and-corporate-affiliates>)) that link to these Terms (collectively, the “Services”), and any information, text, links, graphics, photos, audio, videos, or other materials or arrangements of materials uploaded, downloaded or appearing on the Services (collectively referred to as “Content”). By using the Services you agree to be bound by these Terms.

1. Who May Use the Services

You may use the Services only if you agree to form a binding contract with Twitter and are not a person barred from receiving services under the laws of the applicable jurisdiction. In any case, you must be at least 13 years old, or in the case of Periscope 16 years old, to use the Services. If you are accepting these Terms and using the Services on behalf of a company, organization, government, or other legal entity, you represent and warrant that you are authorized to do so and have the authority to bind such entity to these Terms, in which case the words “you” and “your” as used in these Terms shall refer to such entity.

2. Privacy

Our Privacy Policy (<https://twitter.com/privacy>). (<https://www.twitter.com/privacy>. (<https://www.twitter.com/privacy>)) describes how we handle the information you provide to us when you use our Services. You understand that through your use of the Services you consent to the collection and use (as set forth in the Privacy Policy) of this information, including the transfer of this information to the United States, Ireland, and/or other countries for storage, processing and use by Twitter and its affiliates.

3. Content on the Services

You are responsible for your use of the Services and for any Content you provide, including compliance with applicable laws, rules, and regulations. You should only provide Content that you are comfortable sharing with others.

Any use or reliance on any Content or materials posted via the Services or obtained by you through the Services is at your own risk. We do not endorse, support, represent or guarantee the completeness, truthfulness, accuracy, or reliability of any Content or communications posted via the Services or endorse any opinions expressed via the Services. You understand that by using the Services, you may be exposed to Content that might be offensive, harmful, inaccurate or otherwise inappropriate, or in some cases, postings that have been mislabeled or are otherwise deceptive. All Content is the sole responsibility of the person who originated such Content. We may not monitor or control the Content posted via the Services and, we cannot take responsibility for such Content.

We reserve the right to remove Content that violates the User Agreement, including for example, copyright or trademark violations or other intellectual property misappropriation, impersonation, unlawful conduct, or harassment. Information regarding specific policies and the process for reporting or appealing violations can

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be found in our Help Center (<https://help.twitter.com/en/rules-and-policies/twitter-report-violation#specific-violations>) and <https://help.twitter.com/en/managing-your-account/suspended-twitter-accounts>)).

If you believe that your Content has been copied in a way that constitutes copyright infringement, please report this by visiting our Copyright reporting form (<https://help.twitter.com/forms/dmca>) or contacting our designated copyright agent at:

Twitter, Inc.

Attn: Copyright Agent

1355 Market Street, Suite 900

San Francisco, CA 94103

Reports: <https://help.twitter.com/forms/dmca>

Email: copyright@twitter.com

(for content on Twitter)

Twitter, Inc.

Attn: Copyright Agent - Periscope

1355 Market Street, Suite 900

San Francisco, CA 94103

Reports: <https://help.twitter.com/forms/dmca>

(<https://help.twitter.com/forms/dmca>) Email: copyright@pscp.tv

(for content on Periscope)

Your Rights and Grant of Rights in the Content

You retain your rights to any Content you submit, post or display on or through the Services. What's yours is yours — you own your Content (and your incorporated audio, photos and videos are considered part of the Content).

By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods now known or later developed (for clarity, these rights include, for example, curating, transforming, and translating). This license authorizes us to make your Content available to the rest of

the world and to let others do the same. You agree that this license includes the right for Twitter to provide, promote, and improve the Services and to make Content submitted to or through the Services available to other companies, organizations or individuals for the syndication, broadcast, distribution, Retweet, promotion or publication of such Content on other media and services, subject to our terms and conditions for such Content use. Such additional uses by Twitter, or other companies, organizations or individuals, is made with no compensation paid to you with respect to the Content that you submit, post, transmit or otherwise make available through the Services as the use of the Services by you is hereby agreed as being sufficient compensation for the Content and grant of rights herein.

Twitter has an evolving set of rules for how ecosystem partners can interact with your Content on the Services. These rules exist to enable an open ecosystem with your rights in mind. You understand that we may modify or adapt your Content as it is distributed, syndicated, published, or broadcast by us and our partners and/or make changes to your Content in order to adapt the Content to different media.

You represent and warrant that you have, or have obtained, all rights, licenses, consents, permissions, power and/or authority necessary to grant the rights granted herein for any Content that you submit, post or display on or through the Services. You agree that such Content will not contain material subject to copyright or other proprietary rights, unless you have necessary permission or are otherwise legally entitled to post the material and to grant Twitter the license described above.

4. Using the Services

Please review the Twitter Rules and Policies (<https://help.twitter.com/en/rules-and-policies#twitter-rules>) (and, for Periscope, the Periscope Community Guidelines (<https://www.pscp.tv/content>)) at <https://www.pscp.tv/content> (<https://www.pscp.tv/content>)), which are part of the User Agreement and outline what is prohibited on the Services. You may use the Services only in compliance with these Terms and all applicable laws, rules and regulations.

Our Services evolve constantly. As such, the Services may change from time to time, at our discretion. We may stop (permanently or temporarily) providing the Services or any features within the Services to you or to users generally. We also retain the right to create limits on use and storage at our sole discretion at any time. We may also

remove or refuse to distribute any Content on the Services, limit distribution or visibility of any Content on the service, suspend or terminate users, and reclaim usernames without liability to you.

In consideration for Twitter granting you access to and use of the Services, you agree that Twitter and its third-party providers and partners may place advertising on the Services or in connection with the display of Content or information from the Services whether submitted by you or others. You also agree not to misuse our Services, for example, by interfering with them or accessing them using a method other than the interface and the instructions that we provide. You may not do any of the following while accessing or using the Services: (i) access, tamper with, or use non-public areas of the Services, Twitter's computer systems, or the technical delivery systems of Twitter's providers; (ii) probe, scan, or test the vulnerability of any system or network or breach or circumvent any security or authentication measures; (iii) access or search or attempt to access or search the Services by any means (automated or otherwise) other than through our currently available, published interfaces that are provided by Twitter (and only pursuant to the applicable terms and conditions), unless you have been specifically allowed to do so in a separate agreement with Twitter (NOTE: crawling the Services is permissible if done in accordance with the provisions of the robots.txt file, however, scraping the Services without the prior consent of Twitter is expressly prohibited); (iv) forge any TCP/IP packet header or any part of the header information in any email or posting, or in any way use the Services to send altered, deceptive or false source-identifying information; or (v) interfere with, or disrupt, (or attempt to do so), the access of any user, host or network, including, without limitation, sending a virus, overloading, flooding, spamming, mail-bombing the Services, or by scripting the creation of Content in such a manner as to interfere with or create an undue burden on the Services. We also reserve the right to access, read, preserve, and disclose any information as we reasonably believe is necessary to (i) satisfy any applicable law, regulation, legal process or governmental request, (ii) enforce the Terms, including investigation of potential violations hereof, (iii) detect, prevent, or otherwise address fraud, security or technical issues, (iv) respond to user support requests, or (v) protect the rights, property or safety of Twitter, its users and the public. Twitter does not disclose personally-identifying information to third parties except in accordance with our [Privacy Policy](https://twitter.com/privacy) (<https://twitter.com/privacy>).

If you use developer features of the Services, including but not limited to [Twitter for Websites](https://developer.twitter.com/docs/twitter-for-websites/overview) (<https://developer.twitter.com/docs/twitter-for-websites/overview>) (<https://developer.twitter.com/docs/twitter-for-websites/overview>) (<https://developer.twitter.com/docs/twitter-for-websites/overview>)), [Twitter Cards](#)

(<https://developer.twitter.com/docs/tweets/optimize-with-cards/guides/getting-started>)
 (<https://developer.twitter.com/docs/tweets/optimize-with-cards/guides/getting-started>
 (<https://developer.twitter.com/docs/tweets/optimize-with-cards/guides/getting-started>)), [Public API](#)
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 (<https://developer.twitter.com/en/docs>)), or [Sign in with Twitter](#)
 (<https://developer.twitter.com/docs/basics/authentication/guides/log-in-with-twitter>)
 (<https://developer.twitter.com/docs/basics/authentication/guides/log-in-with-twitter>
 (<https://developer.twitter.com/docs/basics/authentication/guides/log-in-with-twitter>)), you agree to our
[Developer Agreement](#) (<https://developer.twitter.com/en/developer-terms/agreement>)
 (<https://developer.twitter.com/en/developer-terms/agreement>
 (<https://developer.twitter.com/en/developer-terms/agreement>)) and [Developer Policy](#).
 (<https://developer.twitter.com/en/developer-terms/policy>)
 (<https://developer.twitter.com/en/developer-terms/policy>
 (<https://developer.twitter.com/en/developer-terms/policy>)). If you want to reproduce, modify,
 create derivative works, distribute, sell, transfer, publicly display, publicly perform,
 transmit, or otherwise use the Services or Content on the Services, you must use the
 interfaces and instructions we provide, except as permitted through the Twitter
 Services, these Terms, or the terms provided on
<https://developer.twitter.com/en/developer-terms> (<https://developer.twitter.com/en/developer-terms>). If you are a security researcher, you are required to comply with the rules of
 the Twitter [Vulnerability Reporting Program](#) (<https://hackerone.com/twitter>)
 (<https://hackerone.com/twitter> (<https://hackerone.com/twitter>)). The requirements set out in
 the preceding paragraph may not apply to those participating in Twitter's Vulnerability
 Reporting Program.

If you use advertising features of the Services, you must agree to our [Twitter Master Services Agreement](#) (<https://ads.twitter.com/terms>) (<https://ads.twitter.com/terms>
 (<https://ads.twitter.com/terms>)).

If you use Super Hearts, Coins, or Stars on Periscope, you must agree to our [Super Hearts Terms](#) (<https://legal.twitter.com/en/periscope/super/terms.html>)
 (<https://legal.twitter.com/en/periscope/super/terms.html>
 (<https://legal.twitter.com/en/periscope/super/terms.html>)).

Your Account

You may need to create an account to use some of our Services. You are responsible for safeguarding your account, so use a strong password and limit its use to this account. We cannot and will not be liable for any loss or damage arising from your failure to comply with the above.

You can control most communications from the Services. We may need to provide you with certain communications, such as service announcements and administrative messages. These communications are considered part of the Services and your account, and you may not be able to opt-out from receiving them. If you added your phone number to your account and you later change or deactivate that phone number, you must update your account information to help prevent us from communicating with anyone who acquires your old number.

Your License to Use the Services

Twitter gives you a personal, worldwide, royalty-free, non-assignable and non-exclusive license to use the software provided to you as part of the Services. This license has the sole purpose of enabling you to use and enjoy the benefit of the Services as provided by Twitter, in the manner permitted by these Terms.

The Services are protected by copyright, trademark, and other laws of both the United States and other countries. Nothing in the Terms gives you a right to use the Twitter name or any of the Twitter trademarks, logos, domain names, other distinctive brand features, and other proprietary rights. All right, title, and interest in and to the Services (excluding Content provided by users) are and will remain the exclusive property of Twitter and its licensors. Any feedback, comments, or suggestions you may provide regarding Twitter, or the Services is entirely voluntary and we will be free to use such feedback, comments or suggestions as we see fit and without any obligation to you.

Ending These Terms

You may end your legal agreement with Twitter at any time by deactivating your accounts and discontinuing your use of the Services. See <https://help.twitter.com/en/managing-your-account/how-to-deactivate-twitter-account> (<https://help.twitter.com/en/managing-your-account/how-to-deactivate-twitter-account>) (and for Periscope, <https://help.pscp.tv/customer/portal/articles/2460220> (<https://help.pscp.tv/customer/portal/articles/2460220>)) for instructions on how to deactivate your account and the Privacy Policy for more information on what happens to your information.

We may suspend or terminate your account or cease providing you with all or part of the Services at any time for any or no reason, including, but not limited to, if we reasonably believe: (i) you have violated these Terms or the [Twitter Rules and Policies](https://help.twitter.com/en/rules-and-policies#twitter-rules) (<https://help.twitter.com/en/rules-and-policies#twitter-rules>) or [Periscope Community Guidelines](https://www.pscp.tv/content) (<https://www.pscp.tv/content>), (ii) you create risk or possible legal exposure for

us; (iii) your account should be removed due to unlawful conduct, (iv) your account should be removed due to prolonged inactivity; or (v) our provision of the Services to you is no longer commercially viable. We will make reasonable efforts to notify you by the email address associated with your account or the next time you attempt to access your account, depending on the circumstances. In all such cases, the Terms shall terminate, including, without limitation, your license to use the Services, except that the following sections shall continue to apply: II, III, V, and VI. If you believe your account was terminated in error you can file an appeal following the steps found in our [Help Center](https://help.twitter.com/forms/general?subtopic=suspended) (<https://help.twitter.com/forms/general?subtopic=suspended>) (<https://help.twitter.com/forms/general?subtopic=suspended>) (<https://help.twitter.com/forms/general?subtopic=suspended>)). For the avoidance of doubt, these Terms survive the deactivation or termination of your account.

5. Disclaimers and Limitations of Liability

The Services are Available "AS-IS"

Your access to and use of the Services or any Content are at your own risk. You understand and agree that the Services are provided to you on an "AS IS" and "AS AVAILABLE" basis. The "Twitter Entities" refers to Twitter, its parents, affiliates, related companies, officers, directors, employees, agents, representatives, partners, and licensors. Without limiting the foregoing, to the maximum extent permitted under applicable law, THE TWITTER ENTITIES DISCLAIM ALL WARRANTIES AND CONDITIONS, WHETHER EXPRESS OR IMPLIED, OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT. The Twitter Entities make no warranty or representation and disclaim all responsibility and liability for: (i) the completeness, accuracy, availability, timeliness, security or reliability of the Services or any Content; (ii) any harm to your computer system, loss of data, or other harm that results from your access to or use of the Services or any Content; (iii) the deletion of, or the failure to store or to transmit, any Content and other communications maintained by the Services; and (iv) whether the Services will meet your requirements or be available on an uninterrupted, secure, or error-free basis. No advice or information, whether oral or written, obtained from the Twitter Entities or through the Services, will create any warranty or representation not expressly made herein.

Limitation of Liability

TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THE TWITTER ENTITIES SHALL NOT BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES, OR ANY LOSS OF PROFITS OR REVENUES, WHETHER INCURRED DIRECTLY OR INDIRECTLY, OR ANY LOSS OF DATA, USE, GOODWILL, OR OTHER INTANGIBLE LOSSES, RESULTING FROM (i) YOUR ACCESS TO OR USE OF OR INABILITY TO ACCESS OR USE THE SERVICES; (ii) ANY CONDUCT OR CONTENT OF ANY THIRD PARTY ON THE SERVICES, INCLUDING WITHOUT LIMITATION, ANY DEFAMATORY, OFFENSIVE OR ILLEGAL CONDUCT OF OTHER USERS OR THIRD PARTIES; (iii) ANY CONTENT OBTAINED FROM THE SERVICES; OR (iv) UNAUTHORIZED ACCESS, USE OR ALTERATION OF YOUR TRANSMISSIONS OR CONTENT. IN NO EVENT SHALL THE AGGREGATE LIABILITY OF THE TWITTER ENTITIES EXCEED THE GREATER OF ONE HUNDRED U.S. DOLLARS (U.S. \$100.00) OR THE AMOUNT YOU PAID TWITTER, IF ANY, IN THE PAST SIX MONTHS FOR THE SERVICES GIVING RISE TO THE CLAIM. THE LIMITATIONS OF THIS SUBSECTION SHALL APPLY TO ANY THEORY OF LIABILITY, WHETHER BASED ON WARRANTY, CONTRACT, STATUTE, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, AND WHETHER OR NOT THE TWITTER ENTITIES HAVE BEEN INFORMED OF THE POSSIBILITY OF ANY SUCH DAMAGE, AND EVEN IF A REMEDY SET FORTH HEREIN IS FOUND TO HAVE FAILED OF ITS ESSENTIAL PURPOSE.

6. General

We may revise these Terms from time to time. The changes will not be retroactive, and the most current version of the Terms, which will always be at [twitter.com/tos](https://twitter.com/en/tos) (<https://twitter.com/en/tos>), will govern our relationship with you. We will try to notify you of material revisions, for example via a service notification or an email to the email associated with your account. By continuing to access or use the Services after those revisions become effective, you agree to be bound by the revised Terms.

The laws of the State of California, excluding its choice of law provisions, will govern these Terms and any dispute that arises between you and Twitter. All disputes related to these Terms or the Services will be brought solely in the federal or state courts located in San Francisco County, California, United States, and you consent to personal jurisdiction and waive any objection as to inconvenient forum.

If you are a federal, state, or local government entity in the United States using the Services in your official capacity and legally unable to accept the controlling law, jurisdiction or venue clauses above, then those clauses do not apply to you. For such U.S. federal government entities, these Terms and any action related thereto will be governed by the laws of the United States of America (without reference to conflict of laws) and, in the absence of federal law and to the extent permitted under federal law, the laws of the State of California (excluding choice of law).

In the event that any provision of these Terms is held to be invalid or unenforceable, then that provision will be limited or eliminated to the minimum extent necessary, and the remaining provisions of these Terms will remain in full force and effect. Twitter's failure to enforce any right or provision of these Terms will not be deemed a waiver of such right or provision.

These Terms are an agreement between you and Twitter, Inc., 1355 Market Street, Suite 900, San Francisco, CA 94103 U.S.A. If you have any questions about these Terms, please contact [us](https://help.twitter.com/forms) (<https://help.twitter.com/forms>).

Effective: June 18, 2020

[Archive of Previous Terms](https://twitter.com/en/tos/previous) (<https://twitter.com/en/tos/previous>).

Twitter Terms of Service

If you live in the European Union, EFTA States, or the United Kingdom

These Terms of Service ("Terms") govern your access to and use of our services, including our various websites, SMS, APIs, email notifications, applications, buttons, widgets, ads, commerce services, and our other covered services (<https://help.twitter.com/en/rules-and-policies/twitter-services-and-corporate-affiliates> (<https://help.twitter.com/en/rules-and-policies/twitter-services-and-corporate-affiliates>)) that link to these Terms (collectively, the "Services"), and any information, text, links, graphics, photos, audio, videos, or other materials or arrangements of materials uploaded, downloaded or appearing on the Services (collectively referred to as "Content"). By using the Services you agree to be bound by these Terms.

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3. Content on the Services

You are responsible for your use of the Services and for any Content you provide, including compliance with applicable laws, rules, and regulations. You should only provide Content that you are comfortable sharing with others.

Any use or reliance on any Content or materials posted via the Services or obtained by you through the Services is at your own risk. We do not endorse, support, represent or guarantee the completeness, truthfulness, accuracy, or reliability of any Content or communications posted via the Services or endorse any opinions expressed via the Services. You understand that by using the Services, you may be exposed to Content that might be offensive, harmful, inaccurate or otherwise inappropriate, or in some cases, postings that have been mislabeled or are otherwise deceptive. All Content is the sole responsibility of the person who originated such Content. We may not monitor or control the Content posted via the Services and, we cannot take responsibility for such Content.

We reserve the right to remove Content that violates the User Agreement, including for example, copyright or trademark violations or other intellectual property misappropriation, impersonation, unlawful conduct, or harassment. Information regarding specific policies and the process for reporting or appealing violations can be found in our Help Center (<https://help.twitter.com/en/rules-and-policies/twitter-report-violation#specific-violations>) and <https://help.twitter.com/en/managing-your-account/suspended-twitter-accounts>)).

If you believe that your Content has been copied in a way that constitutes copyright infringement, please report this by visiting our Copyright reporting form (<https://help.twitter.com/forms/dmca>) or contacting our designated copyright agent at:

Twitter, Inc.

Attn: Copyright Agent

1355 Market Street, Suite 900

San Francisco, CA 94103

Reports: <https://help.twitter.com/forms/dmca>

Email: copyright@twitter.com

(for content on Twitter)

Twitter, Inc.

Attn: Copyright Agent - Periscope

1355 Market Street, Suite 900

San Francisco, CA 94103

Reports: <https://help.twitter.com/forms/dmca>

(<https://help.twitter.com/forms/dmca>) Email: copyright@pscp.tv

(for content on Periscope)

Your Rights and Grant of Rights in the Content

You retain your rights to any Content you submit, post or display on or through the Services. What's yours is yours — you own your Content (and your incorporated audio, photos and videos are considered part of the Content).

By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods now known or later developed (for clarity, these rights include, for example, curating, transforming, and translating). This license authorizes us to make your Content available to the rest of the world and to let others do the same. You agree that this license includes the right for Twitter to provide, promote, and improve the Services and to make Content submitted to or through the Services available to other companies, organizations or individuals for the syndication, broadcast, distribution, Retweet, promotion or publication of such Content on other media and services, subject to our terms and conditions for such Content use. Such additional uses by Twitter, or other companies, organizations or individuals, is made with no compensation paid to you with respect to the Content that you submit, post, transmit or otherwise make available through the Services as the use of the Services by you is hereby agreed as being sufficient compensation for the Content and grant of rights herein.

Twitter has an evolving set of rules for how ecosystem partners can interact with your Content on the Services. These rules exist to enable an open ecosystem with your rights in mind. You understand that we may modify or adapt your Content as it is distributed, syndicated, published, or broadcast by us and our partners and/or make changes to your Content in order to adapt the Content to different media.

You represent and warrant that you have, or have obtained, all rights, licenses, consents, permissions, power and/or authority necessary to grant the rights granted herein for any Content that you submit, post or display on or through the Services. You agree that such Content will not contain material subject to copyright or other proprietary rights, unless you have necessary permission or are otherwise legally entitled to post the material and to grant Twitter the license described above.

4. Using the Services

Please review the Twitter Rules and Policies (<https://help.twitter.com/en/rules-and-policies#twitter-rules>) (and, for Periscope, the Periscope Community Guidelines (<https://www.pscp.tv/content>), at <https://pscp.tv/content> (<https://www.pscp.tv/content>)), which are part of the User Agreement and outline what is prohibited on the Services. You may use the Services only in compliance with these Terms and all applicable laws, rules and regulations.

Our Services evolve constantly. As such, the Services may change from time to time, at our discretion. We may stop (permanently or temporarily) providing the Services or any features within the Services to you or to users generally. We also retain the right to create limits on use and storage at our sole discretion at any time. We may also remove or refuse to distribute any Content on the Services, limit distribution or visibility of any Content on the service, suspend or terminate users, and reclaim usernames without liability to you.

In consideration for Twitter granting you access to and use of the Services, you agree that Twitter and its third-party providers and partners may place advertising on the Services or in connection with the display of Content or information from the Services whether submitted by you or others. You also agree not to misuse our Services, for example, by interfering with them or accessing them using a method other than the interface and the instructions that we provide. You may not do any of the following while accessing or using the Services: (i) access, tamper with, or use non-public areas of the Services, Twitter's computer systems, or the technical delivery systems of Twitter's providers; (ii) probe, scan, or test the vulnerability of any system or network or breach or circumvent any security or authentication measures; (iii) access or search or attempt to access or search the Services by any means (automated or otherwise) other than through our currently available, published interfaces that are provided by Twitter (and only pursuant to the applicable terms and conditions), unless you have been specifically allowed to do so in a separate agreement with Twitter (NOTE: crawling the Services is permissible if done in accordance with the provisions of the robots.txt file, however, scraping the Services without the prior consent of Twitter is expressly prohibited); (iv) forge any TCP/IP packet header or any part of the header information in any email or posting, or in any way use the Services to send altered, deceptive or false source-identifying information; or (v) interfere with, or disrupt, (or attempt to do so), the access of any user, host or network, including, without limitation, sending a virus, overloading, flooding, spamming, mail-bombing the Services, or by scripting the creation of Content in such a manner as to interfere with or create an undue burden on the Services. We also reserve the right to access, read, preserve, and disclose any information as we reasonably believe is necessary to (i) satisfy any applicable law, regulation, legal process or governmental request, (ii) enforce the Terms, including investigation of potential violations hereof, (iii) detect, prevent, or otherwise address fraud, security or technical issues, (iv) respond to user support requests, or (v) protect the rights, property or safety of Twitter, its users and the public. Twitter does not disclose personally-identifying information to third parties except in accordance with our [Privacy Policy \(https://twitter.com/privacy\)](https://twitter.com/privacy).

If you use developer features of the Services, including but not limited to Twitter for Websites (<https://developer.twitter.com/docs/twitter-for-websites/overview>) (<https://developer.twitter.com/docs/twitter-for-websites/overview>), Twitter Cards (<https://developer.twitter.com/docs/tweets/optimize-with-cards/guides/getting-started>) (<https://developer.twitter.com/docs/tweets/optimize-with-cards/guides/getting-started>), Public API (<https://developer.twitter.com/en/docs>) (<https://developer.twitter.com/en/docs>), or Sign in with Twitter (<https://developer.twitter.com/docs/basics/authentication/guides/log-in-with-twitter>) (<https://developer.twitter.com/docs/basics/authentication/guides/log-in-with-twitter>), you agree to our Developer Agreement (<https://developer.twitter.com/en/developer-terms/agreement>) (<https://developer.twitter.com/en/developer-terms/agreement>) and Developer Policy (<https://developer.twitter.com/en/developer-terms/policy>) (<https://developer.twitter.com/en/developer-terms/policy>). If you want to reproduce, modify, create derivative works, distribute, sell, transfer, publicly display, publicly perform, transmit, or otherwise use the Services or Content on the Services, you must use the interfaces and instructions we provide, except as permitted through the Twitter Services, these Terms, or the terms provided on <https://developer.twitter.com/en/developer-terms> (<https://developer.twitter.com/en/developer-terms>). If you are a security researcher, you are required to comply with the rules of the Twitter Vulnerability Reporting Program (<https://hackerone.com/twitter>) (<https://hackerone.com/twitter>). The requirements set out in the preceding paragraph may not apply to those participating in Twitter's Vulnerability Reporting Program.

If you use advertising features of the Services, you must agree to our Twitter Master Services Agreement (<https://ads.twitter.com/terms>) (<https://ads.twitter.com/terms>) (<https://ads.twitter.com/terms>).

If you use Super Hearts, Coins, or Stars on Periscope, you agree to our Super Hearts Terms (<https://legal.twitter.com/en/periscope/super/terms.html>) (<https://legal.twitter.com/en/periscope/super/terms.html>) (<https://legal.twitter.com/en/periscope/super/terms.html>).

Your Account

You may need to create an account to use some of our Services. You are responsible for safeguarding your account, so use a strong password and limit its use to this account. We cannot and will not be liable for any loss or damage arising from your failure to comply with the above.

You can control most communications from the Services. We may need to provide you with certain communications, such as service announcements and administrative messages. These communications are considered part of the Services and your account, and you may not be able to opt-out from receiving them. If you added your phone number to your account and you later change or deactivate that phone number, you must update your account information to help prevent us from communicating with anyone who acquires your old number.

Your License to Use the Services

Twitter gives you a personal, worldwide, royalty-free, non-assignable and non-exclusive license to use the software provided to you as part of the Services. This license has the sole purpose of enabling you to use and enjoy the benefit of the Services as provided by Twitter, in the manner permitted by these Terms.

The Services are protected by copyright, trademark, and other laws of both the United States and other countries. Nothing in the Terms gives you a right to use the Twitter name or any of the Twitter trademarks, logos, domain names, other distinctive brand features, and other proprietary rights. All right, title, and interest in and to the Services (excluding Content provided by users) are and will remain the exclusive property of Twitter and its licensors. Any feedback, comments, or suggestions you may provide regarding Twitter, or the Services is entirely voluntary and we will be free to use such feedback, comments or suggestions as we see fit and without any obligation to you.

Ending These Terms

You may end your legal agreement with Twitter at any time by deactivating your accounts and discontinuing your use of the Services. See <https://help.twitter.com/en/managing-your-account/how-to-deactivate-twitter-account> (<https://help.twitter.com/en/managing-your-account/how-to-deactivate-twitter-account>) (and for Periscope, <https://help.pscp.tv/customer/portal/articles/2460220> (<https://help.pscp.tv/customer/portal/articles/2460220>)) for instructions on how to deactivate your account and the Privacy Policy for more information on what happens to your information.

We may suspend or terminate your account or cease providing you with all or part of the Services at any time for any or no reason, including, but not limited to, if we reasonably believe: (i) you have violated these Terms or the Twitter Rules and Policies (<https://help.twitter.com/en/rules-and-policies#twitter-rules>) or Periscope Community Guidelines (<https://www.pscp.tv/content>), (ii) you create risk or possible legal exposure for us; (iii) your account should be removed due to unlawful conduct, (iv) your account should be removed due to prolonged inactivity; or (v) our provision of the Services to you is no longer commercially viable. We will make reasonable efforts to notify you by the email address associated with your account or the next time you attempt to access your account, depending on the circumstances. In all such cases, the Terms shall terminate, including, without limitation, your license to use the Services, except that the following sections shall continue to apply: II, III, V, and VI. If you believe your account was terminated in error you can file an appeal following the steps found in our Help Center (<https://help.twitter.com/forms/general?subtopic=suspended>) (<https://help.twitter.com/forms/general?subtopic=suspended>) (<https://help.twitter.com/forms/general?subtopic=suspended>). For the avoidance of doubt, these Terms survive the deactivation or termination of your account.

5. Limitations of Liability

By using the Services you agree that Twitter, its parents, affiliates, related companies, officers, directors, employees, agents representatives, partners and licensors, liability is limited to the maximum extent permissible in your country of residence.

6. General

We may revise these Terms from time to time. The changes will not be retroactive, and the most current version of the Terms, which will always be at twitter.com/tos (<https://twitter.com/en/tos>), will govern our relationship with you. Other than for changes addressing new functions or made for legal reasons, we will notify you 30 days in advance of making effective changes to these Terms that impact the rights or obligations of any party to these Terms, for example via a service notification or an email to the email associated with your account. By continuing to access or use the Services after those revisions become effective, you agree to be bound by the revised Terms.

In the event that any provision of these Terms is held to be invalid or unenforceable, then that provision will be limited or eliminated to the minimum extent necessary, and the remaining provisions of these Terms will remain in full force and effect. Twitter's failure to enforce any right or provision of these Terms will not be deemed a waiver of such right or provision.

These Terms are an agreement between you and Twitter International Company, (Co. number 503351, VAT number IE9803175Q), an Irish company with its registered office at One Cumberland Place, Fenian Street Dublin 2, D02 AX07 Ireland. If you have any questions about these Terms, please contact [us](https://help.twitter.com/forms) (<https://help.twitter.com/forms>).

Effective: June 18, 2020

[Archive of Previous Terms](https://twitter.com/en/tos/previous) (<https://twitter.com/en/tos/previous>).

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[Cookies](https://help.twitter.com/rules-and-policies/twitter-cookies) (<https://help.twitter.com/rules-and-policies/twitter-cookies>)

[Privacy](https://twitter.com/privacy) (<https://twitter.com/privacy>).

[Terms and conditions](https://twitter.com/tos) (<https://twitter.com/tos>).

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**UNITED STATES DISTRICT COURT
NORTHER DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

ROGAN O'HANDLEY

Plaintiff,

v.

ALEX PADILLA, et. al.,

Defendants.

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

**DECLARATION OF THOMAS G.
SPRANKLING IN SUPPORT OF
DEFENDANT TWITTER, INC.'S
MOTION TO DISMISS**

1 I, Thomas G. Sprankling, declare and state as follows:

2 1. I am an attorney licensed to practice law in California and am one of the counsel of record
3 for Defendant Twitter, Inc. (“Twitter”) in this action. I submit this Declaration in support of Twitter’s
4 Motion to Dismiss.

5 2. **Exhibit A** is a true and accurate copy of Twitter’s User Agreement, including its
6 component Terms of Service, which was effective from June 18, 2020 to August 18, 2021, as
7 downloaded on October 5, 2021 from Twitter’s publicly available website at
8 https://twitter.com/en/tos/previous/version_15.

9 3. **Exhibit B** is a true and accurate copy of Twitter’s Rules, as downloaded on October 5,
10 2021 from Twitter’s publicly available website at [https://help.twitter.com/en/rules-and-](https://help.twitter.com/en/rules-and-policies/twitter-rules)
11 [policies/twitter-rules](https://help.twitter.com/en/rules-and-policies/twitter-rules).

12 4. **Exhibit C** is a true and accurate copy of Twitter’s “Civic Integrity Policy,” as it appeared
13 as of May 27, 2020, and as downloaded on October 5, 2021 from a publicly available archive of
14 webpages at [https://web.archive.org/web/20200527112946/https://help.twitter.com/en/rules-](https://web.archive.org/web/20200527112946/https://help.twitter.com/en/rules-and-policies/election-integrity-policy)
15 [and-policies/election-integrity-policy](https://web.archive.org/web/20200527112946/https://help.twitter.com/en/rules-and-policies/election-integrity-policy).

16 5. **Exhibit D** is a true and accurate copy of Twitter’s “Civic Integrity Policy” as it appeared
17 as of November 12, 2020, the date on which O’Handley posted the first Tweet at issue in the
18 Complaint, and as downloaded on October 5, 2021 from a publicly available archive of webpages at
19 [http://web.archive.org/web/20201112120745/https://help.twitter.com/en/rules-and-](http://web.archive.org/web/20201112120745/https://help.twitter.com/en/rules-and-policies/election-integrity-policy)
20 [policies/election-integrity-policy](http://web.archive.org/web/20201112120745/https://help.twitter.com/en/rules-and-policies/election-integrity-policy).

21 6. **Exhibit E** is a true and accurate copy of Twitter’s public announcement dated January 12,
22 2021 regarding updates to its Civic Integrity Policy, as downloaded on October 5, 2021 from Twitter’s
23 publicly available website at [https://blog.twitter.com/en_us/topics/company/2021/protecting--the-](https://blog.twitter.com/en_us/topics/company/2021/protecting--the-conversation-following-the-riots-in-washington--)
24 [conversation-following-the-riots-in-washington--](https://blog.twitter.com/en_us/topics/company/2021/protecting--the-conversation-following-the-riots-in-washington--).

25 7. **Exhibit F** is a true and accurate copy of Twitter’s “Civic Integrity Policy,” as it appeared
26 as of January 12, 2021, and as downloaded on October 5, 2021 from a publicly available archive of
27
28

webpages at <https://web.archive.org/web/20210112080812/https://help.twitter.com/en/rules-and-policies/election-integrity-policy>.

I declare under penalty of perjury that the foregoing is true and correct. This declaration was executed on October 5, 2021 in Redwood City, California.

By: /s/ Thomas G. Sprankling
THOMAS G. SPRANKLING

ATTORNEY ATTESTATION

I, Patrick J. Carome, am the ECF User whose ID and password are being used to file the foregoing. In compliance with Civil Local Rule 5-1(1) (3), I hereby attest that concurrence in the filing of this document has been obtained from each signatory.

By: /s/ Patrick J. Carome
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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

ROGAN O'HANDLEY

Plaintiff,

v.

ALEX PADILLA, et. al.,

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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10	<i>Nat'l Inst. of Family & Life Advocates v. Becerra</i> ,	
11	138 S. Ct. 2361 (2018)	19
12	<i>Pac. Gas & Elec. Co. v. Pub. Utilities Utils. Comm'n of Cal.</i> ,	
13	475 U.S. 1 (1986)	19
14	<i>Prager University v. Google LLC</i> ,	
	951 F.3d 991 (9th Cir. 2020)	viii.
15	<i>R.A.V. v. City of St. Paul</i> ,	
16	505 U.S. 377 (1992)	18
17	<i>Robins v. Pruneyard Shopping Ctr.</i> ,	
18	23 Cal.3d 899 (1979)	17, 18, 19
19	<i>Schneider v. Tretola</i> ,	
	8 F.3d 809 (1st Cir. 1993) (unpub. table dec.)	8
20	<i>Schultz v. Sundberg</i> ,	
21	759 F.2d 714 (9th Cir. 1985)	16
22	<i>Sikhs for Justice, Inc. v. Facebook, Inc.</i> ,	
	144 F. Supp. 3d 1088 (N.D. Cal. 2015), <i>aff'd</i> , 697 F. App'x 526 (9th Cir. 2017)	20
23	<i>Taylor v. List</i> ,	
24	880 F.2d 1040 (9th Cir. 1989)	7-8, 12
25	<i>Tsao v. Desert Palace, Inc.</i> ,	
26	698 F.3d 1128 (9th Cir. 2012)	11
27	<i>United Bhd. of Carpenters & Joiners of Am. v. Scott</i> ,	
28	463 U.S. 825 (1983)	16

<i>Van v. Target Corp.</i> , 155 Cal. App. 4th 1375 (2007).....	17
<i>Wilson v. Twitter</i> , 2020 WL 3410349 (S.D.W. Va. May 1, 2020)	7
<i>WMX Techs., Inc. v. Miller</i> , 197 F.3d 367 (9th Cir. 1999)	14
<i>Zhang v. Baidu.com, Inc.</i> , 10 F. Supp. 3d 433 (S.D.N.Y. 2014)	19

CONSTITUTIONS

Cal. Const.	14, 16
U.S. Const. amend I.....	6, 7, 14, 15, 18, 19, 21
U.S. Const. amend XIV	6, 15

STATUTES

42 U.S.C. § 1983.....	21
42 U.S.C. § 1985.....	14, 15, 16, 19
47 U.S.C. § 230	18, 19, 20, 21

RULES

Fed. R. Civ. P. 12	6
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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

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

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

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>.¹ 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 (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

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 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.*

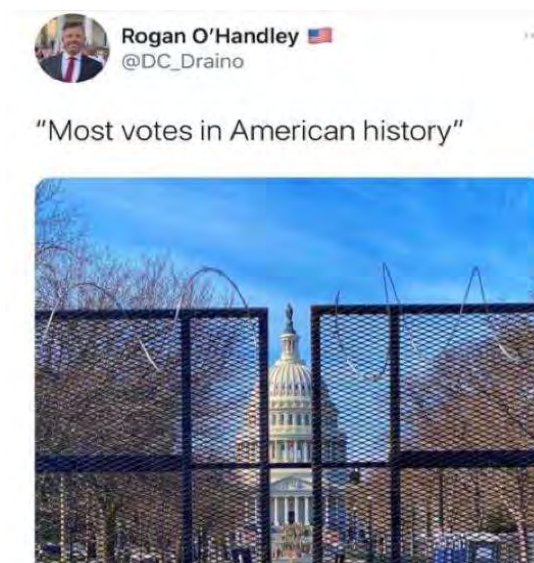
16 **B. Twitter Enforcement Actions Regarding Certain Of O’Handley’s Tweets**

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

O’Handley posted the remainder of his Tweets identified in the Complaint more than two months later, shortly after the insurrection at the U.S. Capitol that prompted Twitter to “aggressively increase ... enforcement action” on “misleading and false information surrounding the 2020 US presidential election.” See January 2021 Civic Integrity Policy Update. The first of these, posted on January 18, two days before the inauguration, stated: “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 allegedly 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. The Complaint alleges that Twitter treated these three Tweets as second, third, and fourth strikes against O’Handley’s account, and locked his account for seven days following the fourth strike. *Id.*

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



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

suspension was 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 process that is published online or on other platforms.” Compl. ¶ 20 (quoting Cal. Elec. Code § 10.5(b)(2)). Apparently hoping to establish such a connection before filing this lawsuit, O’Handley used public record requests to obtain various internal documents and communications from OEC, which are referenced in and attached to the Complaint. *E.g.*, Compl. ¶¶ 24, 28-31, 77; *id.* Exs. 1-4, 9.

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

Hi, We wanted to flag this Twitter post:
https://twitter.com/DC_Draino/status/1237073866578096129 from user
@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.

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

D. This Litigation

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

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

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

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

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

² *See also Wilson v. Twitter*, 2020 WL 3410349, at *2 (S.D.W. Va. May 1, 2020), *report and rec'n adopted*, 2020 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.

16 *Id.*

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

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

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

* * *

A theory of state action that would allow a single government report to a private actor to transform that actor’s conduct into state action would have disastrous consequences. Under such a theory, any time a government official seeks to persuade private actors to take action in accordance with the private actor’s own rules or policies, the private actor’s conduct would become that of the state. And any time a 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.³

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.

18
 19 ³ 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).

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

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

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

The Complaint does not even clearly identify any “class” at which animus was allegedly directed—let alone demonstrate that any such class is a group that courts or Congress have identified as requiring special protection. The Complaint vaguely alleges that “Defendants focused their speech censorship 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) (“[T]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

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

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

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

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

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

The First Amendment protects the “exercise of editorial control and judgment” by privately operated communications media over what content they do or do not disseminate. *See Miami Herald*, 418 U.S. at 257-58. That is why the Supreme Court has held that a newspaper cannot be required to publish op-ed columns with which it disagrees or simply wishes to exclude. *Id.* at 258. It is why the California Public Utilities Commission could not order Pacific Gas, a private company, to include in its billing envelopes speech of a third party with which the company disagreed. *See Pacific Gas*, 475 U.S. at 4. It is 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.

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 v. Facebook, Inc.*, 808 F. App'x 597, 598 (9th Cir. 2020), *cert. denied*, 141 S.Ct. 1067 (2021); *Lewis v. Google 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*, No. 21-419 (U.S. Sept. 13, 2021); *Ebeid v. Facebook, Inc.*, 2019 WL 2059662, at *5 (N.D. Cal. May 9, 2019); *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 33-35 (2021).

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

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

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

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9

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12

13 **ROGAN O'HANDLEY,**

14 Plaintiff,

15 v.

16 **ALEX PADILLA, in his personal capacity,**
17 **et al.,**

18 Defendants.
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3:21-cv-07063-CRB

**REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF STATE DEFENDANTS'
MOTION TO DISMISS**

Date: December 16, 2021
Time: 10:00 a.m.
Dept: 6
Judge: The Honorable Charles R. Breyer
Trial Date: Not set
Action Filed: June 13, 2021

1 Defendants Jenna Dresner, Akilah Jones, Sam Mahood, Alex Padilla, Paula Valle, and
2 Secretary of State Shirley Weber (together, “State Defendants”) respectfully request that the
3 Court take judicial notice of the terms of Twitter’s civic integrity policy under Federal Rule of
4 Evidence 201. A true and correct copy of Twitter’s civic integrity policy, available at
5 <https://help.twitter.com/en/rules-and-policies/election-integrity-policy> (last accessed Oct. 4, 2021), is
6 attached as **Exhibit A** to this request.

7 A fact is judicially noticeable when it is not subject to reasonable dispute and “can be
8 accurately and readily determined from sources whose accuracy cannot reasonably be
9 questioned.” Fed. R. Evid. 201(b)(2). Judicial notice is mandatory if “a party requests it” and the
10 court is “supplied with the necessary information.” Fed. R. Evid. 201(c)(2). Judicial notice may
11 be taken at any stage of the proceeding. Fed. R. Evid. 201(d); *Papai v. Harbor Tug & Barge Co.*,
12 67 F.3d 203, 207 n.5 (9th Cir. 1995), *overruled on other grounds*, 520 U.S. 548 (1997). Courts
13 have routinely taken judicial notice of terms of services or policies of online services that are
14 posted and publicly available on websites. *E.g.*, *Calhoun v. Google LLC*, __ F. Supp. 3d __, 2021
15 WL 1056532, at *5 (N.D. Cal. Mar. 17, 2021) (taking judicial notice of Google’s terms of
16 services and citing similar cases).

17 The complaint in this matter alleges the existence of this policy, which is publicly available,
18 as well as actions taken by Twitter to enforce this policy against Plaintiff. Compl. ¶¶ 3, 77-79,
19 84-88 (ECF 1). As such, the terms of the attached record are not reasonably subject to dispute.
20 Defendants have furnished the Court with sufficient information to enable it to take judicial
21 notice. Accordingly, judicial notice should be granted.

22 ///

23 ///

1 Dated: October 5, 2021

Respectfully submitted,

2 ROB BONTA
Attorney General of California
3 PAUL STEIN
Supervising Deputy Attorney General
4 KRISTIN A. LISK
Deputy Attorney General

5 /s/ Anna Ferrari

6 ANNA FERRARI
7 Deputy Attorney General
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10 *Paula Valle, and Dr. Shirley Weber*


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Exhibit A

[Skip to main content](#)



Help Center

- [Using Twitter](https://help.twitter.com/en/using-twitter) (https://help.twitter.com/en/using-twitter).
- [Managing your account](https://help.twitter.com/en/managing-your-account) (https://help.twitter.com/en/managing-your-account).
- [Safety and security](https://help.twitter.com/en/safety-and-security) (https://help.twitter.com/en/safety-and-security).
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- [Resources](#) 
 - [New user FAQ](https://help.twitter.com/en/resources/new-user-faq) (https://help.twitter.com/en/resources/new-user-faq).
 - [Glossary](https://help.twitter.com/en/resources/glossary) (https://help.twitter.com/en/resources/glossary).
 - [How to get even more Twitter](https://help.twitter.com/en/resources/more-twitter) (https://help.twitter.com/en/resources/more-twitter).
 - [A safer Twitter](https://help.twitter.com/en/resources/a-safer-twitter) (https://help.twitter.com/en/resources/a-safer-twitter).
 - [Our rules](https://help.twitter.com/en/resources/rules) (https://help.twitter.com/en/resources/rules).
 - [My privacy](https://help.twitter.com/en/resources/how-you-can-control-your-privacy) (https://help.twitter.com/en/resources/how-you-can-control-your-privacy).
 - [Getting Started Guide](https://help.twitter.com/en/resources/twitter-guide) (https://help.twitter.com/en/resources/twitter-guide).





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1. Civic integrity policy

Civic integrity policy



1. [Help Center](https://help.twitter.com/en)  (https://help.twitter.com/en)
2. [Platform integrity and authenticity](https://help.twitter.com/en/rules-and-policies#platform-integrity-and-authenticity)  (https://help.twitter.com/en/rules-and-policies#platform-integrity-and-authenticity)

Civic integrity policy

Overview

October 2021

You may not use Twitter's services for the purpose of manipulating or interfering in elections or other civic processes. This includes posting or sharing content that may suppress participation or mislead people about when, where, or how to participate in a civic process. In addition, we may label and reduce the visibility of Tweets containing false or misleading information about civic processes in order to provide additional context.

The public conversation occurring on Twitter is never more important than during elections and other civic events. Any attempts to undermine the integrity of our service is antithetical to our fundamental rights and undermines the core tenets of freedom of expression, the value upon which our company is based.

We believe we have a responsibility to protect the integrity of those conversations from interference and manipulation. Therefore, we prohibit attempts to use our services to manipulate or disrupt civic processes, including through the distribution of false or misleading information about the procedures or circumstances around participation in a civic process. In instances where misleading information does not seek to directly manipulate or disrupt civic processes, but leads to confusion on our service, we may label the Tweets to give additional context. Given the significant risks of confusion about key election information, we may take these actions even if Tweets contain (or attempt to contain) satirical or humorous elements.

Feedback

What is a civic process?

Twitter considers civic processes to be events or procedures mandated, organized, and conducted by the governing and/or electoral body of a country, state, region, district, or municipality to address a matter of common concern through public participation. Some examples of civic processes may include:

- Political elections
- Censuses
- Major referenda and ballot initiatives

What is in violation of this policy?

This policy addresses 4 categories of misleading behavior and content:

Misleading information about how to participate

We will label or remove false or misleading information about how to participate in an election or other civic process. This includes but is not limited to:

- misleading information about procedures to participate in a civic process (for example, that you can vote by Tweet, text message, email, or phone call in jurisdictions where these are not a possibility);
- misleading information about requirements for participation, including identification or citizenship requirements;
- misleading claims that cause confusion about the established laws, regulations, procedures, and methods of a civic process, or about the actions of officials or entities executing those civic processes; and
- misleading statements or information about the official, announced date or time of a civic process.

Feedback

Suppression and intimidation

We will label or remove false or misleading information intended to intimidate or dissuade people from participating in an election or other civic process. This includes but is not limited to:

- misleading claims that polling places are closed, that polling has ended, or other misleading information relating to votes not being counted;
- misleading claims about police or law enforcement activity related to voting in an election, polling places, or collecting census information;
- misleading claims about long lines, equipment problems, or other disruptions at voting locations during election periods;
- misleading claims about process procedures or techniques which could dissuade people from participating; and
- threats regarding voting locations or other key places or events (note that our [violent threats policy](https://help.twitter.com/rules-and-policies/violent-threats-glorification) (<https://help.twitter.com/rules-and-policies/violent-threats-glorification>) may also be relevant for threats not covered by this policy).

Misleading information about outcomes

We will label or remove false or misleading information intended to undermine public confidence in an election or other civic process. This includes but is not limited to:

- disputed claims that could undermine faith in the process itself, such as unverified information about election rigging, ballot tampering, vote tallying, or certification of election results; and
- misleading claims about the results or outcome of a civic process which calls for or could lead to interference with the implementation of the results of the process, e.g. claiming victory before election results have been certified, inciting unlawful conduct to prevent the procedural or practical implementation of election results (note that our violent threats policy may also be relevant for threats not covered by this policy).

Feedback

False or misleading affiliation

You can't create fake accounts which misrepresent their affiliation, or share content that falsely represents its affiliation, to a candidate, elected official, political party, electoral authority, or government entity. Read more about our [parody, commentary, and fan account policy](https://help.twitter.com/rules-and-policies/parody-account-policy). (<https://help.twitter.com/rules-and-policies/parody-account-policy>).

What is not a violation of this policy?

Not all false or untrue information about politics or civic processes constitutes manipulation or interference. In the absence of other policy violations, the following are generally not in violation of this policy:

- inaccurate statements about an elected or appointed official, candidate, or political party;
- organic content that is polarizing, biased, hyperpartisan, or contains controversial viewpoints expressed about elections or politics;
- discussion of public polling information;
- voting and audience participation for competitions, game shows, or other entertainment purposes; and
- using Twitter pseudonymously or as a parody, commentary, or fan account (<https://help.twitter.com/rules-and-policies/parody-account-policy>), to discuss elections or politics.

Who can report violations of this policy?

Accurate reporting of suspected violations of this policy requires information and knowledge specific to an election or civic process. Therefore, we enable reporting of false or misleading information about civic processes in advance of major events, for people located in the relevant countries and locations. We also work with select government and civil society partners in these countries to provide additional channels for reporting and expedited review.

For civic processes with multiple stages or parts, such as primary elections or lengthy campaigns, reporting will be enabled leading up to the first officially-sanctioned event associated with the civic process.


How can I report violations of this policy?

If the reporting option for this policy is enabled in your country at the relevant time, you can report this content in-app or on desktop.

Feedback


In-app

You can report this content for review in-app as follows:

1. Select **Report Tweet** from the  icon.
2. Select **It's misleading about a political election or other civic event**.
3. Select the option that best tells us how the Tweet is misleading about voting or participation in civic processes.
4. Submit your report.

Desktop

You can report this content for review on desktop as follows:

1. Select **Report Tweet** from the  icon.
2. Select **It's misleading about a political election or other civic event**.
3. Select the option that best tells us how the Tweet is misleading about voting or participation in a civic process.
4. Submit your report.

Feedback

What happens if you violate this policy?

The consequences for violating our civic integrity policy depends on the severity and type of the violation and the accounts' history of previous violations. In instances where accounts repeatedly violate this policy, we will use a strike system to determine if further enforcement actions should be applied. We believe this system further helps to reduce the spread of potentially harmful and misleading information on Twitter, particularly for high-severity violations of our rules.

The actions we take may include the following:

Tweet deletion

For high-severity violations of this policy, including (1) misleading information about how to participate, and (2) suppression and intimidation, we will require you to remove this content. We will also temporarily lock you out of your account before you

can Tweet again. Tweet deletions accrue 2 strikes.

Profile modifications

If you violate this policy within your profile information (e.g., your bio), we will require you to remove this content. We will also temporarily lock you out of your account before you can Tweet again. If you violate this policy again after your first warning, your account will be permanently suspended.

Labeling

In circumstances where we do not remove content which violates this policy, we may provide additional context on Tweets sharing the content where they appear on Twitter. This means we may:

- Apply a label and/or warning message to the content where it appears in the Twitter product;
- Show a warning to people before they share or like the content;
- Turn off people's ability to reply, Retweet, or like the Tweet;
- Reduce the visibility of the content on Twitter and/or prevent it from being recommended;
- Provide a link to additional explanations or clarifications, such as in a Twitter Moment or relevant Twitter policies; and/or
- Turn off likes, replies, and Retweets.

In most cases, we will take all of the above actions on Tweets we label. In some instances, we'll also turn off your ability to reply, Retweet, or like the Tweet. We prioritize producing Twitter Moments in cases where misleading content on Twitter is gaining significant attention and has caused public confusion on our service. Labels applied to Tweets accrue 1 strike.

Account locks and permanent suspension

For severe or repeated violations of this policy, accounts will be permanently suspended.

Feedback

10/4/21, 1:06 PM

Twitter's civic integrity and election fraud policy | Twitter Help

Repeated violations of this policy are enforced against on the basis of the number of strikes an account has accrued for violations of this policy:

- 1 strike: No account-level action
- 2 strikes: 12-hour account lock
- 3 strikes: 12-hour account lock
- 4 strikes: 7-day account lock
- 5 or more strikes: Permanent suspension

If you believe that your account was locked or suspended in error, you can [submit an appeal](https://help.twitter.com/forms/general?subtopic=suspended) (<https://help.twitter.com/forms/general?subtopic=suspended>).

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Was this article helpful?



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Feedback

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[Cookies](https://help.twitter.com/rules-and-policies/twitter-cookies) (<https://help.twitter.com/rules-and-policies/twitter-cookies>).

[Privacy](https://twitter.com/privacy) (<https://twitter.com/privacy>).

[Terms and conditions](https://twitter.com/tos) (<https://twitter.com/tos>).

[English](#)

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Feedback

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Feedback

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Attorneys for Defendant
NATIONAL ASSOCIATION OF SECRETARIES OF STATE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROAN O'HANDLEY,)
)
Plaintiff,)
)
vs.)
)
ALEX PADILLA, in his personal capacity)
SANDNICERBOCER, LLC, a)
Delaware company)
PAULA ALLE)
CASTAON, in her personal capacity)
JENNA DRESNER, in her personal)
capacity)
SAM MAHOOD, in his personal)
capacity)
AHILAH JONES in her personal)
capacity)
SHIRLEY N. WEBER, in her)
official capacity as California Secretary of)
State)
TWITTER, INC., a Delaware)
corporation)
NATIONAL ASSOCIATION)
OF SECRETARIES OF STATE, a)
professional nonprofit organization,)
)
Defendants.)

CASE NO. 21cv070CRB)
)
**DEFENDANT NATIONAL)
ASSOCIATION OF)
SECRETARIES OF STATE'S)
MOTION TO DISMISS)
PLAINTIFF'S COMPLAINT)
PURSUANT TO FEDERAL)
RULE OF CIVIL)
PROCEDURE 12(b)(2) AND)
12(b)(6)**

Hearing Date: December 1, 202)
Time: 10:00 a.m.)
Judge: Honorable Charles R.)
Breyer)
Courtroom: 17th Floor)

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I. NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE THAT on December 1, 2021, at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 17 on the 17th Floor of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue in San Francisco, California 94102, before the Honorable Charles R. Breyer, Defendant National Association of Secretaries of State (“NASS”), Inc. will, and hereby does, move to dismiss the Complaint of Plaintiff Rogan O’Handley pursuant Rule 12(b)(2) of the Federal Rules of Civil Procedure for lack of personal jurisdiction. Further, Defendant NASS will, and hereby does, move to dismiss the Complaint of Plaintiff Janet Snyder pursuant Rule 12(b)(1) of the Federal Rules of Civil Procedure for failure to state a claim.

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

This motion is made following conferences of counsel pursuant to L.R. 7.1, which took place on July 22, 2021.

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II. SUMMARY OF ARGUMENT AND STATEMENT OF ISSUES

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

First, the Court should dismiss because it lacks personal jurisdiction over NASS. Fed. R. Civ. Proc. 12(b)(2). NASS is incorporated in Kentucky with its principal place of business in Washington, D.C. (Declaration of Leslie Reynolds (“Reynolds Dec.”) ¶7.) NASS does not and did not have a presence in California rendering it “at home” here. It never had any subsidiaries, offices, bank accounts, employees, or agents in California. NASS does not target California residents and it has never been registered to do business in California. (Reynolds Dec. ¶8.) Thus, the Court has neither general nor specific jurisdiction over NASS. *Daimler AG v. Bauman*, 571 U.S. 117, 118 (2014) (requirements for general jurisdiction) *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 28, 27 (1980) (specific jurisdiction).

Second, the Court should dismiss NASS from this action for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. Proc. 12(b)(6). NASS is a private corporation, not a government or state actor. Plaintiff alleges violation of rights allegedly protected by the federal and California constitutions, but both protect only against government action, not the actions of private entities, like NASS, or like Twitter. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 52 U.S. 40, 450 (1850) *Caviness v. Horizon Community Learning Center, Inc.*, 50 F.3d 80, 812 (9th Cir. 2010) *Golden Gateway Center v. Golden Gateway Tenants Assn.*, 2 Cal. 4th 101, 101 (2001). The gravamen of Plaintiff’s complaint is that he was “suspended” from Twitter, and the other defendants contributed in some way. With no Constitutional right to appear on any particular social media site, and no possible Constitutional violation by a private actor, Plaintiff’s claims against NASS are meritless on their face, and this Court should dismiss.

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1 **III. FACTS**

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

4 NASS is non-profit, nonpartisan professional organization for public
5 officials. It serves as a medium for the exchange of information between states and
6 fosters cooperation in the development of public policy. The association has key
7 initiatives in the areas of elections and voting, state business services, and state
8 heritage archive. NASS is not a government agency but is a private concern. NASS
9 is not a creature of any statute, rule, or regulation, nor does NASS have the power
10 to enact any statute, rule, or regulation. (Reynolds Dec. 115.)

11 NASS is incorporated in Kentucky and its principal place of business is in
12 Washington, D.C. (Reynolds Dec. 117.) NASS has no presence in California.

- 13 • NASS has no subsidiaries incorporated or qualified to do business in
14 California
- 15 • NASS is not and never has been registered to do business in the state of
16 California
- 17 • NASS does not have now and never previously had any offices in the
18 state of California
- 19 • NASS does not have now and never previously had any employees in
20 the state of California
- 21 • NASS does not have now and never previously had any bank accounts
22 in the state of California
- 23 • NASS does not have now and never previously had a registered agent
24 in the state of California
- 25 • None of NASS's current officers or directors reside or are domiciled in
26 California

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

B. Plaintiff's complaint admits NASS is headquartered in D.C., and alleges deprivation of his Constitutional rights.

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

Plaintiff's complaint alleges six claims for relief. Four are alleged against NASS.

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

(2) Second claim for relief, entitled California Constitution art. I § 2 Free Speech. (Docket Nos. 1 ¶ 2, p. 2 ¶)

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

(4) Sixth claim for relief, entitled claim for Civil Conspiracy to Interfere with Civil Rights (42 U.S.C. § 1985). (Docket Nos. 1 ¶ 2, p. ¶ 0.)¹

Plaintiff admits NASS's headquarters are located in Washington, D.C., and alleges that NASS "does business in California, and the California Secretary of State is an association member." (Docket Nos. 1 ¶ 2, p. ¶ 18.)

Plaintiff then makes the following allegations against NASS:

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

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- 1 2□ The National Association of Secretaries (“NASS”) spearheaded efforts
2 to censor disfavored election speech.
- 3 □ 27. NASS created direct channels of communication between Secretaries
4 of States’ staff and social media companies to facilitate the quick take
5 down of speech deemed “misinformation.”
- 6 □ 28. For instance, NASS Director of Communications Maria Benson stated
7 in email that Twitter asked her to let Secretaries of States’ offices know
8 that it had created a separate dedicated way for election officials to “flag
9 concerns directly to Twitter.” A true and correct copy of Maria
10 Benson’s October 1, 2020, email, as obtained through a public records
11 request, is attached to this complaint as Exhibit 2.
- 12 2□ NASS’s dedicated reporting channel to Twitter, according to Maria
13 Benson, would get Secretaries of States’ employees’ censorship
14 requests “bumped to the head of the queue.” A true and correct copy of
15 Maria Benson’s August 8, 2020, email, as obtained through a public
16 record request, is attached to this complaint as Exhibit □
- 17 □0. NASS asked its members to give it a “heads up” when officials saw
18 mis□or disinformation on social platforms to help NASS “create a more
19 national narrative.” A true and correct copy of Maria Benson’s August
20 8, 2020, email, as obtained through a public record request, is attached
21 to this complaint as Exhibit 4.
- 22 □1. NASS wanted election officials to have NASS’s email guidance
23 regarding how to report “mis□disinformation” directly to social media
24 companies “handy” directly prior to election day as election officials
25 “prepare□d □for battle.” A true and correct copy of Maria Benson’s
26 □□□□
- 27 □□□□
- 28 □□□□

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1 November 2, 2020, email, as obtained through a public record request,
2 is attached to this complaint as Exhibit 4². (Docket Nos. 112, pp. 718.)

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

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

10 **IV. ARGUMENT**

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

12 “When a defendant challenges the sufficiency of personal jurisdiction, the
13 plaintiff bears the burden of establishing personal jurisdiction over the defendant.”
14 *Sinatra v. Nat’l Enquirer, Inc.*, 854 F.2d 1111, 1114 (11th Cir. 1988). Plaintiff cannot
15 meet that burden. There are two types of personal jurisdiction, general and specific.
16 Neither applies to NASS, which has almost no connection to California.

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

19 General jurisdiction arises when the defendant’s “continuous corporate
20 operations within a state are so substantial and of such a nature as to justify suit
21 against it on causes of action arising from dealings entirely distinct from those
22 activities’.” *Daimler AG v. Bauman*, 571 U.S. 117, 118 (2014) (citation omitted).
23 Only in an exceptional case will a corporation’s operations in a forum other than its
24 state of incorporation or principal place of business be “so continuous and
25 systematic’ as to render it essentially at home” in the forum state. *Id.* at 111 n.11,
26 quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 544 U.S. 15 (2011).

27 ² Nothing in Exhibit 4 attached to the Complaint states anything about election
28 officials getting “prepared for battle.”

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

NASS is incorporated in Kentucky and its principal place of business is in Washington, D.C. (Reynolds Dec. 7.) NASS has no operations in California, and certainly not any operations that make California “essentially” NASS’s home. (Reynolds Dec. 8.) Plaintiff concedes the lack of general jurisdiction in his complaint by admitting that NASS is headquartered in Washington D.C. (Docket Nos. 12 18.) There is no basis for general jurisdiction.

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

A defendant “may be subject to the specific jurisdiction of the forum, if the defendant has purposefully availed himself or herself of forum benefits, and the controversy is related to or arises out of a defendant’s contacts with the forum.” *Vons Cos., Inc. v. Seabest Foods, Inc.* 14 Cal. 4th 444, 448 (Cal. 1997), quoting *Helicopteros Nacionales de Columbia v. Hall*, 448 U.S. 408, 414-415 (1984) (citations omitted). Here, Plaintiff cannot show that NASS purposely availed itself to the benefits of California.

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

(1985) (citations omitted) accord *Walden v. Fiore* (2019) 571 U.S. 277 (no Nevada jurisdiction over Georgia resident where acts complained of took place in Georgia to a Nevada plaintiff).

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

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

□□□□

□□□□

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

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

Such remote digital contact was at issue in in *PREP Tours, Inc. v American Youth Soccer Organization*, 11 F.3d 11 (1st Cir. 2011). A Puerto Rico tour company sued a California youth soccer organization in Puerto Rico district court alleging breach of contract related to a potential group soccer trip to Puerto Rico. 11 F.3d at 21. The tour company’s contact with the soccer group in California consisted of emails and telephone communications. The District Court dismissed the action for lack of personal jurisdiction and First Circuit Court of Appeals affirmed the dismissal holding that the contacts did not amount to “purposeful availment.” *Ibid*. The soccer group’s “in-forum” activities consisted exclusively of remote communications concerning a possible trip, and it could not be inferred from the communications alone that defendants contemplated “the kind of ongoing and close working relationship with plaintiff that could establish the requisite substantial connection between the defendants and the forum.” *Ibid*. The preliminary nature of the communications diminished foreseeability of extensive in-forum activities. *Ibid*.

Secretaries of State from any state in the country can become members of NASS. The California Secretary of State is a member and therefore receives communications from NASS. (Reynolds Decl. 11) These communications are not extensive in-forum activities sufficient to subject NASS to the jurisdiction of this Court. They are similar to emails received when one subscribes to an online magazine or newspaper. The receipt of these emails in California does not subject the nonresident sender of the emails to jurisdiction in California.

□□□□

□□□□

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

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

Even if NASS’s emails to California Secretary of State’s office were somehow sufficient to establish minimum contacts with California (an argument NASS does not concede), Plaintiff’s claims do not arise out of or relate to that activity. Rather, Plaintiff’s claims stem from unilateral activity by others over whom NASS has no control. This is insufficient to satisfy the “purposeful availment” requirement. The “unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.” *Helicopteros Nacionales de Colombia, S.A., supra*, 400 U.S. at 414-17.

In the seminal case of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 281 (1980), the Supreme Court found no Oklahoma jurisdiction over New York area companies that distributed an allegedly defective car in New York that was later involved in an Oklahoma accident.

Federal courts have as broad powers of personal jurisdiction as the courts of the state in which they sit, but no broader. *Omni Capital Int’l, Ltd. V, Rudolph Wolff & Co., Ltd*, 484 U.S. 7, 104-105 (1987).

This Court may exercise personal jurisdiction over a non-resident defendant, such as NASS, only to the extent permitted by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 544 U.S. 15 (2011) (“The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal’s authority to proceed against a defendant”) *see also Bristol-Myers Squibb v. Superior Court*, 137 S. Ct. 177, 177 (2017) (“It has long been established that the Fourteenth Amendment limits the personal jurisdiction of state courts.”)

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

7 *Id.* at 28, citing *Hanson v. Denckla, supra*, at 25

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

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

20 Federal Rule of Civil Procedure 12(b)(1) requires dismissal if a plaintiff fails
 21 “to state a claim upon which relief can be granted.” For the plaintiff to survive a
 22 motion to dismiss, the complaint must contain “enough facts to state a claim to relief
 23 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
 24 Mere “labels and conclusions” are insufficient. *Id.* at 555. “A claim has facial
 25 plausibility when the plaintiff pleads factual content that allows the court to draw
 26 the reasonable inference that the defendant is liable for the misconduct alleged.”
 27 *Ashcroft v. Iqbal*, 556 U.S. 266, 278 (2009), citing *Bell Atl. Corp., supra*, 550 U.S.
 28 at 554 “Plausibility” requires more than a “sheer possibility that a defendant has
 acted unlawfully” or the “mere possibility of misconduct,” and a complaint that

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1 alleges facts that are “merely consistent with” liability “stops short of the line
2 between possibility and plausibility of entitlement to relief.” *Ashcroft, supra*, 55
3 □.S. at 78□7□ citing *Bell Atl. Corp., supra*, 550 □.S. at 557. The well-pled
4 allegations in a complaint must “nudge □□a party’s□claims across the line from
5 conceivable to plausible.” *Bell Atl. Corp., supra*, 555 □.S. at 570.

6 The Supreme Court has decreed that a plaintiff’s complaint must contain facts
7 with enough specificity “to raise a right to relief above the speculative level.” *Bell*
8 *Atl. Corp.*, 550 □.S. at 555. On a motion to dismiss under Rule 12(b)(□), factual
9 matter in the complaint is taken as true, but the court need not accept legal
10 conclusions. *Ibid.*□*Ashcroft, supra*, 55□ □.S. at 78. “Threadbare recitals of the
11 elements of a cause of action, supported by mere conclusory statements,” will not
12 pass muster. *Ashcroft, supra*, 55□ □.S. at 78.

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

16 All of Plaintiff’s claims under 42 □.S.C. □1□8□(the First, Third, and Si□th
17 claims) require that “the conduct at issue must have occurred □under color of” state
18 law□thus, liability attaches only to those wrongdoers □who carry a badge of authority
19 of a State and represent it in some capacity, whether they act in accordance with their
20 authority or misuse it.” *National Collegiate Athletic Assn. v. Tarkanian* (1□88) 488
21 □.S. 17□, 1□1 (“*Tarkanian*”) (citations omitted). “C□onstitutional standards are
22 invoked only when it can be said that the State is responsible for the specific conduct
23 of which the plaintiff complains.” *Blum v. Yaretsky*, 457 □.S. □□1, 1004 (1□82).

24 For e□ample, Plaintiff’s first claim for relief is for violation of his First
25 Amendment rights. However, there is no such claim against non□governmental
26 parties such as NASS, or Twitter. “A □private actor, not a state actor ... is not subject
27 to First Amendment constraints on its editorial discretion.” *Manhattan Community*
28 *Access Corporation v. Halleck*, 1□□ S.Ct. 1□21, 1□2□ (201□) (operator of public
access cable T□ channels not subject to First Amendment).

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

7 *Tarkanian, supra*, 488 U.S. 171, 181 (citations omitted).

8 “To state a claim for relief in an action brought under Section 1983, a
9 plaintiff must establish that he was deprived of a right secured by the
10 Constitution or laws of the United States, and that the alleged deprivation was
11 committed under color of state law.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 520 U.S.
12 40, 450 (1997). “Like the state action requirement of the Fourteenth Amendment,
13 the undercolorofstate law element of Section 1983 excludes from its reach
14 merely private conduct, no matter how discriminatory or wrongful.” *Id.* at 50,
15 quoting *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982). Thus, “in order to recover
16 under Section 1983 for conduct by the defendant, a plaintiff must show that the
17 conduct allegedly causing the deprivation of a federal right must be fairly
18 attributable to the State.” *Caviness v. Horizon Community Learning Center, Inc.*,
19 500 F.3d 803, 812 (9th Cir. 2010), quoting *Lugar v. Edmondson Oil Co.*, 457 U.S.
20 22, 27 (1982)).

21 The same is true for Plaintiff’s second claim for relief alleging violation of his
22 California constitutional claims. “We hold that article I, section 2, subdivision (a)
23 only protects against state action.” *Golden Gateway Center v. Golden Gateway*
24 *Tenants Assn.*, 2 Cal. 4th 101, 101 (2001). *Golden Gateway* ruled that a landlord
25 could prohibit dissemination of leaflets by residents in areas not “freely and openly
26 accessible to the public.” *Id.* at 101. The state action requirement means that the
27 California free speech guarantee will not “constitutionalize a private dispute,” like
28 Plaintiff’s with NASS or Twitter.

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

“When addressing whether a private party acted under color of law, the Court must start with the presumption that private conduct does not constitute governmental action.” *Sutton v. Providence St. Joseph Med. Center*, 12 F.3d 82, 85 (9th Cir. 1994).

“Whether a private party engaged in state action is a highly factual question. Only by sifting facts and weighing circumstances’ can we hope to ferret out obvious as well as non-obvious State involvement in private conduct.” *Brunette v. Humane Soc’y of Ventura Cty.*, 24 F.3d 1205, 1209 (9th Cir. 2002) (citations omitted).

“Courts have used four different factors or tests to identify” when the presumption of private action is overcome and the private action can be attributed to the state: “(1) public function, (2) joint action, (3) governmental compulsion or coercion, and (4) governmental nexus.” *Sutton, supra*, 12 F.3d at 85. Although the Ninth Circuit “recognized several tests to determine where state action lies, the central question remains whether the alleged infringement of federal rights is fairly attributable to the government.” *Kirtley v. Rainey*, 22 F.3d 1088, 1090 (9th Cir. 2000) (citations and quotations omitted).

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

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

The court in *Polk v. Yee*, 481 F. Supp. 3d 1000, 1001 (E.D. Cal. 2020) rejected similar arguments:

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

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

Polk involved a suit filed by personal care providers under § 18 against State Controller of California and union, alleging deprivation of their First Amendment right to refrain from subsidizing union speech through dues. Controller and union filed motions to dismiss. 481 F. Supp. 3d 1000 (E.D. Cal. 2020). The union moved to dismiss on the basis that it was not subject to § 18 liability. The court agreed stating that although there was a “connection between the alleged constitutional violation and the state action, plaintiffs have not pled facts to show that the union acted in concert with the state to cause the deduction of union dues without a “valid waiver,” especially given the state’s lack of involvement in the drafting and executing of the union agreements.” *Id.* at 1007.

Here, there is nothing to tie the state to NASS. NASS sent to its members, 48 Secretaries of State, an email with the portals for lodging complaints about election misdisinformation as provided to NASS by various non-governmental social media companies. (Docket Nos. 12, E’s. 2 and 3) There is no allegation that the California Secretary of State used these portals to allegedly suppress Plaintiff’s speech. Even if that were the case, NASS did not tell the California Secretary of State to report Plaintiff’s tweets. Further, NASS has no control over the actions of a non-governmental agency such as Twitter when such reports are made actions, which according to the law, Twitter is well within its right to take⁴. NASS did nothing to

⁴ “The courts have long held that the right to control the content of a privately published newspaper rests entirely with the newspaper’s publisher. The First Amendment protects the newspaper itself, and grants it a virtually unfettered right to choose what to print and what not to.” *Eisenberg v. Alameda Newspapers, Inc.*, 74 Cal. App. 4th 150, 100 (1999) see also *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“The choice of material to go into a newspaper, ... and treatment of public issues and public officials whether fair or

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

6 The closest the complaint comes to alleging that NASS is a state actor are
 7 allegations that the Office of Electric Cybersecurity (“OEC”) “reported
 8 [mis]information’ to social media companies through NASS” (Docket Nos. 1[2], p.
 9 1[1][1]), and that the California Secretary of State won an award from NASS for the
 10 OEC work. (Docket Nos. 1[2] pp. 1[1]4 [1][1]5.) Throughout the complaint, NASS
 11 is simply lumped in with what Plaintiff refers to as “Defendants’ government
 12 censorship of speech,” “state action,” and claims that NASS “joined with the state
 13 agents.” (Docket Nos. 1-2, pp. 24-25 ¶¶ 100, 107, 109, 112; p. 30 ¶ 170.) These
 14 allegations fall far short of demonstrating that NASS was a “state actor.” NASS is
 15 not a joint actor, nor does its actions fit within any of the other three tests that are
 16 used to overcome the presumption of private action.

17
 18
 19
 20 unfair[] constitute the e[]ercise of editorial control and judgment. It has yet to be
 21 demonstrated how governmental regulation of this crucial process can be e[]ercised
 22 consistent with First Amendment guarantees of a free press”) *Amper and*
 23 *Publishing, LLC v. NLRB*, 702 F. []d 51, 5[] (D.C. Cir. 2012) (“The First
 24 Amendment affords a *publisher* [] not a reporter [] absolute authority to shape a
 25 newspaper’s content.”) *Manhattan Community Access Corp.*, supra, 1[] S.Ct. at
 26 1[]0[] [] (“If the rule were otherwise, all private property owners and private
 27 lessees who open their property for speech would be subject to First Amendment
 28 constraints and would lose the ability to e[]ercise what they deem to be appropriate
 editorial discretion within that open forum. Private property owners and private
 lessees would face the unappeti[]ing choice of allowing all comers or closing the
 platform altogether.”) This same rule of law applies to a private social media
 platform such a Twitter in deciding what posts to allow on its platform. There is no
 Constitutional violation by any of the private actor defendants in this case.

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

A private party’s conduct can constitute state action when that private party exercises powers that are “traditionally the exclusive prerogative of the State.” *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, supra, 50 F.3d at 814. “When private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.” *Julian v. Mission Cmty. Hosp.*, 218 Cal. Rptr. 2d 8, 71 (2017) (citations omitted).

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

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

In assessing the compulsion-coercion test, the court considers “whether the coercive influence or ‘significant encouragement’ of the state effectively converts a private action into a government action.” *Kirtley v. Rainey*, supra, 20 F.3d at 104. “The mere fact that a private business is subject to state regulation does not by itself convert its action into that of the State.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 52 U.S. 40, 41 (1840). Indeed, “even extensive government regulation of a private business is insufficient to make that business a state actor if the challenged conduct was ‘not compelled or even influenced by any state regulation.’” *Caviness*, supra, 50 F.3d at 81 (citation omitted).

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

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1 **d. There is no close nexus between the State and NASS.**
2 State action can only be found pursuant to the governmental ne□us test where
3 “there is a sufficiently close ne□us between the State and the challenged action of
4 the □□entity so that the action of the latter may be fairly treated as that of the State
5 itself.” *Jackson v. Metro. Edison Co.*, 41 □□.S. □45, □51 (1□74). “It is similar to the
6 joint action test in that both tests require that the state is □so far insinuated into a
7 position of interdependence with the □private party□that it was a joint participant in
8 the enterprise.’ ” *Julian, supra*, 218 Cal. Rptr. □d at 72 (citations omitted).
9 In *Sutton, supra*, the Ninth Circuit e□plained that “□in the typical case raising
10 a state□action issue, a private party has taken the decisive step that caused the harm
11 to the plaintiff, and the question is whether the State was sufficiently involved to
12 treat that decisive conduct as state action.” 1 □2 F.□d at 8□8 (quoting *Tarkanian*, 488
13 □.S. at 1□2). The Ninth Circuit concluded that “in each of the Supreme Court’s
14 private□defendant cases, there was some additional ne□us □beyond the application of
15 a general statute□that made it fair to deem the private entity a governmental actor in
16 the circumstances.” *Id.* at 8□□ (citing *Lugar v. Edmondson Oil Co.*, 457 □.S. □22,
17 □41 □42 (1□82)□*Moose Lodge No. 107 v. Irvis*, 407 □.S. 1□□, 177 (1□72)□*Adickes v.*
18 *S.H. Kress & Co.*, □□8 □.S. 144, 14□(1□70)). “Typically, the ne□us has consisted of
19 participation by the state in an action ostensibly taken by the private entity, through
20 conspiratorial agreement (*Adickes*), official cooperation with the private entity to
21 achieve the private entity’s goal (*Lugar*), or enforcement and ratification of the
22 private entity’s chosen action (*Moose Lodge*).” *Id.* at 841.
23 While its members are public officials, NASS is not a government agency.
24 California did not take action through NASS via a conspiratorial agreement or
25 otherwise. NASS sent an email to its members with established portals for
26 reporting election mid□disinformation and that is all NASS did. There is no
27 additional ne□us that would make it fair or appropriate to deem NASS a
28 governmental actor in this case. NASS’s actions fail to satisfy this test for the same

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

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

The same is true for Plaintiff’s second claim for relief alleging violation of his California constitutional claims. “We hold that article I, section 2, subdivision (a) only protects against state action.” *Golden Gateway Center v. Golden Gateway Tenants Assn.*, supra, 2 Cal. 4th at 101. *Golden Gateway* ruled that a landlord could prohibit dissemination of leaflets by residents in areas not “freely and openly accessible to the public.” *Id.* at 101 “A person’s free speech rights under the federal and state constitutions are not infringed unless there is state action.” *Yu v. Univ. of La Verne*, 12 Cal. Rptr. 3d 711, 771 (2011). The state action requirement means that the California free speech guarantee will not “constitutionalize a private dispute,” like Plaintiff’s dispute with NASS about being on Twitter.

Further, this state law claim is pendent to Plaintiff’s federal claims, and this Court has only supplemental jurisdiction. 28 U.S.C. §1332. Thus, should this Court dismiss the federal claims against NASS, it should dismiss this as well, irrespective of the adequacy of its allegations. *Id.*, subd. (c)(1) (dismissal over supplemental jurisdiction claim proper if “the district court has dismissed all claims over which it has original jurisdiction”).

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

“Section 185(1) provides no substantive rights itself—it merely provides a remedy for violation of the rights it designates.” *Great American Fed. S & L Ass’n v. Novotny*, 442 U.S. 111, 172 (1979). Thus, if a plaintiff’s “allegations are insufficient to support a claim based on a violation of his constitutional rights,” then “his allegations of a conspiracy to violate these constitutional rights do not state a claim.” *Peloza v. Capistrano Unified School Dist.*, 7 F.3d 517, 524 (9th

1 Cir. 1□4). In *Peloza*, as in this case, plaintiff asserted claims for violation of his
2 civil rights and for civil conspiracy to interfere with those rights under 42 □.S.C.
3 □ section 1□85. The court found he had not alleged a Constitutional violation, and so
4 could not pursue a conspiracy claim. “Because Pelo□a failed to allege a conspiracy
5 to do something that would violate his □Constitutional□rights ... his section 1□85(□
6 □ claim predicated on a violation of these rights fails.” *Id.* at 524.

7 **V. CONCLUSION**

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

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

20 Respectfully submitted,

21 Dated: October 5, 2021

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□ Applications for admission pro hac vice forthcoming

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION**

RO □AN O'HANDLEY,

Plaintiff,

v.

ALE □ PADIILLA, in his personal
 capacity □S □D □NIC □ERBOC □ER,
 LLC, a Delaware company □PA □LA
 □ALLE CASTANON, in her personal
 capacity □JENNA DRESNER, in her
 personal capacity □SAM MAHOOD, in
 his personal capacity □A □ILAH
 JONES □in her personal capacity □
 SHIRLEY N. WEBER, in her official
 capacity as California Secretary of
 State □TWITTER, INC., a Delaware
 corporation □NATIONAL
 ASSOCIATION OF SECRETARIES
 OF STATE, a professional nonprofit
 organi □ation,

Defendants.

Case No. 2:21 □cv □070 □□CRB

**DEFENDANT SKDKNICKERBOCKER'S
 NOTICE OF MOTION AND MOTION TO
 DISMISS PLAINTIFF'S COMPLAINT;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT**

Date: December 1 □, 2021
 Time: 10:00 a.m.
 Ctrm: □□17th Floor
 Judge: Honorable Charles R. Breyer

NOTICE OF MOTION

TO THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 1, 2021, at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 17, 17th Floor of the above Court, located at 450 Golden Gate Avenue, San Francisco, California, 94102, Defendant SODANICKERBOCKER (“SOD”) will and hereby does move for an order dismissing Plaintiff’s claims pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of standing and pursuant to Federal Rule of Civil Procedure 12(b)(1) for failure to state a claim.

SUMMARY OF ARGUMENT

Motion to Dismiss for Lack of Standing. Plaintiff’s claims against SOD should be dismissed for lack of standing because Plaintiff does not allege a cognizable injury in fact and his alleged injuries are not fairly traceable to SOD. Although Plaintiff alleges that he was injured by Twitter’s decision to remove his Tweets and ultimately suspend his account, he identifies no cognizable injury resulting from any action taken by SOD. Because he has not identified how SOD’s specific actions inflicted concrete and particularized injury upon him, or how his injuries are traceable to SOD, Plaintiff has failed to plead standing against SOD.

Motion to Dismiss for Failure to State a Claim. Even if Plaintiff could clear the standing hurdle, each of Plaintiff’s claims against SOD should be dismissed for failure to plausibly allege that SOD violated any of Plaintiff’s state or federal constitutional or statutory rights. Plaintiff’s constitutional and Section 1983 claims all must be dismissed for the same fundamental reason: those rights are protected against invasion by the government, not private actors like SOD. Not only that, but Plaintiff fails to allege that SOD actually deprived him of his rights of free speech, equal protection, or due process. Nor does he allege a civil conspiracy operated by the Defendants with the intention to accomplish that goal. Because the Complaint fails as a matter of law, it must be dismissed.

1 This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and
2 Authorities in Support, as well as all papers and pleadings filed herein, and such argument as
properly may be presented at a hearing.

4 **STATEMENT OF RELIEF SOUGHT**

5 Defendant S□D□ seeks an order dismissing each of Plaintiff's claims against S□D□ with
prejudice pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(□).

7
8 Dated: October 5, 2021

PERKINS COIE LLP

10 By: /s/ Bruce V. Spiva

11 Bruce □ Spiva, Bar No. 1□40□2

12 *Attorneys for Defendant*
13 *SKDKnickerbocker, LLC*

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INTRODUCTION

This case centers on the suspension of Plaintiff’s Twitter account. After he repeatedly violated Twitter’s terms of service by using their platform to perpetuate falsehoods about the 2020 election, Twitter revoked Plaintiff’s license to continue to use their services. Plaintiff himself concedes that Twitter suspended his account in compliance with their own disciplinary policy, but nonetheless claims a constitutional right to spread election misinformation on Twitter’s platform.

If you are finding it difficult to locate Defendant S□D□nickerbocker (“S□D□”) in this story, you are not alone. Although his central dispute is plainly with Twitter, Plaintiff has nonetheless named as a defendant anyone who flagged his Tweet to Twitter, anyone who flagged his Tweet to California’s Office of Elections Cybersecurity (“OEC”), and any government officials or private organizations involved in identifying election misinformation. In Plaintiff’s telling, S□D□ violated his constitutional rights by including one of his Tweets in a “Misinformation Daily Briefing” to the OEC. After a series of intervening events by other actors□ including an OEC report to Twitter and Plaintiff’s repeated independent violations of Twitter’s disciplinary policy□ Twitter suspended Plaintiff’s account. Because these facts fail to establish that S□D□ actually caused any harm to Plaintiff, the Complaint should be dismissed.

As a threshold matter, Plaintiff lacks standing because he does not allege a cognizable injury in fact and because his alleged injuries are not fairly traceable to S□D□. Both failures leave the Court without jurisdiction under Article III.

Even if Plaintiff had standing, the claims against S□D□ fail as a matter of law. The constitutional and Section 1□8□ claims all guarantee rights against invasion by the government itself□ not private actors like S□D□. Even if Plaintiff could clear that critical hurdle, the allegations in the Complaint do not demonstrate that S□D□ actually deprived him of his rights of free speech, equal protection, or due process. Nor do the allegations support the inference that Defendants formed a civil conspiracy to accomplish that goal. Because the Complaint fails as a matter of law, it must be dismissed.

BACKGROUND

In the wake of the 2020 general election, various groups sought to mitigate the problem of election misinformation. Compl. ¶1. Among those groups was Twitter, which established a “civic integrity policy” and created a “Partner Support Portal” for third parties to report violations of that policy. Compl. ¶¶ 28, ¶2. Twitter’s policy relied on a “strike system.” *Id.* ¶7. If Twitter found a Tweet violated the policy, Twitter would apply a “strike” to the user’s account. *Id.* After a user accumulated five “strikes,” Twitter would remove the user from its platform. *Id.*

In 2018, California created the OEC. *Id.* ¶2. The OEC’s mission is to “monitor and counteract false or misleading information regarding the electoral process that is published online.” *Id.* ¶20 (quoting Cal. Elec. Code §10.5(b)(2)). It does so by “working closely with social media companies” to mitigate “false or misleading information.” *Id.* ¶¶ 22, 24–25. The State also developed its “Vote Safe California” initiative. *Id.* ¶¶7. Part of that initiative included a public education campaign designed to encourage voters to be vigilant about election misinformation. Compl. E¶ 7. The State invited individual voters to participate in the initiative “by reporting suspicious content or election misinformation found on social media directly to a VoteSure email inbox.” *Id.* at ¶

Two years after the creation of the OEC, the California Secretary of State’s Office recruited political consultants and political affairs professionals to help facilitate the monitoring of misinformation online. Compl. ¶¶7. S□D□ was hired as a private contractor in furtherance of this goal. *Id.* ¶42. Among other things, the contract required S□D□ to provide daily briefings regarding election-related misinformation posted online. *Id.* ¶57.

On November 1, 2020, S□D□ sent members of the OEC a daily briefing summarizing and linking to 21 social media posts, online news articles, and search trends that related to the subject of election integrity. *See* Compl. E¶ ¶ Without adding any commentary, that briefing included one of Plaintiff’s Tweets:

[@DC_Draino](#) tweeted, “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.”

¶2

Id. Four days after S□D□ “flagged” Plaintiff’s post, *id.* □74, a staff member from the Secretary’s office then identified Plaintiff’s Tweet as one of □0 total posts for Twitter to review. *Id.* □7□77□ see also Compl. E□ □ The message did not mention S□D□.¹

Hi, We wanted to flag this Twitter post:
https://twitter.com/DC_Draino/status/1327073866578096129
 From user @DC_Draino. In this post user claims California 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.

Twitter then applied its own internal policies to Plaintiff’s post. Compl. □74□7□ On the basis of those policies, Twitter added a “strike” to Plaintiff’s account. *Id.* □78. Plaintiff went on to accumulate four more “strikes,” after which Twitter suspended his account. *Id.* □7□84□88.

LEGAL STANDARDS

To satisfy Rule 12(b)(1), a plaintiff must establish the court’s jurisdiction through sufficient allegations. *See Lujan v. Defs. of Wildlife*, 504 □.S. 555, 5□1 (1□2). When courts evaluate a motion to dismiss under Rule 12(b)(1), they “need not presume the truthfulness of the plaintiffs’ allegations.” *White v. Lee*, 227 F.□d 1214, 1242 (□th Cir. 2000). In fact, courts should “presume that they□lack jurisdiction unless the contrary appears affirmatively from the record.” *Renne v. Geary*, 501 □.S. □12, □□(1□1) (cleaned up). To overcome that presumption, the plaintiff cannot rely solely on conclusory allegations of injury, and instead must allege specific facts demonstrating that the court has the power to entertain the suit. *Schmier v. U.S. Ct. of Appeals for the Ninth Cir.*, 27□ F.□d 817, 820 (□th Cir. 2001)□see also *FW/PBS, Inc. v. City of Dallas*, 4□□□.S. 215, 2□1 (1□0).

To survive a motion to dismiss under Rule 12(b)(□), a plaintiff’s complaint must contain “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550

¹ Without comment, Plaintiff’s Complaint includes an edited image of S□D□’s November 1□daily briefing email. *Compare* Compl. □74 *with* Compl. E□ □ The edited image misrepresents S□D□’s daily briefing email as including only Plaintiff’s Tweet, Compl. □74, when the daily briefing email noted 20 other articles and social media posts from people other than Plaintiff, Compl. E□ □

1 □.S. 544, 570 (2007). This “plausibility” standard “asks for more than a sheer possibility that a
2 defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 55 □ □.S. □2, □78 (200□). More than pleading
□ facts that are “merely consistent with” a defendant’s liability, the complaint must include factual
4 allegations that “allow the court to draw the reasonable inference that the defendant is liable for the
5 misconduct alleged.” *Id.*

□ ARGUMENT

7 I. All claims against SKDK should be dismissed for lack of standing.

8 All claims against S□D□ should be dismissed because Plaintiff fails to meet the
□ requirements of Article III standing. Whether a plaintiff has standing presents a “threshold question
□ in every federal case □because it determines□the power of the court to entertain the suit.” *Warth v.*
10 *Seldin*, 422 □.S. 4□0, 4□8 (1□75). Plaintiff bears the burden of establishing standing. *LSO, Ltd. v.*
11 *Stroh*, 205 F.□d 114□, 1152 (□th Cir. 2000). To do so, Plaintiffs must show they have “(1) suffered
12 an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (□) that
1□ is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 1□□ S. Ct. 1540,
14 1547 (201□). A failure of any of the three elements deprives a plaintiff of standing to maintain an
15 action in federal court. *Lujan*, 504 □.S. at 5□0□□1. Where there are multiple defendants, a plaintiff
1□ must allege Article III standing as to each named defendant, for each claim. *See Wash. Env’t*
17 *Council v. Bellon*, 7□2 F.□d 11□1, 11□□ (□th Cir. 201□) □see also *Golden Gate Transactional Indep.*
18 *Serv., Inc. v. California*, No. C□18□080□□, 201□WL 4222452, at □7 (C.D. Cal. May 1, 201□). When
1□ a party lacks Article III standing, the court must dismiss the action “for lack of subject matter
20 jurisdiction under Federal Rule of Civil Procedure 12(b)(1).” *Maya v. Centex Corp.*, □58 F.□d 10□0,
21 10□7 (□th Cir. 2011).

22 A. Plaintiff has not established injury-in-fact.

23 Plaintiff cannot meet the injury in fact requirement of Article III because he has not alleged
24 facts supporting that he was actually injured by any of S□D□’s actions. An injury in fact is “an
25 invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or
2□ imminent, not conjectural or hypothetical.” *Lujan*, 504 □.S. at 5□0 (cleaned up). To be
27

“particularized,” an injury “must affect the plaintiff in a personal and individual way.” *Pierce v. Ducey*, 15 F.3d 1085, 1088 (11th Cir. 2020) (citation omitted). “To be concrete, the injury must actually exist; an abstract, theoretical concern will not do.” *Id.* (cleaned up). Conclusory allegations that a defendant’s conduct runs afoul of the First Amendment will not suffice to establish injury in fact unless the plaintiff alleges facts establishing that defendant’s actions could constitute constitutional injury. *See Carrico v. City & Cty. of San Francisco*, 51 F.3d 1002, 1007 (11th Cir. 2011) (affirming dismissal of First Amendment claim where plaintiffs’ allegations “could not establish even a threat” of unlawful deprivation).

The crux of Plaintiff’s Complaint is that he was injured by Twitter’s decision to remove his Tweets and ultimately suspend his account. Compl. 108, 115, 117, 152, 153. But the Complaint’s sole allegation about SOD’s actions is that it flagged one of Plaintiff’s Tweets to OEC in a November 2020 briefing. *Id.* 174. The Complaint identifies no cognizable injury that results when an actor reports a Tweet to a government agency as a potential source of election misinformation. To the contrary, SOD itself has broad First Amendment protections to communicate with its government without the threat of litigation. *See E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 35 U.S. 127, 178 (1961) (recognizing the right of petition falls in the Bill of Rights and noting that “in a representative democracy such as this... the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.”).

Because he has not identified how SOD’s specific actions inflicted concrete and particularized injury upon him, Plaintiff has failed to plead an injury in fact. *See Lujan*, 504 U.S. at 54 (stating that a plaintiff must establish standing with the “manner and degree of evidence required at the successive stages of the litigation”). The defect is fatal and the claims against SOD must be dismissed for lack of jurisdiction.

B. Plaintiff has not established traceability.

Even if the Complaint had sufficiently pled injury in fact, the Court would still lack jurisdiction to adjudicate claims against SOD because Plaintiff’s alleged injury is not “fairly traceable to the challenged conduct” of SOD. *See Spokeo*, 135 S.Ct. at 1547. Allegations that “rest

on speculation about the decisions of independent actors” do not satisfy the traceability requirement. *Clapper v. Amnest Int’l USA*, 518 U.S. 308, 414 (2011). Rather, the “line of causation between the defendant’s action and the plaintiff’s harm must be more than attenuated.” *Wash. Env’t Council*, 712 F.3d at 1141. As described in the Complaint, Plaintiff’s alleged injury stems from Twitter’s decision to suspend his account. *See* Compl. 88, 91. But Plaintiff does not allege nor can he that SOD controlled or even knew about Twitter’s decision. The opposite is true—the Complaint acknowledges that Twitter’s decision to suspend his account was based on Twitter’s own internal “strike system” discipline policy. *Id.* 71. The Complaint contains no allegations that SOD controlled, developed, implemented, or enforced that policy.

At bottom, Plaintiff challenges only one action taken by SOD: its inclusion of a single Tweet by Plaintiff in a briefing to the OEC about election misinformation. *Id.* 74. That initial report is attenuated from OEC’s later decision to report the Tweet to Twitter, Twitter’s subsequent decision to apply a single “strike” to Plaintiff’s account, Plaintiff’s accumulation of four more disciplinary “strikes,” and Twitter’s ultimate decision to suspend Plaintiff’s account. *Id.* 84–88. These are precisely the kind of “attenuated” links that fail to satisfy the traceability requirement. *Wash. Env’t Council*, 712 F.3d at 1142. Plaintiff’s claims against SOD must be dismissed.

II. The Complaint fails to state cognizable claims against SKDK.

Even if the Court possessed jurisdiction to adjudicate this case, it should still dismiss Plaintiff’s claims against SOD for failure to plausibly allege that SOD violated any of Plaintiff’s state or federal constitutional or statutory rights. The Complaint also fails to plead facts that, accepted as true, could establish a conspiracy to deprive Plaintiff of any right or privilege.

A. Plaintiff’s constitutional claims against SKDK fail for lack of state action. (Claims I, II, III, and IV).

Each of Plaintiff’s constitutional claims against SOD suffers from the same fundamental flaw: the constitutional rights Plaintiff asserts protect only against infringement by the government, not a private actor like SOD. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 92, 101 (1982) (“As a matter of substantive constitutional law the state action requirement reflects judicial recognition of

□□□

1 the fact that most rights secured by the Constitution are protected only against infringement by
2 governments.” (cleaned up)) *Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 2 Cal. 4th
3 101, 1027–28 (2001) (“Based on the historical evidence suggesting that the framers of California’s
4 free speech clause intended to protect against governmental and not private encroachments, and
5 the absence of any evidence to the contrary, we see no grounds for reaching a different
6 conclusion.”). That remains true even where challenged acts are performed by a private government
7 contractor. *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (noting that acts of private contractors
8 are not acts of the government).

9 Federal courts have recognized only two narrow exceptions to the state action requirement
10 under the U.S. Constitution: (1) when the private actor is performing a public function, *Jackson v.*
11 *Metropolitan Edison Co.*, 413 U.S. 445, 451 (1974), and (2) when the government is so entangled
12 in private conduct that it affirmatively authorizes, encourages, or facilitates unconstitutional
13 conduct. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972). Neither exception applies here.

14 Plaintiff does not allege that SOD, despite its contractor status, performed a public
15 function under the law. The public function exception applies only when a private actor performs a
16 function that is “both traditionally and exclusively governmental.” *Prager Univ. v. Google LLC*,
17 51 F.3d 111, 117 (4th Cir. 2020). Because the exception is “difficult to meet,” the short list of
18 recognized public functions includes “running elections,” “operating a company town,” “and not
19 much else.” *Id.* at 117–18. None of those resemble SOD’s alleged action here: identifying a
20 publicly available Tweet as a potential source of election misinformation. Compl. ¶ 74. The
21 Complaint does not allege that reporting potential misinformation to the government is a
22 “traditionally and exclusively governmental” activity, nor can it do so with any degree of logic.
23 Accordingly, the public function exception does not apply. *See Prager*, 51 F.3d at 117.

24 Nor do Plaintiff’s allegations satisfy the entanglement exception. The entanglement
25 exception applies only when the state has exercised such “coercive power,” or has provided such
26 “significant encouragement” over the private conduct that the conduct is effectively that of the
27 state’s. *Blum v. Yaretsky*, 457 U.S. 111, 1004 (1982). Here, Plaintiff alleges no such thing. To be

1 sure, the Complaint states that S□D□ contracted with the OEC to create daily briefings (among
2 other things), which is the vehicle that S□D□ ultimately used to identify Plaintiff’s Tweet as one
□ source of election misinformation. Compl. □ 74. But private acts “do not become acts of the
4 government by reason of their significant or even total engagement in performing public contracts.”
5 *Rendell-Baker*, 457 □.S. at 841 □ *see also Blum*, 457 □.S. at 1004 □ 5. The Complaint does not allege
□ that the state exercised control over the substance or format of S□D□’s daily briefings at all, let
7 alone that the state influenced S□D□’s specific decision to flag Plaintiff’s Tweet as a potential
8 source of misinformation. *See* Compl. □ □ 7 □ 58. Because the Complaint fails to establish that either
□ of the two narrow exceptions for private actors apply, Plaintiff has failed to show that S□D□ is
10 subject to the same constitutional restraints that bind the government under the □.S. Constitution.

11 Plaintiff also fails to establish that S□D□ has taken part in any state action that would
12 subject it to the same constitutional restraints as the state government under the California
13 Constitution. California courts recognize a limited exception to the state actor rule in the context
14 of privately owned shopping centers. *Robins v. Pruneyard Shopping Ctr.*, 2 □ Cal. □ 8 □, □ 08
15 (1 □ 7 □) □ *Donahue Schriber Realty Grp., Inc. v. Nu Creation Outreach*, 2 □ Cal. App. 4th 1171, 118 □
16 (2014) (narrowing “the *Pruneyard* rule” to apply only to common areas of the shopping center).
17 But the California Supreme Court has never extended the *Pruneyard* doctrine outside the context
18 of a shopping mall’s common areas. *Cf. Fashion Valley Mall, LLC v. Nat’l Lab. Rels. Bd.*, 42 Cal.
19 4th 850 (2007) □ *see also Kinderstart.com LLC v. Google, Inc.*, No. 0 □ 2057, 2007 WL 8 □ 80 □ at
20 □ 1 □ (N.D. Cal. Mar. 1 □, 2007) (dismissing alleged violation of California constitution because
21 website was not “the functional equivalent of a traditional public forum”). Thus, that exception
22 does not apply here.

23 **B. Plaintiff’s Section 1983 claims against SKDK fail because SKDK did not**
24 **act under color of state law. (Claims I, III, and IV).**

25 For similar reasons, Plaintiff’s Section 1 □ 8 □ claims against S□D□ must be dismissed. Like
26 the First and Fourteenth Amendments, Section 1 □ 8 □ “excludes from its reach merely private
27 conduct, no matter how discriminatory or wrongful.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 52 □ □.S.

1 40, 50 (1□□) (citing *Blum*, 457 □.S. at 1002). □nder □ 1□8□, “a defendant may be liable for
2 violating a plaintiff’s constitutional rights only if the defendant committed the alleged deprivation
□ while acting under color of state law.” *Rawson v. Recovery Innovations, Inc.*, □75 F.□d 742, 747
4 (□th Cir. 2020).

5 Those circumstances are not present here. “In the typical case raising a state□action issue, a
□ private party has taken the decisive step that caused the harm to the plaintiff, and the question is
7 whether the State was sufficiently involved to treat that decisive conduct as state action.” *NCAA v.*
8 *Tarkanian*, 488 □.S. 17□, 1□2 (1□88). The determination of whether a nominally private person or
□ corporation acts under color of state law “is a matter of normative judgment, and the criteria lack
10 rigid simplicity.” *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 5□1 □.S. 288, 2□5□□
11 (2001). Courts have been clear, however, that “□iability under section 1□8□ arises only upon a
12 showing of personal participation by the defendant.” *Taylor v. List*, 880 F.2d 1040, 1045 (□th Cir.
1□ 1□8□). “It is not enough to show that the State takes certain actions in response to □□... private
14 decision.” *Rendell-Baker*, 457 □.S. at 84□(White, J., concurring).

15 The Ninth Circuit has “recogni□ed at least four different general tests” to determine whether
1□ a defendant acted under color of state law: “(1) public function□(2) joint action□(□ governmental
17 compulsion or coercion□and (4) governmental ne□us.” *Rawson*, □75 F.□d at 747. The public
18 function test requires that the defendant’s challenged action is “both traditionally and e□clusively
1□ governmental.” *Id.* at 748. Both the government ne□us and joint action tests require “a sufficiently
20 close ne□us between the state and the private actor so that the action of the latter may be fairly
21 treated as that of the State itself, or where the State has so far insinuated into a position of
22 interdependence with the private party that it was a joint participant in the enterprise.” *Id.* (cleaned
2□ up) The governmental compulsion test requires a showing that the private actor undertook the
24 challenged action only because the State coerced or compelled it to. *Id.* The Ninth Circuit has
25 acknowledged the similar nature of these tests, and e□plained that “□t bottom, the inquiry is
2□ always whether the defendant has e□ercised power possessed by virtue of state law and made
27 possible only because the wrongdoer is clothed with the authority of state law.” *Id.* (cleaned up).

28 □□□

1 Although Plaintiff does not identify which test he presses his claim under, it is ultimately academic:
2 none of the four are met here.

3 Under Section 188, a private actor's compliance with a state contract does not cloak a
4 private actor's conduct as the action of the state even if the state ultimately took action based on
5 the recommendation of the contractor. *See NCAA*, 488 U.S. at 115. In *Tarkanian*, the NCAA
6 recommended that the University of Nevada Las Vegas implement sanctions against its famous
7 basketball coach, which the university did. *See id.* at 181-82. The coach sued, and the Supreme
8 Court ordered dismissal of the suit against the NCAA for want of state action. *See id.* at 111. For
9 the Court, the question was whether the NCAA's action on the NCAA's recommendation "turned the
10 NCAA's conduct into state action," and the Court found that it did not. *Id.* at 111. The facts are
11 even less compelling here, where SOD's identification of Plaintiff's Tweet did not include an
12 accompanying recommendation for a specific course of action, as the NCAA's did. In neither
13 instance, however, do the government's downstream decisions reverberate back on the private actor
14 for purposes of Section 188 liability.

15 Nor do any other facts support a finding of state action under Section 188. Plaintiff does
16 not allege that SOD performed any task that is traditionally, exclusively, performed by the
17 government. *See supra* at 11. Nor does Plaintiff allege that the State compelled SOD to classify
18 Plaintiff's Tweet as election misinformation or include it in any briefings. *See supra* at 11-12. The
19 Complaint contains no facts supporting the inference that SOD and the State were acting in a
20 sufficiently close nexus that SOD's decision to flag Plaintiff's Tweet can be fairly characterized
21 as the decision of the State of California. In fact, the OEC's intervening review of Plaintiff's Tweet,
22 and the State's subsequent report to Twitter show that even under Plaintiff's narrative of events
23 his first Twitter "strike" was the result of multiple intervening actions by independent actors (only
24 some of which were state actors). Compl. 75-77. Because the Complaint fails to plausibly
25 demonstrate that SOD acted under the color of state law under any recognized test, Plaintiff's
26 Section 188 claims against SOD must be dismissed.

C. Even assuming that the Complaint established state action, Plaintiff fails to allege substantive constitutional violations.

Even assuming that the Complaint adequately alleged standing and state action, the Complaint should still be dismissed against S□D□ because it does not sufficiently plead that S□D□ itself inflicted any cognizable constitutional injury upon Plaintiff.

1. Plaintiff’s free speech claims fail (Claims I and II).

The Complaint fails to plead facts that, accepted as true, establish that S□D□ violated Plaintiff’s speech rights under the □.S. or California Constitutions.

The First Amendment of the □.S. Constitution prohibits only acts that burden expression, not those that characterize it. *Meese v. Keene*, 481 □.S. 4□5, 478, 480 (1□87). The Complaint only identifies one specific action that S□D□ took: reporting one of his Tweets to OEC as potentially containing “misinformation.” Compl. □ 74, 78. Long-established law makes clear that the government can constitutionally characterize speech, even with unfavorable labels, as long as it does not burden or silence the speech. *See Meese*, 481 □.S. at 481 (holding that a statute labeling certain art as “political propaganda” did not violate the First Amendment because it did not burden any speech). Thus, the Complaint fails to point to any action on S□D□’s part that violated the Plaintiff’s speech rights under the First Amendment.

Nor have Plaintiff’s speech rights been violated under the California Constitution. The California Constitution guarantees that “every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.” Cal. Const., art. I, □ 2. Like the First Amendment, “California’s free speech clause contains a state action limitation.” *Golden Gateway Ctr.*, 2□ Cal. 4th at 102□ Plaintiff pleads no facts establishing that S□D□ acted with governmental authority when it flagged a Tweet to the OEC as a potential source of election misinformation. *Supra* at □□ 10. Without any allegations that S□D□ actually prohibited, chilled, burdened, penalized, or silenced any speech on behalf of the State, the Complaint fails to plead that Plaintiff’s speech rights have been invaded under the California Constitution. *See* Cal. Const., art. I, □2.

2. **Plaintiff's equal protection discrimination claim against SKDK fails (Claim III).**

Plaintiff similarly fails to allege that S□D□ violated his Fourteenth Amendment rights under the Equal Protection Clause. Without having pled that S□D□'s inclusion of Plaintiff's Tweet was a cognizable state action, Plaintiff fails to demonstrate that S□D□'s actions were subject to equal protection guarantees at all, let alone that it violated them.

Because Plaintiff does not allege that anyone other than him was allegedly discriminated against, his claim is considered a "class-of-one" equal protection claim. "Where a plaintiff is making a class-of-one claim, the essence of the claim is that only the plaintiff has been discriminated against, and therefore the basis for the differential treatment might well have been because the plaintiff was unique—thus, there is a higher premium for a plaintiff to identify how he or she is similarly situated to others." *Scocca v. Smith*, No. C11□□8, 2012 WL 2□7520□, at □5 (N.D. Cal. June 22, 2012). To do so, Plaintiff must allege facts sufficient to support a plausible inference that S□D□ (1) intentionally, (2) treated him differently than others similarly situated, (□) without a rational basis. *Hill St. Health Servs. LLC v. Cty. of Los Angeles*, No. 1□0248□, 201□WL □45□□8, at □7 (C.D. Cal. Nov. 1□, 201□). Plaintiff's allegations fall far short of these requirements.

Plaintiff does not allege that S□D□ intended to□ or did□ single him out for differential treatment. Although filled with ominous rhetoric casting aspersions on S□D□, *see* Compl. □5□, the Complaint does not contain a single allegation that S□D□ intentionally targeted Plaintiff and treated him differently from other similarly□situated Twitter users. The allegations are the precise opposite: as described in the Complaint, Plaintiff's Tweet was one of a list of nine Tweets (by seven individual users) identified in just the November 1□briefing alone. *See* Compl. E□ □²

² To the extent that Plaintiff's claim rests on the fact that not all Twitter users spreading election disinformation were identified in an S□D□ briefing, that is not enough to establish a viable equal protection claim. *Hill St. Health*, 201□WL □45□□8, at □8 (finding the existence of similarly situated individuals insufficient to show differential treatment) *see also Scocca*, 2012 WL 2□7520□ at □5. If it were otherwise, essentially every prohibitory law would be subject to an equal protection claim whenever somebody escapes enforcement.

1 Even setting aside all previous arguments, the equal protection claim should still be
2 dismissed for failure to surmount one last, final hurdle: the rational basis test. As Plaintiff concedes,
3 rational basis scrutiny applies. *See Village of Willowbrook v Olech*, 528 U.S. 512 (2000) *see also*
4 Compl. ¶140. Under that test, the challenged action will be upheld if it has a rational relationship
5 to a legitimate state interest. Plaintiff must overcome a “presumption of rationality,” which can only
6 be done by “a clear showing of arbitrariness and irrationality.” *Hodel v. Indiana*, 452 U.S. 14, 11
7 ¶2 (1981).

8 Assuming solely for argument’s sake that the rational basis test can be applied to the conduct
9 of a purely private actor like SOD, the Complaint itself gives the best explanation of SOD’s
10 animating motivations as a contractor of OEC: the OEC was intended “to monitor and counteract
11 false or misleading information regarding the electoral process . . . that may suppress voter
12 participation or cause confusion and disruption of the orderly and secure administration of
13 elections.” Compl. ¶20 (quoting Cal. Elec. Code § 10.5(b)(2)) *see also id.* ¶4 (noting that
14 “election security continues to be a top priority for the Secretary of State’s office,” and the OEC’s
15 goal was “to increase voter awareness about election misinformation online and provide official,
16 trusted election resources”). Court after court has affirmed that governments have an interest in
17 protecting the integrity and accuracy of elections. *See, e.g., Paralyzed Veterans of Am. v.*
18 *McPherson*, No. 04-70, 2008 WL 418181, at ¶24 (N.D. Cal. Sept. 1, 2008). Plaintiffs’
19 allegations confirm that this interest was served, not undermined, by SOD’s decision to flag his
20 Tweet to OEC as election misinformation.

21 **3. Plaintiff’s procedural due process claim against SKDK fails**
22 **(Claim IV).**

23 Finally, Plaintiff fails to sufficiently allege that SOD’s actions violated his right to Due
24 Process under the U.S. Constitution. “A threshold requirement to a substantive or procedural due
25 process claim is the plaintiff’s showing of a liberty or property interest protected by the
26 Constitution.” *Hill St. Health*, 201 WL 45118, at ¶ A property interest triggers due process
27 protections only when it is based on “a reasonable expectation of entitlement deriving from existing
28 rules or understandings that stem from an independent source such as state law.” *Id.* at ¶(internal

quotation marks and citation omitted). When a position is held “at the will and pleasure” of a third party, there is no protected property interest in it. *Bishop v. Wood*, 42 U.S. 41, 45 (1979).

Plaintiff fails at each step. He cannot establish a protected property interest in “pursuing his occupation as a Twitter influencer and commentator,” Compl. 150, because that position is held “at the will and pleasure” of Twitter, a private company. *Hill St. Health*, 201 WL 45118, at 11 (see also *Shepherd v. Jones*, 1 Cal. App. 4d 104, 105 (1982) (finding no property interest in employment that was held “at the pleasure” of a third party). Even if that property interest were cognizable, he alleges no facts supporting the inference that SOD deprived him of it. His Complaint confirms that it was his own repeated violations of Twitter’s internal policies that ultimately led Twitter not SOD to suspend his account. Compl. 11 Plaintiff alleges that SOD “flagged” just one of his Tweets. *Id.* 74. But Twitter suspended his account based on its review of five of Plaintiff’s Tweets. *Id.* 7, 84-88. And Plaintiff alleges no connection between SOD and Twitter’s review of four of those Tweets. *See id.* 84-88. The due process claim against SOD should be dismissed.

4. Plaintiff’s conspiracy claim fails (Claim VI).

Lastly, Plaintiff’s claim that SOD conspired with other Defendants to violate his civil rights under Section 185 should be dismissed. Compl. 177 To state a cause of action under Section 185, “a complaint must allege (1) a conspiracy, (2) to deprive any person or a class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, (3) an act by one of the conspirators in furtherance of the conspiracy, and (4) a personal injury, property damage or a deprivation of any right or privilege of a citizen of the United States.” *Gillespie v. Civiletti*, 2 F.2d 17, 41 (1st Cir. 1980) (citing *Griffin v. Breckenridge*, 40 U.S. 88, 102 (1971)). “A mere allegation of a conspiracy without factual specificity is insufficient.” *Karim-Panahi v. L.A. Police Dep’t*, 8 F.2d 21, 22 (1st Cir. 1988). The Complaint does not establish any of the required elements.

First, Plaintiff fails to allege a conspiracy. To plausibly allege a conspiracy under Section 185, Plaintiff must plead facts sufficient to show “an agreement or ‘meeting of the minds’ to

violate constitutional rights.” *United Steelworkers of Am. v. Phelps Dodge Corp.*, 815 F.2d 1501, 1540-41 (11th Cir. 1987) (en banc). To be liable, each participant of the conspiracy “must at least share the common objective of the conspiracy.” *Id.* at 1541. Plaintiff alleges no facts indicating that each defendant shared a common objective. At best, Plaintiff alleges that Defendants desired to “censor speech which they found objectionable or misleading.” Compl. 171. But aside from that conclusory allegation, Plaintiff offers no specific facts that actually demonstrate that Defendants had a meeting of the minds over that objective, let alone that each Defendant shared it. For that reason, Plaintiff’s conspiracy claim fails. *Karim-Panahi*, 815 F.2d at 12.

Second, Plaintiff fails to allege that Defendants intended to discriminate against a class entitled to special protection. Section 1985’s intent requirement “means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.” *Griffin*, 404 U.S. at 102. The Ninth Circuit has extended Section 1985 “beyond race only when the class in question can show that there has been a governmental determination that its members require and warrant special federal assistance in protecting their civil rights.” *Sever v. Alaska Pulp Corp.*, 78 F.2d 152, 154 (11th Cir. 1942) (cleaned up). Plaintiff alleges only that Defendants intended to discriminate against “individuals who questioned election processes and outcomes.” Compl. 118. But Plaintiff does not even attempt to allege that that “class” merits any heightened protections. *Id.* 118. That failure is fatal to Plaintiff’s Section 1985 claim.

Finally, Plaintiff did not plausibly allege that he has been personally injured or deprived of any right or privilege. *See supra* at 78, 121. Although the Complaint states that Plaintiff has suffered “economic and reputational injuries,” Compl. 17, it alleges no facts supporting those claimed losses and no explanation for how SOD was part of a conspiracy that caused them. In the context of a conspiracy claim, such conclusory allegations are not enough. *Karim-Panahi*, 815 F.2d at 12. This claim, too, should be dismissed.

CONCLUSION

For the reasons stated above, the Court should grant Defendant SOD’s motion to dismiss all claims against it.

1 Dated: October 5, 2021

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ROGAN O'HANDLEY

Plaintiff,

v.

ALEX PADILLA, et. al.,

Defendants.

Case No. 3:21-cv-07063-TSH
**CIVIL LOCAL RULE 6-2(a)
STIPULATION AND ~~PROPOSED~~
ORDER REGARDING SCHEDULE
FOR BRIEFING MOTIONS IN
RESPONSE TO THE COMPLAINT
AND FOR INITIAL CASE
MANAGEMENT ACTIVITIES (DKT.
37)**

1 Pursuant to Civil Local Rule 6-2(a), the parties hereby jointly stipulate to, and respectfully
2 request the Court's approval of, a briefing schedule for Defendants' initial responsive pleadings or
3 motions and a temporary stay of initial case management deadlines. The reasons for and terms of
4 this stipulated request are as follows.

5 1. On June 16, 2021, Plaintiff Rogan O'Handley filed a complaint in the United States
6 District Court for the Central District of California. Dkt. 1.

7 2. Pursuant to Central District of California Local Rule 8-3, with Plaintiff's consent,
8 Defendants Twitter, SKDKnickerbocker, and National Association of Secretaries of State sought
9 and received a 30-day extension to answer or otherwise respond to the complaint. Dkt. 17, 19, 29.

10 3. In the interest of judicial economy, the parties proposed and, on August 12, 2021, the
11 district court in the Central District of California ordered a consolidated briefing schedule whereby
12 the deadline for all Defendants in this action to file their initial responsive pleadings and/or motions
13 in response to the complaint was September 10, 2021; the deadline for Plaintiff to file his
14 oppositions/responses to any such motions was October 12, 2021; and the deadline for Defendants
15 to file any reply briefs in support of such motions was November 1, 2021. Dkt. 30, 31.

16 4. On September 9, 2021, all parties stipulated to transfer this case to this district. Dkt.
17 34. On September 10, 2021, the district court in the Central District of California ordered that the
18 case be transferred to this district, vacated the foregoing briefing schedule, and directed the parties
19 to "seek to establish a new schedule for filing and briefing of motions to dismiss or other responses
20 to the complaint in accordance with the rules, orders, and practices of the transferee court." Dkt.
21 35 ("Transfer Order").

22 5. On September 14, 2021, the case was transferred to this Court, Dkt. 36, which entered
23 an order setting an initial case management conference and certain other discovery-related
24 deadlines. Dkt. 37 ("Initial Case Management Order").

6. Pursuant to the Transfer Order, the parties have conferred and agreed to the below proposal to provide for an orderly briefing schedule for Defendants' motions or other responses to the complaint:

Defendants' motions/responses to complaint due: Oct. 5, 2021

Plaintiff's Oppositions to Defendants' Motions due: Nov. 5, 2021

Defendants' Replies due: Dec. 1, 2021

7. The parties respectfully request that the deadlines set forth in the Initial Case Management Order be stayed pending the resolution of Defendants' forthcoming motions responding to the complaint.

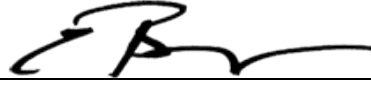
8. Good cause exists to stay the deadlines set forth in the Initial Case Management Order until the Court rules on the forthcoming motions responding to the complaint. Such a stay will promote judicial economy and save court and party resources that would otherwise be spent litigating issues that the forthcoming motions may moot or reshape. Moreover, any conferral regarding discovery and the case management conference would be far more productive—to the extent necessary—once the parties have clarity as to the scope of the claims, if any, that remain. *See, e.g.*, Order at 1, *Cortez v. United Natural Foods, Inc.*, 5:18-cv-04603-BLF, ECF No. 31 (N.D. Cal Dec. 14, 2018) (continuing CMC when pending motions will inform “the claims at issue in the litigation, the scope of discovery, the scheduling of discovery ..., and whether the case continues to exist at all”).

Pursuant to Civil Local Rule 6-2(a), Plaintiff and Defendants hereby request that the Court establish the schedule set forth above by approving and so-ordering this stipulation.¹

¹ This order complies with Civil Local Rule 6-1(b), as it does not affect a hearing or proceeding on the Court's calendar scheduled for a date within the next 14 days.

PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: Septmeber 30, 2021



UNITED STATES DISTRICT ~~MAGISTRATE~~
JUDGE

Dated: September 20, 2021

/s/ Thomas G. Sprankling
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/s/ Christine Wheatley
Christine Wheatley
GORDON & REES SCULLY
MANSUKHANI

*Attorneys for Defendant National Association of
Secretaries of State*

/s/ Bruce V. Spiva
Bruce V. Spiva
PERKINS COIE LLP

*Attorneys for Defendant SKDKnickerbocker,
LLC*

/s/ Anna Ferrari
Anna Ferrari
Deputy Attorney General
Office of the Attorney General of California

*Attorneys for Defendants Alex Padilla, Paula
Valle, Jenna Dresner, Sam Mahood, Akilah
Jones, and Shirley N. Weber*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROGAN O HANDLEY,

Plaintiff,

v.

ALEX PADILLA, et al.,

Defendants.

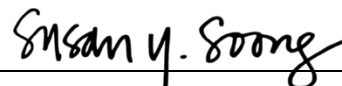
Case No. 21-cv-07063-TSH

ORDER REASSIGNING CASE

IT IS ORDERED that this case has been reassigned using a proportionate, random and blind system pursuant to General Order No. 44 to the Honorable Charles R. Breyer in the San Francisco division for all further proceedings. Counsel are instructed that all future filings shall bear the initials CRB immediately after the case number.

All hearing and trial dates presently scheduled are vacated. However, existing briefing schedules for motions remain unchanged. Motions must be renoticed for hearing before the judge to whom the case has been reassigned, but the renoticing of the hearing does not affect the prior briefing schedule. Other deadlines such as those for ADR compliance and discovery cutoff also remain unchanged.

Dated: September 28, 2021



Susan Y. Soong
Clerk, United States District Court

A true and correct copy of this order has been served by mail upon any pro se parties.

ER-442

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Attorneys for Defendant
TWITTER, INC.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ROGAN O'HANDLEY

Plaintiff,

v.

ALEX PADILLA, et. al.,

Defendants.

Case No. 3:21-cv-07063-TSH
**CIVIL LOCAL RULE 6-2(a)
STIPULATION AND [PROPOSED]
ORDER REGARDING SCHEDULE
FOR BRIEFING MOTIONS IN
RESPONSE TO THE COMPLAINT
AND FOR INITIAL CASE
MANAGEMENT ACTIVITIES (DKT.
37)**

1 Pursuant to Civil Local Rule 6-2(a), the parties hereby jointly stipulate to, and respectfully
2 request the Court's approval of, a briefing schedule for Defendants' initial responsive pleadings or
3 motions and a temporary stay of initial case management deadlines. The reasons for and terms of
4 this stipulated request are as follows.

5 1. On June 16, 2021, Plaintiff Rogan O'Handley filed a complaint in the United States
6 District Court for the Central District of California. Dkt. 1.

7 2. Pursuant to Central District of California Local Rule 8-3, with Plaintiff's consent,
8 Defendants Twitter, SKDKnickerbocker, and National Association of Secretaries of State sought
9 and received a 30-day extension to answer or otherwise respond to the complaint. Dkt. 17, 19, 29.

10 3. In the interest of judicial economy, the parties proposed and, on August 12, 2021, the
11 district court in the Central District of California ordered a consolidated briefing schedule whereby
12 the deadline for all Defendants in this action to file their initial responsive pleadings and/or motions
13 in response to the complaint was September 10, 2021; the deadline for Plaintiff to file his
14 oppositions/responses to any such motions was October 12, 2021; and the deadline for Defendants
15 to file any reply briefs in support of such motions was November 1, 2021. Dkt. 30, 31.

16 4. On September 9, 2021, all parties stipulated to transfer this case to this district. Dkt.
17 34. On September 10, 2021, the district court in the Central District of California ordered that the
18 case be transferred to this district, vacated the foregoing briefing schedule, and directed the parties
19 to "seek to establish a new schedule for filing and briefing of motions to dismiss or other responses
20 to the complaint in accordance with the rules, orders, and practices of the transferee court." Dkt.
21 35 ("Transfer Order").

22 5. On September 14, 2021, the case was transferred to this Court, Dkt. 36, which entered
23 an order setting an initial case management conference and certain other discovery-related
24 deadlines. Dkt. 37 ("Initial Case Management Order").
25
26
27
28

6. Pursuant to the Transfer Order, the parties have conferred and agreed to the below proposal to provide for an orderly briefing schedule for Defendants' motions or other responses to the complaint:

Defendants' motions/responses to complaint due: Oct. 5, 2021

Plaintiff's Oppositions to Defendants' Motions due: Nov. 5, 2021

Defendants' Replies due: Dec. 1, 2021

7. The parties respectfully request that the deadlines set forth in the Initial Case Management Order be stayed pending the resolution of Defendants' forthcoming motions responding to the complaint.

8. Good cause exists to stay the deadlines set forth in the Initial Case Management Order until the Court rules on the forthcoming motions responding to the complaint. Such a stay will promote judicial economy and save court and party resources that would otherwise be spent litigating issues that the forthcoming motions may moot or reshape. Moreover, any conferral regarding discovery and the case management conference would be far more productive—to the extent necessary—once the parties have clarity as to the scope of the claims, if any, that remain. *See, e.g.*, Order at 1, *Cortez v. United Natural Foods, Inc.*, 5:18-cv-04603-BLF, ECF No. 31 (N.D. Cal Dec. 14, 2018) (continuing CMC when pending motions will inform “the claims at issue in the litigation, the scope of discovery, the scheduling of discovery ..., and whether the case continues to exist at all”).

Pursuant to Civil Local Rule 6-2(a), Plaintiff and Defendants hereby request that the Court establish the schedule set forth above by approving and so-ordering this stipulation.¹

¹ This order complies with Civil Local Rule 6-1(b), as it does not affect a hearing or proceeding on the Court's calendar scheduled for a date within the next 14 days.

PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: _____

UNITED STATES DISTRICT/MAGISTRATE
JUDGE

Dated: September 20, 2021

/s/ Thomas G. Sprankling
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*Attorneys for Plaintiff Rogan
O'Handley*

/s/ Christine Wheatley
Christine Wheatley
GORDON & REES SCULLY
MANSUKHANI

*Attorneys for Defendant National Association of
Secretaries of State*

/s/ Bruce V. Spiva
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PERKINS COIE LLP

*Attorneys for Defendant SKDKnickerbocker,
LLC*

/s/ Anna Ferrari
Anna Ferrari
Deputy Attorney General
Office of the Attorney General of California

*Attorneys for Defendants Alex Padilla, Paula
Valle, Jenna Dresner, Sam Mahood, Akilah
Jones, and Shirley N. Weber*

SIGNATURE ATTESTATION

I am the ECF User whose identification and password are being used to file the foregoing. Pursuant to Civil Local Rule 5-1(i), I hereby attest that the other signatures have concurred in this filing.

Dated: September 20, 2021

By: /s/ Thomas G. Sprankling
THOMAS G. SPRANKLING

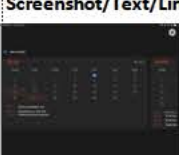






CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2021, I electronically filed the above document with the Clerk of the Court using CM/ECF which will send electronic notification of such filing to all registered counsel.

Dated: September 20, 2021

By: /s/ Thomas G. Sprankling
THOMAS G. SPRANKLING

EXHIBIT 9

Platform	Date of Post	Time of Post	Screenshot/Text/Link	Misinformation	Indicator	Tracking Number	Date Reported	Time Reported	Reporting Details	Social Media Action Taken	Result	Date Removed	Time Removed	
Citizen	10/2/2020	N/A		Election Misinformation from Citizen App.	Incorrect Election Information		10/2/20	4:45 PM	A user of the Citizen app called our hotline to report that she had received an alert titled California Election Center. She reported, the post has incorrect information regarding the Election, particularly the date of the Election.	Post removed.	Removed	10/2/20	7:48 PM	
Facebook	9/16/20	5:58 AM		Screen-shot: I'll vote for Biden if one of his supporters sends me \$500 dollars. If you're a Biden supporter and decide to not send me \$500 you're voting for Trump. www.facebook.com/1488685372/posts/10217971982599681/?extid=zvXstmDOKWte5PmE&	Solicitation	N/A	9/18/20	11:00 AM	Please see images attached. There is a thread we're reporting on Twitter - that's been screen shot and is circulating on Facebook. Facebook's notes reportable content as: any offers to buy or sell votes with cash or gifts so flagging with you as well in hopes of limiting its spread. It is a crime under state and federal law to solicit and or receive any consideration/money in exchange for voting, voting for someone, or not voting for someone.	Facebook removed post.	Removed	9/18/20	12:10 PM	
Facebook	10/31/2020	N/A		I'm a member of a private Facebook group for rideshare drivers in the SF Bay area. A user going by "DC O'Bryan" claims to have obtained, and implies having voted, multiple ballots with the aim of defeating Proposition 22. In a reply to a comment on the post, the user says it's "not like [they] registered [their] dogs to get extra ballots." I don't know whether all of it is just foolish hot air meant to provoke. If it is, a call from an official might get the point across that you don't joke about election fraud. If it's not, and they're really stupid enough to write about criminal behavior online, then please see that they're prosecuted. Screenshots viewable here: photos.app.goo.gl/jv6EGZQTbHdNHv4r7 Permanent link to the post: www.facebook.com/groups/sfuberdrivers/permalink/3167691863343122/	Voting Twice	N/A	11/1/2020	12:00 PM	Wanted to alert you to the following Facebook post where a user implies having voted with multiple ballots (screenshots attached). While we investigate internally, we recommend it be taken down as it is a misrepresentation of legal methods for voting. Report: "I'm a member of a private Facebook group for rideshare drivers in the SF Bay area. A user going by "DC O'Bryan" claims to have obtained, and implies having voted, multiple ballots with the aim of defeating Proposition 22. In a reply to a comment on the post, the user says it's "not like [they] registered [their] dogs to get extra ballots." I don't know whether all of it is just foolish hot air meant to provoke. If it is, a call from an official might get the point across that you don't joke about election fraud. If it's not, and they're really stupid enough to write about criminal behavior online, then please see that they're prosecuted. Screenshots viewable here: photos.app.goo.gl/jv6EGZQTbHdNHv4r7 Permanent link to the post: www.facebook.com/groups/sfuberdrivers/permalink/3167691863343122/	Post removed.	Removed	10/31/20	2:10 PM	
Instagram	10/28/2020	12:00 AM		In the post voters are being asked to gerrymander and voter suppress their "trump supporting father's ballots". This is a clear example of voter suppression and we are concerned about the spread of misinformation this may cause as well as the distrust in the voting process and security of ballots this may present as well. Purposefully losing or destroying and keeping someone from exercising their right to vote is a crime. https://www.instagram.com/p/CG0axYA0M/	Voter Suppression	Emailed	10/29/20	12:20 PM	We want to flag this Instagram post from: @Screenplaywale. In the post voters are being asked to gerrymander and voter suppress their "trump supporting father's ballots". This is a clear example of voter suppression and we are concerned about the spread of misinformation this may cause as well as the distrust in the voting process and security of ballots this may present as well. Purposefully losing or destroying and keeping someone from exercising their right to vote is a crime.	Post removed.	Removed	10/28/20	3:27 PM	
Instagram	9/17/2020	9:00:00 AM		Vote-by-Mail Registration. #recallnewsom. Doing our duty. Draining the swamp. Former actress claims all CA voters are now permanently vote-by-mail in video https://www.instagram.com/p/CFQqnFMDsBr/	Permanent VBM	N/A	9/21/20	12:00 PM	We wanted to flag this Instagram post: https://www.instagram.com/p/CFQqnFMDsBr/ from user @Samaira.xoxo. In the video - the participants claim that Gavin Newsom changed everyone's voting status to automatic, permanent mail in votes. We are concerned for the spread of this misinformation as it already has upwards of 40K views. The truth is that because of COVID-19, California passed a law to send every active, registered voter a vote-by-mail ballot for the November 3rd election, and only the November 3rd election. This does not change individuals voter preferences permanently and this misrepresentation of the method to vote/register this year has the potential for voter suppression and confusion.	Instagram removed post.	Removed	9/21/20	12:50 PM	
Instagram	9/1/20	N/A		The post claims that the voting preference of California voters has been changed by Governor Newsom. This is incorrect. Earlier this year, Governor Newsom issued an executive order that directed California's counties to send every active, registered voter a vote-by-mail ballot ahead of the November 3, 2020 General Election. This Executive Order was followed up by AB860, which was signed into law by Governor Newsom. This order only pertains to the November 3, 2020 General Election. The permanent voting preference of voters has not been changed. There will also be in-person voting options available to any Californian voter that would like to vote in-person.	Permanent VBM	N/A	8/31/20	2:33 PM	I would like to report this post because it claims that the voting preference of California voters has been changed by Governor Newsom. This is incorrect. Earlier this year, Governor Newsom issued an executive order that directed California's counties to send every active, registered voter a vote-by-mail ballot ahead of the November 3, 2020 General Election. This Executive Order was followed up by AB860, which was signed into law by Governor Newsom. This order only pertains to the November 3, 2020 General Election. The permanent voting preference of voters has not been changed. There will also be in-person voting options available to any Californian voter that would like to vote in-person.	I wanted to circle back and say the post has been deleted.	Removed	8/31/2020	4:16 PM	
Twitter	11/12/2020	6:20:00 PM	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 https://twitter.com/DC_Draino/status/1327073866578096129	Voter Fraud. 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	Voter Fraud	Case# 0180994675: partner_election [ref:00DA0000000K0A8.5004v0000225CNh:ref]	11/17/20	12:31 PM	Hi, We wanted to flag this Twitter post: https://twitter.com/DC_Draino/status/1327073866578096129 From user @DC_Draino. In this post user claims California 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.	Twitter flagged as misinformation.	Removed			
Twitter	10/31/2020			This post lies about voter registration procedures, diminishing trust in our elections and threatening elections integrity. " https://twitter.com/RoxieCorleone/status/1322366549835964416	Voter Registration	Case# 0178813767	10/31/2020	12:36 PM	Reporting details: https://twitter.com/RoxieCorleone/status/1322366549835964416 This post lies about voter registration procedures, diminishing trust in our elections and threatening elections integrity.	Twitter locked account	Removed	11/1	1:43 AM	
Twitter	10/6/2020	7:20:00 AM	The coming California voting disaster CA is facing: <ul style="list-style-type: none">• Millions of inactive voters receiving ballots• USPS alarm not all ballots will be received on time• Voter fraud as seen by the homeless bringing Prepare yourself for what is coming My latest[1] https://twitter.com/CalConsNews/status/1313484215045025792	VBM Errors. The coming California voting disaster CA is facing: <ul style="list-style-type: none">- Millions of inactive voters receiving ballots- USPS alarm not all ballots will be received on time- Voter fraud as seen by the homeless bringing Prepare yourself for what is coming My latest[1]	VBM Error	Case# 0175871430: partner_election [ref:00DA0000000K0A8.5004A000020lsm:ref]	10/8/20	4:28 PM	Hello, I'd like to report this tweet: https://twitter.com/CalConsNews/status/1313484215045025792 Tweet provides misinformation about California ballots will all have errors due to registered voters receiving mail ballots.	After our review, we've locked the account for breaking our rules regarding civic integrity. Please keep in mind, the account owner does have the option to take the actions we've requested to have their account unlocked. This can include deleting the Tweets that violated the rules, or updating specific account information.	Removed	10/9	1:10 AM	
Twitter	10/7/2020	9:12:00 AM	A system of mass mail outs does not work as there are many mistakes and high potential for fraud. This is especially evident in blue states because Democrats have terrible leadership and love to cheat. https://twitter.com/moll1021/status/1313874739903954949	VBM Fraud. A friend I'm staying with in California received two (2) ballots in the mail. A system of mass mail outs does not work as there are many mistakes and high potential for fraud. This is especially evident in blue states because Democrats have terrible leadership and love to cheat.	VBM Fraud	Case# 0175871659: partner_election [ref:00DA0000000K0A8.5004A000020lIsE:ref]	10/8/20	4:30 PM	Hello, I'd like to report this tweet: https://twitter.com/moll1021/status/1313874739903954949 Tweet provides misinformation about California ballots will all have errors due to registered voters receiving mail ballots. And also states a system of mass mail outs does not work as there are many mistakes and high potential for fraud. This is especially evident in blue states because Democrats have terrible leadership and love to cheat.	After our review, we've locked the account for breaking our rules regarding civic integrity. Please keep in mind, the account owner does have the option to take the actions we've requested to have their account unlocked. This can include deleting the Tweets that violated the rules, or updating specific account information.	Removed	10/9	1:14 AM	
Twitter	9/27/2020	7:36:00 PM	Tweets falsely alleges ballots were found in Sonoma dumpster - does not mention they were recycled materials from 2018. https://twitter.com/sandylevincent/status/1310407902511935488	Ballot Collection/Harvesting. Tweet baselessly claims Orange County votes were fraudulent in 2018. 343 RTs, 678 likes as of 10:25am 9/28.	Ballot Collection	Case# 0174777320: partner_election [ref:00DA0000000K0A8.5004A000020CFC:ref]	9/29/20	11:58 AM	Tweet provides misinformation about California ballots will all have errors due to registered voters receiving mail ballots.	Twitter removed post.	Removed	9/29	1:47 PM	

Platform	Date of Post	Time of Post	Screenshot/Text/Link	Misinformation	Indicator	Tracking Number	Date Reported	Time Reported	Reporting Details	Social Media Action Taken	Result	Date Removed	Time Removed	
Twitter	9/10/2020	11:22:00 PM		Double-voting. Yes, he did. I plan on voting several times. I can only vote once in my state because we have to show ID. But, I'm flying to California where I'll vote as many times as I can, plus I should be able to send in quite a few mail-in ballots. How about you? https://twitter.com/vmfalcon21/status/1304304292552204288	Double Voting	Case# 0172782201: partner_election [ref:00DA0000000K0A8.5004A00001zp4iz:ref]	9/14/20	12:47 PM	Tweet indicates you can vote more than once, promotes distrust in elections process, and indicates attempt at voter fraud which is illegal. All of which could lead to voter suppression.	Post still up as of 12/7 9:30 AM	No Action Taken			
Twitter	11/3/2020	6:47 AM		Voting fraud in Dem States California Cheating, cheating.. They give me paper to fill out Then I scan it into a scanner This is stored in a hard drive This hard drive will be loaded into internet on Election Day They can reject this hard drive and load their default hard drive	Voter Fraud	Case# 0179172911: partner_election [ref:00DA0000000K0A8.5004A000021Jg1k:ref]	11/3/2020	11:10 AM	We wanted to flag this Twitter post: https://twitter.com/JanePK/status/1323637872310714369 from user @JanePK. In this post user claims election officials will use alternate hard drive to commit election fraud. This accusation can lead to voter distrust and should be addressed accordingly.	Thanks for your report. After our review, we've locked the account for breaking our rules. Please keep in mind, the account does have the option to take the actions we've requested to have their account unlocked. This can include deleting the Tweet(s) that violated the rules, having their account features be temporarily limited or updating specific information on their account.	Removed	11/4	2:01 AM	
Twitter	11/3/2020	11:27 AM	<p>No worries I used an alias when voting in person. No id needed so it was easy. Thinking of going back later today if the lines arent too long.</p> <p>https://twitter.com/dailyTT3/status/1323708441127350272</p>	No worries I used an alias when voting in person. No id needed so it was easy. Thinking of going back later today if the lines arent too long.	Voter Fraud	Case# 0179201999: partner_election [ref:00DA0000000K0A8.5004A000021Jpu a:ref]	11/3/2020	4:30 PM	We wanted to flag this Twitter post: https://twitter.com/dailyTT3/status/1323708441127350272 From user @dailyTT3. In this post user claims he used an alias when voting in person. No ID needed so it was easy. Thinking of going back later today if the lines aren't too long. This is voter fraud and needs to be address accordingly.	Thanks for your report. After our review, we've locked the account for breaking our rules. Please keep in mind, the account does have the option to take the actions we've requested to have their account unlocked. This can include deleting the Tweet(s) that violated the rules, having their account features be temporarily limited or updating specific information on their account.	Removed	11/4	4:33 AM	
Twitter	9/25/20	7:50 AM		Repeated pic of drop box with words unmanned and unmonitored vote in person no one is watching these https://twitter.com/BrianGoodlife/status/1309505665048567816	Drop Box Security	Case# 0174779241: partner_election [ref:00DA0000000K0A8.5004A000020Of5:ref]	9/29/20	12:19 AM	Hello, I'd like to report this tweet: https://twitter.com/BrianGoodlife/status/1309505665048567816 from user @BrianGoodlife. The post presents misinformation and it is also inaccurate and misrepresents voter rolls, ballot collection, and the security and safety of drop boxes. Leading to potential confusion with the public. User routinely posts misinformation regarding the election/voting and continues to post that mail in ballot collection boxes are unmanned and unmonitored.	Twitter removed post. After our review, we've locked the account for breaking our rules regarding civic integrity. Please keep in mind, the account owner does have the option to take the actions we've requested to have their account unlocked. This can include deleting the Tweets that violated the rules, or updating specific account information.	Removed	10/6	12:07 AM	
Twitter	9/24/20	8:23 AM	<p>Easy target. Would you be concerned if largely Democrat precinct boxes might be targeted? I'm concerned mostly Republican precincts will be targeted. The rioters have shown they will sow whatever division and chaos they can. Use common sense Ms. PhD. Mail in drop boxes are unmanned and unmonitored. Vote in person. Antifa/BLM can destroy 1000s of ballots with bleach, acid and gas.</p> <p>https://twitter.com/BrianGoodlife/status/1309151581556924419</p>	Easy target. Would you be concerned if largely Democrat precinct boxes might be targeted? I'm concerned mostly Republican precincts will be targeted. The rioters have shown they will sow whatever division and chaos they can. Use common sense Ms. PhD. Mail in drop boxes are unmanned and unmonitored. Vote in person.Antifa/BLM can destroy 1000s of ballots with bleach, acid and gas.	Drop Box Security	Case# 0174240113: partner_election [ref:00DA0000000K0A8.5004A000020DQt U:ref]	9/24/20	4:51 PM	We want to flag a post from @BrianGoodlife where he states Mail-in ballot drop boxes are unmanned and unmonitored. On the grounds that its misinformation and misrepresents the voting process and when votes are counted. Leading to potential confusion with the public. https://twitter.com/BrianGoodlife/status/1309151581556924419	Twitter removed post	Removed			
Twitter	9/24/20	6:59 AM	<p>Vote In Person at your polling place. CA SOS has closed hundreds of poll locations so use your local County Registrars website to locate the nearest one.</p> <p>Oh and Dropboxes are unsafe.</p> <p>https://twitter.com/BrianGoodlife/status/1309130427899277313</p>	Vote In Person at your polling place. CA SOS has closed hundreds of poll locations so use your local County Registrars website to locate the nearest one.	Drop Box Security	Case# 0174241087: partner_election [ref:00DA0000000K0A8.5004A000020DDR7 Z:ref]	9/24/20	5:04 PM	Report post - We wanted to flag this Twitter post: https://twitter.com/BrianGoodlife/status/1309130427899277313 from user @BrianGoodlife. The post presents misinformation and it is also inaccurate and misrepresents voter rolls, ballot collection, and the security and safety of drop boxes. Leading to potential confusion with the public. User routinely posts misinformation regarding the election/voting.	Twitter removed post	Removed			
Twitter	10/13/2020	4:44 AM		California hired a pure Sleepy Joe Democrat firm to count and "harvest" votes. No way Republicans get a fair shake. Lawyers, get started!!! @GOPLeader California is in big trouble. Vote Trump and watch the greatest comeback of them all!!! Also, New York and Illinois - go for it! The statement in this tweet that "California hired a pure Sleepy Joe Democrat firm to count and "harvest" votes." is completely false. https://twitter.com/realDonaldTrump/status/1315981668784709632	Ballot Collection/Harvesting	Case# 0176459384: partner_election [ref:00DA0000000K0A8.5004A000020oR2 m:ref]	10/13/2020	4:01 PM	The statement in this tweet that "California hired a pure Sleepy Joe Democrat firm to count and "harvest" votes." is completely false: https://twitter.com/realDonaldTrump/status/1315981668784709632?s=20 Ballots in California are only counted by local elections officials in an open and transparent process. This tweet undermines voters confidence that their votes will be fairly and properly counted. Please see relevant election codes:Relevant ECs 15004,15104,15360 re public observation From our Voting Law Compliance Handbook: sos.ca.gov/elections/publications-and-resources/voting-law-compliance-handbook I would like to watch how ballots get counted on election night to see how it works. Is this process open to the public? [Please contact your county elections official to ask if there are COVID-19 specific instructions related to elections observers.] Yes. The entire process, from the opening of the vote-by-mail ballot envelopes to the counting of ballots on election night is open to the public. (Elections Code §§ 15004, 15104) Contact your local election official for more information on observing the process on election night. Additionally, to test the accuracy of the counting machines prior to the official certification of election results, each county election official must conduct a public manual count of the ballots cast in one percent of the precincts or a two-part public manual count; the ballots counted are chosen at random by the election official. (Elections Code § 15360) Relevant ECs 15101 re county's as entities who county: Jurisdictions count ballots through a detailed process in EC 15100 et seq.	We're writing to let you know that after a review, we didn't find a violation of our civic integrity policy in the content you reported.	No Action Taken			
Twitter	9/21/20	9:48 PM		@AlexPadilla4CA Just letting you know my absentee ballot has already been cast.... some how with out ever reaching my house. Not I king this. #DNC2020 #DNC #California https://twitter.com/underhill4517/status/1308221513263271938	Ballot Cast Prior to Date	Case# 0174240603: partner_election [ref:00DA0000000K0A8.5004A000020DQzs:ref]	9/24/20	4:57 PM	Report post - We wanted to flag this Twitter post: https://twitter.com/underhill4517/status/1308221513263271938 from user @underhill4517. The post presents misinformation and misrepresents the voting process and when votes are counted. Leading to potential confusion with the public. User routinely posts misinformation regarding the election/voting.	Post still up as of 9/25 3:24 PM	No Action Taken			
YouTube	11/9/2020	N/A	<p>This individual made a youtube video of himself registering to vote (or attempting to) under a fake alias ("Marco Fernandez") in Los Angeles County, California, in hopes of the video going viral. (He is also spreading false information about CA voter laws.)</p> <p>https://www.youtube.com/watch?v=r-hyOL_10E4&t=130s</p>	I would like to report voter registration fraud.This individual made a youtube video of himself registering to vote (or attempting to) under a fake alias ("Marco Fernandez") in Los Angeles County, California, in hopes of the video going viral. (He is also spreading false information about CA voter laws.) Here is the video: https://www.youtube.com/watch?v=r-hyOL_10E4&t=130s The individual who made the video is Paul Leach 6021 Hackers Ln Agoura Hills, CA 91301-1409 DOB: July 20, 1972 The fake email he used is marcofern72@yahoo.com He may also go by an alias: Paul Soleil To the best of my knowledge, the information I have provided is correct. Thank you so much for looking into this matter.	Voter Fraud	N/A	11/13/2020	11:31 AM	Hi all, My name is Jenna Dresner with the Office of Election Cybersecurity for the California Secretary of State. I wanted to report this video where an individual made a Youtube video of himself attempting to register to vote under a fake alias. The videographer makes false claims around California elections, including that it would be easy for non-citizens to vote, that there are many "fake registered voters" out there, and that you could pay masses of people to set up fake voter registrations to sway elections. Aside from being false, these claims fuel distrust in our elections and display an intent at multiple cases of voter fraud which are illegal. Here is the video: https://www.youtube.com/watch?v=r-hyOL_10E4&t=130s Please let me know if you need additional information. Jenna	YouTube removed post	Removed	12/8/20	10:13 AM	

Platform	Date of Post	Time of Post	Screenshot/Text/Link	Misinformation	Indicator	Tracking Number	Date Reported	Time Reported	Reporting Details	Social Media Action Taken	Result	Date Removed	Time Removed	
YouTube	9/22/2020	2:00:00 PM	"The states are taking reasonable steps to clean up the rolls and that led in part to a settlement with Los Angeles county in Californian Michigan they chant the court uh one court judge changed the rules to allow them to count ballots 14 days after the election and mandated ballot harvesting and what is ballot harvesting it basically means anybody can take anyone's ballot and bring it to the polling place again more opportunity". https://www.youtube.com/watch?v=rYhZobZ-5IM#:~:text=california&text=ballot&text=harvesting&text=california&text=california	"the the states are taking reasonable steps to clean up the rolls and that led in part to a settlement with los angeles county in californiain michigan they chant the court uh one court judge changed the rules to allow them to count ballots 14 days after the election and mandated ballot harvesting and what is ballot harvesting it basically means anybody can take anyone's ballot and bring it to the polling place again more opportunity"...Ballot Collection/Harvesting: Voter Rolls. Head of conservative group Judicial Watch hosts video alleging Democrats benefit from incorrect voter rolls and ballot collection. Has 2,398 views as of 4:07pm 9/22.	Ballot Collection	Emailed YouTube no case# yet.	9/24/20	4:40 PM	Report video- We wanted to flag this YouTube video because it misleads community members about elections or other civic processes and misrepresents the safety and security of mail-in ballots. https://www.youtube.com/watch?v=rYhZobZ-5IM#:~:text=california&text=ballot&text=harvesting&text=california&text=california	Video was removed from YouTube	Removed	9/27/20	7:04 PM	

EXHIBIT 8



ALEX PADILLA
California Secretary of State

AP20:067

FOR IMMEDIATE RELEASE

July 23, 2020

CONTACT:

SOS Press Office

(916) 653-6575

National Association of Secretaries of State Presents California Secretary of State with 2020 IDEAS Award

SACRAMENTO, CA – The National Association of Secretaries of State (NASS) presented the 2020 IDEAS (Innovation, Dedication, Excellence and Achievement in Service) Award to the Office of the California Secretary of State for California's VoteSure program. This award recognizes significant state contributions to the mission of NASS.

The VoteSure program, launched in October 2018, is a statewide public education campaign to increase voter awareness about election misinformation online and provide official, trusted election resources. The campaign included the launch of VoteSure.sos.ca.gov, a web portal that consolidates important voter resources.

California Secretary of State Alex Padilla said this about the VoteSure program receiving the NASS IDEAS Award:

“Bad actors — both foreign and domestic — continue to threaten our elections and elections officials must be more proactive and innovative in strengthening voter confidence. In response, California launched VoteSure, the first initiative of its kind in the nation to both promote official, trusted sources of election information while countering election misinformation on social media.

"VoteSure strategically placed social media ads aimed at directing voters to official elections tools, information, and resources. Other ads explained the various security measures in place that protect the integrity of our elections. The initiative also included proactive social media monitoring for election misinformation and provided voters a dedicated email address to report suspicious posts. We worked in partnership with social media platforms to develop more efficient reporting procedures for potential misinformation. Misinformation identified by our office or voters was promptly reviewed and, in most cases, removed by the social media platforms.

"This era demands swift communication campaigns to respond to emerging threats. Despite the threats and misinformation, a record number of Californians cast their ballots in the November 2018 midterm election. I'm proud of the California Secretary of State staff and of California voters

who helped make VoteSure an immediate success, and I am thankful for my colleagues' recognition of our work in California.”

The award was voted on by members of NASS and announced by NASS Awards Committee co-chair and North Dakota Secretary of State Al Jaeger during the NASS 2020 Virtual Summer Conference Business Meeting on July 22, 2020.

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EXHIBIT 7

NASS 2020 IDEAS Award

VoteSure: A Public Education Campaign Encouraging Voters to be Vigilant of Election Misinformation

California Secretary of State's Office

Subject Area of Nomination: Cybersecurity

Cyber threats to our elections are the new normal. In 2016, federal intelligence officials were unanimous in their conclusion that foreign actors interfered in the U.S. Presidential Election. In response, with the support of California's Governor and Legislature, the California Secretary of State's office developed innovative safeguards, including a public education campaign, to secure our elections. Launched in October 2018, VoteSure counteracted misinformation, provided public education resources, and bolstered confidence in our elections. VoteSure was the first-of-its-kind public education initiative launched by a Secretary of State's office.

Project Lead:

Paula Valle
Deputy Secretary of State,
Chief Communications Officer
1500 11th St.
Sacramento, CA 95814
Phone: (213) 797-9920
E-Mail Address: [REDACTED]
Web Address: www.sos.ca.gov





VoteSure: A Public Education Campaign Encouraging Voters to be Vigilant of Election Misinformation

Background

For the first time in the history of California, the Legislature and Governor approved a public education and outreach budget for the California Secretary of State's office, specifically designated for communicating accurate election information to California voters. This came at a critical time when federal intelligence agencies were unanimous in their assessment that foreign governments targeted California and other states with sophisticated misinformation campaigns on social media that were confusing to voters.

This funding approved in fiscal year 2018-2019 enabled the California Secretary of State's office to employ additional tools and resources necessary to identify misinformation and create content to provide voters, particularly in hard-to-reach communities, access to information about California Secretary of State programs via verified websites. The target population, of these educational campaigns, was estimated at 19.4 million at the last report of registration.

Our office identified email communication with California voters as one of the primary areas where we could be effective in addressing misinformation as well as providing proactive accurate, reliable and verified information. As such, we secured a contract with Granicus to ensure that we had the ability to email and distribute, as well as text message, all registered voters in California that provided email addresses in their voter registration forms. While not all registered voters provide emails and/or phone numbers, a vast majority do.

Having the ability to email voters statewide should a major incident occur is essential to our responsibility as the state's chief elections office. For example, if there is a coordinated misinformation campaign that targets a county or precinct, we are now able to use an email management system to communicate accurate information to voters.

In addition to these outreach and educational tools, the Offices of Election Cybersecurity and Enterprise Risk Management were created to develop strategies for communicating elections information and mitigating potential risks to the California Secretary of State security infrastructure.

The Office of Election Cybersecurity created VoteSure, which was a first-of-its-kind public education initiative to promote trusted, accurate, and official sources of election information on Facebook, Instagram, and Twitter. The goal of VoteSure was to increase voter awareness about election misinformation online and provide official, trusted election resources.

The Office of Election Cybersecurity utilized Facebook, Instagram and Twitter's software to communicate accurate information to voters across the state, which increased and enhanced the outreach and civic engagement by the Secretary of State's office ahead of Election 2018. The software and analytics provided by these social media channels enabled the Secretary of State's office to provide real-time reports and data, which helped fine tune our target messaging more appropriately for our communication and outreach efforts.

Election security continues to be a top priority for the Secretary of State's office, and we are continuing to work around the clock to protect the integrity of our systems ahead of Election 2020 and to combat misinformation through our Office of Election Cybersecurity.

The Campaign: VoteSure

Public Education:

The VoteSure campaign included paid advertisements on Twitter, Facebook and Instagram. These paid advertisements included graphics about misinformation and official Election Day information. A series of videos encouraged voters to report misinformation at **cybersecurity.sos.ca.gov** and to visit **VoteSure.sos.ca.gov** to obtain official election information straight from the source. The new **VoteSure.sos.ca.gov** portal was created to inform the public about efforts being taken to protect elections. It included links to help voters look up their voter registration status, find their polling place and early voting opportunities, and learn about their rights as voters.

On Election Day, November 6, 2018, the #VoteSure hashtag was included alongside several informational graphics that encouraged early voting and a link to the Voter Bill of Rights on Facebook and Twitter.

Statewide Outreach:

As part of the VoteSure initiative, around 6 million voters who included an email address with their voter registration received an email communication with election information directly from the California Secretary of State's office. This electronic campaign was the first time the California Secretary of State's office directly emailed registered voters. Due to the very positive feedback, the California Secretary of State's office plans on making this a standard method for disseminating information.

Monitoring and Countering Misinformation:

The Office of Election Cybersecurity worked with state, local, and federal agencies to share information about cyber threats, develop emergency preparedness plans, and recommend ways to protect election infrastructure. This included piloting a new social media monitoring effort in the days leading up to and on Election Day. Posts spreading false information such as "vote online," "provisional ballots don't count," or "Democrats vote on 7/6 and Republicans vote on 7/7," were reported to officials at Facebook and Twitter.

Voters could also participate with monitoring by reporting suspicious content or election misinformation found on social media directly to a VoteSure email inbox. These posts would be reviewed by the Office of Election Cybersecurity and in most cases reported to the social media company so they could be removed.

Results

In total, the VoteSure initiative targeted all Californians over the age of 18 and made 46 million impressions on Facebook and Twitter. Using the election portal, **VoteSure.sos.ca.gov**, voters were able to easily verify their registration status, find their polling place or report election misinformation.

The Office of Election Cybersecurity discovered nearly 300 erroneous or misleading social media posts that were identified and forwarded to Facebook and Twitter to review and 98 percent of those posts were


promptly removed for violating the respective social media company's community standards.

Voters turned out to the polls on Election Day in record numbers. Approximately 12 million Californians cast their ballot on November 6, 2018. That's a 60 percent turnout— the highest level of participation in a midterm election since 1982.

Supporting Documents: Social Media Graphics and Posts



Supporting Documents: VoteSure Email and Website



**California
General
Election**

**Tuesday
November 6, 2018**

Polls are open from 7:00 a.m. to 8:00 p.m.
on Election Day!

***** OFFICIAL ELECTION EMAIL FROM THE CALIFORNIA SECRETARY OF STATE *****

Dear California Voter,

Tuesday, November 6, 2018, is the General Election in California. Polls are open from 7:00 a.m. to 8:00 p.m. on Election Day. This email includes important and official voter resources from the California Secretary of State to prepare you to cast your ballot this election.

Voter Information Guide Online
 To research statewide propositions and candidates, visit:
VoterGuide.sos.ca.gov

Check Your Voter Registration Status
 Registered voters can check their voter registration status and voter preferences using the "My Voter Status" tool at VoterStatus.sos.ca.gov

Find Your Polling Place or Vote Center on Election Day
 Registered voters can look up their polling place or vote center at <https://www.sos.ca.gov/elections/polling-place/>

Early Voting Locations
 Any registered voter can visit their county elections office in person to drop off their vote-by-mail ballot or request to vote a vote-by-mail ballot on or before Election Day. To find early voting or ballot drop-off locations in your county, visit: CaEarlyVoting.sos.ca.gov

Voters with Disabilities
 County Voter Information Guides describe how persons with disabilities can vote privately and independently. For more information, visit: <https://www.sos.ca.gov/elections/voting-resources/voters-disabilities/>

Quick Guide to Propositions
 Review the Secretary of State's official "Quick Guide to Propositions" tool at <http://quickguidetoprops.sos.ca.gov/propositions/2018-11-06>

Voter's Choice Act - Madera, Napa, Nevada, Sacramento and San Mateo Counties
 All registered voters in Madera, Napa, Nevada, Sacramento and San Mateo counties receive their ballots in the mail before the election. Voters can vote-by-mail, drop off their ballots at a designated county dropbox, or vote in-person at a vote center. Vote centers are open for 11 days, up to and including, Election Day. To learn more, visit: VotersChoice.sos.ca.gov






Download the Vote California Smart Phone App
 Get connected with important election information for the November 6, 2018 General Election. Use it to check your voter status, find your polling place or review our Quick Guide to Propositions. Search "Vote California" in the Apple Store or on Google Play.

For more information visit: sos.ca.gov/elections/


California Secretary of State | 1500 11th Street, Sacramento, California 95814
www.sos.ca.gov

***** OFFICIAL ELECTION EMAIL FROM THE CALIFORNIA SECRETARY OF STATE *****

***** SOS.CA.GOV *****

You received this email because you provided your email address when you registered to vote.



Home » Elections and Voter Information

VoteSure

Voting Resources













 <p>Check Voter Status</p>	 <p>Find My Polling Place</p>	 <p>Early Voting Information</p>	 <p>Voting in California</p>
 <p>Vote By Mail</p>	 <p>Voter Information Guide</p>	 <p>Voter Bill of Rights</p>	 <p>Frequently Asked Questions</p>
 <p>March 3, 2020 Election Information</p>	 <p>Contact Your Election Official</p>	 <p>Election Cybersecurity</p>	 <p>Report Misinformation</p>

EXHIBIT 6

To: Valle, Paula; Dresner, Jenna; Mahood, Sam; Jones, Akilah
Cc: Heather Wilson; Emily Campbel; Jason Rosenbaum; Tania Mercado; Grace Gill
From: Zeke Sandoval
Sent: Fri 11/13/2020 4:43:28 PM (UTC-08:00)
Subject: Misinformation Daily Briefing: 11/13

Weekly Recap:

On Monday 11/9 [@ErrolWebber](#) tweeted, "George Bush was declared [December 15th](#). It is only the 1st week of November now. Be patient. PRESIDENT TRUMP WON!" The post has been flagged as misleading by Twitter.

On Tuesday 11/10 [The New York Times](#) reported that tech companies are struggling to keep up and identify false claims that Joe Biden lost in Pennsylvania, the state that put him over the 270 electoral vote threshold.

On Wednesday 11/11 [Forbes](#) reported Facebook's ban on political ads will continue for at least another month. The 2020 election results will not be certified until the middle of December.

On Thursday 11/12 [@realDonaldTrump](#) tweeted, "REPORT: DOMINION DELETED 2.7 MILLION TRUMP VOTES NATIONWIDE. DATA ANALYSIS FINDS 221,000 PENNSYLVANIA VOTES SWITCHED FROM PRESIDENT TRUMP TO BIDEN. 941,000 TRUMP VOTES DELETED. STATES USING DOMINION VOTING SYSTEMS SWITCHED 435,000 VOTES FROM TRUMP TO BIDEN." [@ChanelRion@OANN](#)." The tweet has been flagged by Twitter.

National

[CNN](#) reported the Trump campaign has eliminated their voter fraud hotline after it was flooded with prank calls. The campaign is yet to provide evidence of widespread voter fraud.

[@realDonaldTrump](#) tweeted, "For years the Dems have been preaching how unsafe and rigged our elections have been. Now they are saying what a wonderful job the Trump Administration did in making 2020 the most secure election ever. Actually this is true, except for what the Democrats did. Rigged Election!"

[Breitbart](#) published a report by Tom Fitton in which the conservative activist claims to have exposed massive voter fraud across the country.

[The New York Times](#) warned that the term election fraud is becoming more popular in some circles. The Times concluded that "The Rush Limbaugh Show," which averages about 15 million listeners per week, has mentioned the term 204 times since Election Day.

California:

[@RealErinCruz](#) tweeted, "Story after story of votes wrongly allocated, some individuals being told they already electronically voted when they were trying to relinquish their mail in ballot at voting assistance centers so they could vote in person... We need a FULL AUDIT. I'm not stopping. [#CA36](#)," along with a video of a computer programmer claiming he was hired to rig an election.

[ABC News](#) included President Trump's tweet about ballots being illegally collected in CA after the election on their list of debunked election misinformation. The ballot box was sealed on Election Day, meaning all ballots inside were eligible to be counted.

[NBC 4](#) reported the Orange County registrar is conducting an audit of local election results in search of possible errors. The audit is not required by law but is tradition.

[@DC_Draino](#) tweeted, "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."

[The Daily Breeze](#) published an opinion piece calling expanded mail voting an "electoral success." The piece claims that both Democrats and Republicans benefited from the change.

[@WatchTheBreaks](#) tweeted, "Just did some research on California voting and unless I'm missing something, there isn't a place I can see HOW my

Narrative:

[@SteveHiltonx](#) tweeted, ""The Democratic strategy...was to get rules in place that would allow them to flood the zone with additional mail-in ballots...the beauty of ballot harvesting is that it's nearly impossible to prove fraud" [@KimStrassel](#) details Democrats' systemic meddling," along with a link to a Wall Street Journal opinion piece that contains the quote.

[Fox News](#) reported that Nikki Haley is attacking Twitter for labeling her tweet as potentially misleading while ignoring other problematic posts.

[Sputnik News](#) reported that dead people receiving ballots could be the tip of the iceberg in terms of voter fraud in the United States. The piece calls ballot harvesting a potential avenue for voter fraud in the election process. The outlet is owned by the Russian government.

[@SteveHiltonx](#) tweeted, "Ballot Harvesting...voter rolls "plagued with errors" (Pew)...a patchwork of dodgy technology...regardless of the impact on any party or candidate America clearly has the voting system of a banana republic or late 19th century big city political machine Investigate and Reform!"

Questions:

What is the difference between a vote recount and a vote audit? - from [Quora](#)

Was there really widespread election fraud? How many votes are we talking about? What evidence exists other than highly skewed vote counts late in the process? - from [Quora](#)

What evidence is out there to prove that Joe Biden committed fraud? - from [Quora](#)



Stories about voting twice topped 400 for the fourth consecutive day. People voting twice has been a favorite claim of individuals trying to undermine the legitimacy of the election.

###

EXHIBIT 5

To: Mahood, Sam [REDACTED]
Cc: Reyes, Steve [REDACTED], Valle, Paula [REDACTED]
From: Kevin Kane [REDACTED]
Sent: Tue 12/31/2019 7:51:23 AM (UTC-08:00)
Subject: Re: Fw: Case# 0136918935: partner_election [ref:00DA0000000K0A8.5004A00001qaD26:ref]

Sam-

Thank you for reporting, this Tweet has been removed. Please don't hesitate to contact me if there is anything else we can do.

Best regards,

Kevin

On Mon, Dec 30, 2019 at 9:05 PM Mahood, Sam <[REDACTED]> wrote:

Hi Kevin,

Flagging the following tweet that I reported through the partner portal. This tweet is sharing a doctored image of a California Voter Registration Card (inaccurately claiming that the Republican Party is not an option):

https://twitter.com/Paul_USAPatriot/status/1211709756311621633

We would like this tweet taken down ASAP to avoid the spread of election misinformation.

Please let us know if there is anything else we can do to facilitate this request.

Thank you,

-Sam

Sam Mahood - Press Secretary, California Secretary of State Alex Padilla
 [REDACTED]

From: Twitter Support <support@twitter.com>

Sent: Monday, December 30, 2019 6:02 PM

To: Mahood, Sam [REDACTED]

Subject: Case# 0136918935: partner_election [ref:00DA0000000K0A8.5004A00001qaD26:ref]


 Hello,

This is a confirmation that we've received your request. Someone from our team will review it and reply to you shortly.

Thanks,

Twitter Support

ref:00DA0000000K0A8.5004A00001qaD26:ref

[Help](#) | [Privacy](#)

Twitter, Inc. [1355 Market Street, Suite 900 San Francisco, CA 94103](#)

ER-467

EXHIBIT 4

To: Jimenez, Jerry; Grambusch, Claire; Lansley, Susan
Case: 22-150715-04/25/2022; ID: 42436626; Entry: 18-4, Page 12 of 12
From: Mahood, Sam [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=5ADE179F920245A594801E1F9BC7464F-MAHOOD, SAM]
Sent: Tue 4/30/2019 9:22:39 AM (UTC-07:00)
Subject: Fw: NASS Communications: Reporting Social Media Mis/Disinformation

Jerry, Claire, Susan, Steve,

Please see this email from NASS about reporting social media misinformation to various social media platforms.

-Sam

From: Maria Benson >
Sent: Tuesday, April 30, 2019 9:19 AM
To: Maria Benson
Cc: Reynolds, Leslie; Milhofer, John; Dodd, Stacy; Lindsey Forson
Subject: NASS Communications: Reporting Social Media Mis/Disinformation

Good Afternoon Communications Directors,

We all know that mis/disinformation on social media does not disappear when we aren't running major elections. If you see something on a platform, please report it. In addition, please pass this on to your local election officials as well. **I would also appreciate a heads up so I know what is going on, this helps us create a more national narrative.**

Reporting mechanisms currently in place:

Facebook

Send email to reports@content.facebook.com; copy Eva Guidarini () and your state Facebook representative; include "election mis/disinformation" or something similar in subject line. Identify specific pieces of content that potentially violate their [voter fraud and suppression policy](#) using links to content on FB; if you believe pages or profiles are inauthentic, send links to pages or profiles. If there is a statute or regulation on point (e.g., if misrepresentation concerns voting requirements), please include that information in email.

Twitter

To report something, Twitter has an election partner portal which NASS has access to. You will need to email me () as much information as you have and I will submit it through the portal as soon as possible, including Twitter handle, tweet content, link, why you believe it is mis/disinformation, etc. I will also include your contact information in the report so Twitter can get back to you about it directly.

Google

When there is a question about the legality of an election advertisement or how it falls under a Google policy, please

EXHIBIT 3

EXHIBIT 2

To: Maria Benson
Cc: Reynolds, Leslie; Milhofer, John; Lindsey Forson; Dodd, Stacy
From: Maria Benson
Sent: Thur 10/1/2020 7:33:43 AM (UTC-07:00)
Subject: NASS Communications: CIS 1 pager and Twitter updates
[EI-ISAC Reporting Misinformation Sheet Final.pdf](#)
[8.28.20 Copy of NASS and NASED Twitter Portal List.xlsx](#)

Good Morning Communications Directors,

I wanted to pass along the **attached** one pager on the new CIS single source mis/disinformation reporting channel I updated you on 9/29 (**original email below**).

Twitter also asked me to let you guys know about a couple items...copy/pasted below:

(1) State and Local Election Officials: Please join Twitter on Thursday, October 8 from 3:30 - 4:30 pm EST for a training on creative and effective content strategies on Twitter in advance of the U.S. Election. You will hear the latest on product updates, best practices, and strategy for creating engaging content! Time for Q&A will be reserved at the end. RSVP here: <https://trainingforuselectionpartners.splashthat.com/>

(2) We are onboarding state and local election officials onto Twitter's Partner Support Portal. The Partner Support Portal is a dedicated way for critical stakeholders -- like you -- to flag concerns directly to Twitter. These concerns can include technical issues with your account and content on the platform that may violate our policies. Email PSPOnboarding@Twitter.com to enroll.

If you do decide to join the PSP please cc' me for awareness. Attached is the last list I have, which I've asked Twitter to cross reference with those they have in their files. But alas, if you'd like to just report to the new CIS reporting structure that works too! Up to you!

Two last things... I bcc'd you all on the press release for the new NASS 2020 Election FAQs but just in case you didn't see it you can find the FAQs [here](#); and today begins National Cybersecurity Awareness Month and American Archives Month.

Onward,

Maria Benson

Director of Communications
 National Association of Secretaries of State (NASS)
 444 N. Capitol Street NW, Suite 401 | Washington, DC 20001
 Desk: 202-624-3528 | Cell: [REDACTED]

www.nass.org



From: Maria Benson
Sent: Tuesday, September 29, 2020 11:40 AM
To: Maria Benson
Cc: 'Reynolds' <[REDACTED]>; 'John Milhofer' <[REDACTED]> Lindsey Forson
 <[REDACTED]>; 'Stacy Dodd' <[REDACTED]>
Subject: NASS Communications: Several Updates

Good Afternoon Communications Directors,

Don't TL;DR at me, but I have several odds and ends updates that I wanted to package together:

NEW Single Source CIS Mis/Disinformation Reporting Email

To help combat misinformation in elections, the EI-ISAC has teamed up with CISA, NASS, NASED, and Stanford University to

ER-473/1

EXHIBIT 1

pathways to monitor for mis/disinformation online. We have a dedicated email line, voter hotlines, media monitoring tools, contractors, etc. to stay apprised on misinformation and give voters an outlet to report. We always see an influx in misinformation around elections, but this year it was louder than ever.

Given the sheer volume and nature of social media, we at the State level monitor for trends and themes more often than we do individual pieces of misinformation in order to ensure we're countering misinformation with fact-based messaging.

Since September, our office has tracked somewhere around 200 social media/media posts, but our priority is working closely with social media companies to be proactive so when there's a source

of misinformation, we can contain it. It would be difficult to quantify what what reported the MOST, as misinformation surged around different things in the news or events.

Did the Secretary of State's office reach out to any social media companies to help them combat misinformation?

If so, who was contacted, what concerns were expressed and how did the social media company respond?

We have working relationships and dedicated reporting pathways at each major social media company. When we receive a report of misinformation on a source where we don't have a pre-existing pathway to report, we find one. We've found that many social media companies are taking responsibility on themselves to do this work as well.

We worked

closely and proactively with social media companies to keep misinformation from spreading, take down sources of misinformation as needed, and promote our accurate, official election information at every opportunity.

In your opinion did misinformation play an influential role in dissuading voters during this election cycle?

Misinformation led to greater voter anxiety, but it didn't dissuade voters from voting. We saw record breaking numbers across all fronts, including those metrics that indicate a deep desire to vote but a need for more assurance in the process like voting early and signing up for Where's My Ballot to track the status of their ballot throughout the process.

How did the Secretary of State's office deal with misinformation?

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Facsimile: (517) 465-9683

Attorneys for Plaintiff ROGAN O'HANDLEY

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ROGAN O'HANDLEY,

Plaintiff,

v.

ALEX PADILLA, in his personal capacity;
SKDKNICKERBOCKER, LLC, a Delaware
company; PAULA VALLE CASTAÑON, in
her personal capacity; JENNA DRESNER, in
her personal capacity; SAM MAHOOD, in
his personal capacity; AKILAH JONES; in
her personal capacity; SHIRLEY N.
WEBER, in her official capacity as

Case Number:

**COMPLAINT FOR
DECLARATORY JUDGMENT,
DAMAGES, AND INJUNCTIVE
RELIEF**

DEMAND FOR JURY TRIAL

1 California Secretary of State; TWITTER,
2 INC., a Delaware corporation; NATIONAL
3 ASSOCIATION OF SECRETARIES OF STATE,
4 a professional nonprofit organization;

5
6
7
8
9 Defendants.

10 Plaintiff Rogan O’Handley, through his undersigned counsel, states the
11 following claims for relief against Alex Padilla, in his personal capacity;
12 SKDKnickerbocker, LLC, a Delaware corporation; Paula Valle Castañon, in her
13 personal capacity; Jenna Dresner, in her personal capacity; Sam Mahood, in his
14 personal capacity; Akilah Jones; in her personal capacity; Shirley N. Weber, in her
15 official capacity as California Secretary of State; Twitter, Inc., a Delaware corporation;
16 and the National Association of Secretaries of State, a professional nonprofit
17 organization.

18 **INTRODUCTION**

19 1. Against a backdrop of alleged foreign interference in the 2016 election,
20 various state election agencies, state election officials, national organizations, and
21 social media companies mounted campaigns to combat election misinformation
22 concerns on social media for the 2020 election. While many of these entities pursued
23 a traditional path of educating the public with useful information, others went in a new
24 direction, seeking aggressively to suppress speech they deemed to be “misleading,”
25 under the guise of fostering “election integrity.” The State of California generally, and
26 the Secretary of State’s Office of Elections Cybersecurity in partnership with the other
27 Defendants specifically, took the latter path.

28 //

2. California’s initial foray into the brave new world of engineering better election outcomes, California Elections Code §10.5, created the Office of Elections Cybersecurity in 2018 to “educate voters” with “valid information” through empowering election officials (hereinafter “OEC”). This seemingly benign mandate quickly and predictably devolved into a political weapon for censorship of disfavored speech by an overtly partisan Secretary of State’s office, more resembling an Orwellian “Ministry of Approved Information” than a constitutionally restrained state agency. The OEC deployed government force to bolster the personal political goals of Democrat office holders, most notably including then-Secretary of State Alex Padilla (“Padilla”). Padilla abused his office and the public trust in a myriad of ways, unprecedented even in a California where political corruption has become part of the landscape, as predictable as the sun setting over the Pacific Ocean.

3. Plaintiff Rogan O’Handley (“Mr. O’Handley”) was just one of many speakers targeted in California’s tainted censorship process. Mr. O’Handley’s speech infraction was his expression of the opinion that California, along with the rest of the nation, should audit its elections to protect against voter fraud. A Democratic political consultant—hired with taxpayer dollars in a closed-bid, closed-door boondoggle to which not even California’s Democrat Controller could turn a blind eye—flagged Mr. O’Handley’s inconvenient speech to the OEC as evidence of “election misinformation.” The OEC, an office within the primary agency whose job performance would be scrutinized by an audit, then contacted Twitter through dedicated channels Defendants created to streamline censorship requests from government agencies. Twitter promptly complied with the OEC’s request to censor Mr. O’Handley’s problematic opinions from its platform, and ultimately banned his account, which had reached over 440,000 followers at its zenith, for violating Twitter’s civic integrity policy.

4. The founding fathers fought and died for the right to criticize their government, and enshrined that foundational right as central in the pursuit of the new

1 nation. Defendants’ exercise of government force to censor political speech with which
2 they disagree flies in the face of the ideals upon which our nation was founded, and
3 violates numerous state and federal constitutional rights.

4 JURISDICTION

5 5. This Court has federal question jurisdiction over this case pursuant to 28
6 U.S.C. §§ 1331 because Plaintiff’s claims arise under the First and Fourteenth
7 Amendments to the U.S. Constitution. Further, the Court has jurisdiction pursuant to
8 28 U.S.C. § 1343 because Plaintiff seeks relief under 42 U.S.C. § 1983.

9 6. This action is an actual controversy, and under 28 U.S.C. §§ 2201 and
10 2202, this Court has authority to grant declaratory relief, and other relief, including
11 temporary, preliminary, and permanent injunctive relief, pursuant to Rule 65 of the
12 Federal Rules of Civil Procedure, and may declare the rights of Plaintiff.

13 7. This Court has supplemental jurisdiction over state law claims presented
14 in this matter pursuant to 28 U.S.C. § 1367, because the claims are so related to the
15 federal constitutional claims in this action such that they do not raise novel or complex
16 issues of state law and do not substantially predominate over the federal claims. There
17 are, further, no exceptional circumstances compelling declining state law claims.

18 8. Venue is proper in the Central District of California under 28 U.S.C. §
19 1391(b)(1) because a plurality of Defendants maintain residence or offices in Los
20 Angeles County, and most Defendants are residents of California (within the meaning
21 of 28 U.S.C. § 1391(c)). Venue is also proper under 28 U.S.C. § 1391(b)(2) because a
22 substantial part of the acts or omissions giving rise to the claim occurred in this judicial
23 district.

24 PARTIES

25 9. Plaintiff Rogan O’Handley resides in St. Petersburg, Florida. He is an
26 attorney licensed to practice in the state of California, social media influencer with over
27 3 million combined followers across various social media platforms, civil rights
28 activist, political commentator, and journalist.

1 10. Defendant Alex Padilla (“Padilla”), sued in his personal capacity, was
2 California Secretary of State at the time of the injury to Plaintiff, authorized the
3 disputed contract with Defendant SKDK, and oversaw the efforts to take down
4 disfavored speech. Upon information and belief, Defendant Padilla is a resident of Los
5 Angeles County.

6 11. Defendant SKDKnickerbocker LLC (“SKDK”) is a public affairs and
7 consulting firm known for working with Democrat politicians and political hopefuls,
8 and for progressive political causes. SKDK is a Delaware company that maintains a
9 California office at 3105 S. La Cienega Blvd., Los Angeles, CA 90016.

10 12. Defendant Paula Valle Castañon (“Ms. Castañon”), upon information and
11 belief previously going by the name of Paula Valle, sued in her personal capacity, at
12 the time of Plaintiff’s injury served as the Deputy Secretary of State, Chief
13 Communications Officer for Alex Padilla, California Secretary of State. Ms. Castañon
14 led the communications division of the Office of the Secretary of State. Upon
15 information and belief, Ms. Castañon is a resident of Los Angeles County.

16 13. Defendant Jenna Dresner (“Ms. Dresner”), sued in her personal capacity,
17 is Senior Public Information Officer for the OEC. Upon information and belief, Ms.
18 Dresner is a resident of Los Angeles County.

19 14. Defendant Sam Mahood (“Mr. Mahood”), sued in his personal capacity,
20 was Press Secretary for California Secretary of State Alex Padilla, and one of the OEC
21 employees responsible for receiving reports of alleged election misinformation from
22 Defendant SKDK and requesting social media platforms censor speech with which the
23 OEC disagreed during the 2020 election. When Mr. Padilla was elevated to become
24 United States Senator from California, Sam Mahood followed Mr. Padilla to become
25 his Special Projects and Communications Advisor. Upon information and belief, Mr.
26 Mahood is a resident of Sacramento County.

27 15. Defendant Akilah Jones (“Ms. Jones”), sued in her personal capacity, was
28 OEC’s Social Media Coordinator responsible for receiving reports of election

1 misinformation from Defendant SKDK and requesting social media platforms censor
2 speech with which the OEC disagreed during the 2020 election. Upon information and
3 belief, Ms. Jones is a resident of Sacramento County.

4 16. Defendant Shirley N. Weber, sued in her official capacity as California
5 Secretary of State, is the state official responsible for implementing California
6 Elections Code §10.5. and has oversight over the actions of the OEC. She maintains an
7 office in Sacramento County.

8 17. Defendant Twitter is a microblogging and social networking service with
9 roughly 330 million monthly active users. Twitter is incorporated in Delaware and
10 maintains its principal place of business at 1355 Market Street, Suite 900, San
11 Francisco, CA 94103.

12 18. Defendant National Association of Secretaries of State is a professional
13 organization for state Secretaries of State, headquartered at 444 North Capitol Street
14 NW, Suite 401, Washington, D.C., 20001. The National Association of Secretaries of
15 State does business in California, and the California Secretary of State is an association
16 member.

17 **FACTS**

18 19. In 2018, the California legislature passed, and then-Governor Brown
19 signed, AB 3075, which created the OEC within the California Secretary of State's
20 office.

21 20. Codified at California Elections Code §10.5, one of the "primary
22 missions" of the OEC is "[t]o monitor and counteract false or misleading information
23 regarding the electoral process that is published online or on other platforms and that
24 may suppress voter participation or cause confusion and disruption of the orderly and
25 secure administration of elections." Cal.Elec.Code § 10.5(b)(2).

26 21. California Elections Code § 10.5 further states the OEC shall, "[a]ssess
27 the false or misleading information regarding the electoral process described in
28 paragraph (2) of subdivision (b), mitigate the false or misleading information, and

1 educate voters, especially new and unregistered voters, with valid information from
2 elections officials such as a county elections officials or the Secretary of State.”
3 Cal.Elec.Code § 10.5(c)(8).

4 22. The OEC, under the direction of then-Secretary of State Padilla, seized on
5 the statutory phrase “mitigate [] false or misleading information,” as a license to quash
6 politically-disfavored or inconvenient speech.

7 23. Padilla’s censorship program targeted speech implicating his
8 administration of elections in his capacity as Secretary of State.

9 24. In a written response to CalMatters reporter Freddy Brewster’s November
10 2020 inquiry regarding how OEC handled “voter misinformation,” the OEC explained:
11 “[O]ur priority is working closely with social media companies to be proactive so when
12 there’s a source of misinformation, we can contain it.” A true and correct copy of
13 OEC’s comments, as obtained through a public record request, is attached to this
14 complaint as Exhibit 1.

15 25. The OEC further explained the close working relationship with private
16 social media companies thus:

17 We have working relationships and dedicated reporting pathways at
18 each major social media company. When we receive a report of
19 misinformation on a source where we don't have a pre existing pathway
20 to report, we find one. We’ve found that many social media companies
21 are taking responsibility on themselves to do this work as well. **We**
22 **work[] closely and proactively with social media companies to** keep
23 misinformation from spreading, **take down sources of misinformation**
24 **as needed,** and promote our accurate, official election information at
25 every opportunity.

26 See Exhibit 1 (emphasis added).

27 26. The National Association of Secretaries of State (“NASS”) spearheaded
28 efforts to censor disfavored election speech.

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

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

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

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

18 31. NASS wanted election officials to have NASS’s email guidance regarding
19 how to report “mis/disinformation” directly to social media companies “handy”
20 directly prior to election day as election officials “prepare[d] for battle.” A true and
21 correct copy of Maria Benson’s November 2, 2020, email, as obtained through a public
22 record request, is attached to this complaint as Exhibit 4.

23 32. The California Secretary of State’s office participated in Twitter’s
24 dedicated “Partner Support Portal.”

25 33. Presumably, the California Secretary of State’s office’s participation in
26 Twitter’s “Partner Support Portal” did ensure the Secretary of State’s requests to take
27 down speech were a high priority for Twitter.

28 //

34. As an example, on December 30, 2019, Mr. Mahood emailed Twitter's Kevin Kane the following regarding another Twitter user (not Mr. O'Handley):

On Mon, Dec 30, 2019 at 9:05 PM Mahood, Sam <[REDACTED]> wrote:

Hi Kevin,

Flagging the following tweet that I reported through the partner portal. This tweet is sharing a doctored image of a California Voter Registration Card (inaccurately claiming that the Republican Party is not an option):
https://twitter.com/Paul_USAPatriot/status/1211709756311621633

We would like this tweet taken down ASAP to avoid the spread of election misinformation.

Please let us know if there is anything else we can do to facilitate this request.

Thank you,

-Sam

35. Kevin Kane responded to Sam Mahood's request to take down the tweet before 8:00 am the next morning, which happened to be New Year's Eve, stating:

To: Mahood, Sam [REDACTED]
Cc: Reyes, Steve [REDACTED]; Vane, Paula [REDACTED]atch, Inc.
From: Kevin Kane [REDACTED]
Sent: Tue 12/31/2019 7:51:23 AM (UTC-08:00)
Subject: Re: Fw: Case# 0136918935: partner_election [ref:00DA000000K0A8.5004A00001qaD26:ref]

Sam-

Thank you for reporting, this Tweet has been removed. Please don't hesitate to contact me if there is anything else we can do.

Best regards,

Kevin

See Exhibit 5.

36. At the same time OEC officials and NASS were working externally to streamline their speech takedown processes with social media companies, the OEC also decided to broaden and outsource its efforts to search out "objectionable" speech to censor.

//

1 37. On July 17, 2020, Padilla’s office sent an email to fifteen political
2 consultants and political affairs professionals, many of whom worked on the
3 campaigns of prominent Democrats, offering them the opportunity to participate in an
4 invitation-only, expedited bidding process outside California’s Public Contract Code’s
5 mandated transparent competitive bid process. The winning bid would facilitate the
6 office’s \$35-million-dollar “Vote Safe California” initiative.

7 38. The purpose of the Public Contract Code’s mandated transparent
8 competitive bid process is to protect taxpayers against cronyism and partisanship.

9 39. Mr. Padilla sidestepped the Public Contract Code’s statutory bidding
10 requirements by claiming he had “emergency authority” to create the contract.

11 40. Padilla received seven bids from the OEC’s hand-picked list of political
12 consultants/allies.

13 41. Padilla’s staff, in a closed-door review process, anointed the winner of the
14 \$35-million-dollar contract.

15 42. Padilla awarded the \$35-million-dollar contract to Defendant
16 SKDKnickerbocker (“SKDK”), a political consulting firm heavily involved in then-
17 candidate Joe Biden’s presidential campaign.

18 43. As described by Reuters.com, “SKDK is closely associated with the
19 Democratic Party, having worked on six presidential campaigns and numerous
20 congressional races.” See Joel Schechtman, Raphael Satter, Christopher Bing, Joseph
21 Menn, Exclusive: Microsoft believes Russians that hacked Clinton targeted Biden
22 campaign firm – sources, REUTERS (Sept. 10, 2020, 12:30 am),
23 [https://www.reuters.com/article/us-usa-election-cyber-biden-exclusive/exclusive-](https://www.reuters.com/article/us-usa-election-cyber-biden-exclusive/exclusive-russian-state-hackers-suspected-in-targeting-biden-campaign-firm-sources-idUSKBN2610I4)
24 [russian-state-hackers-suspected-in-targeting-biden-campaign-firm-sources-](https://www.reuters.com/article/us-usa-election-cyber-biden-exclusive/exclusive-russian-state-hackers-suspected-in-targeting-biden-campaign-firm-sources-idUSKBN2610I4)
25 [idUSKBN2610I4](https://www.reuters.com/article/us-usa-election-cyber-biden-exclusive/exclusive-russian-state-hackers-suspected-in-targeting-biden-campaign-firm-sources-idUSKBN2610I4).

26 44. Padilla’s contract award to SKDK raised bipartisan ire, for different
27 reasons.

28 //

1 45. Congressional and State Republicans questioned the appropriateness of
2 SKDK, which publicly boasted its involvement and support for one of the presidential
3 candidates on the ballot, spending taxpayer dollars to create and administer a “non-
4 partisan” voter information campaign at the behest of a partisan Democrat public
5 official.

6 46. Additionally, at the time of the award, Padilla was reportedly already
7 under consideration to fill then Vice-Presidential candidate Kamala Harris’s
8 California Senate seat, should Biden/Harris win the presidential Election. See Bee
9 Editorial Board, If Gavin Newsom picks Alex Padilla for the U.S. Senate, who owns
10 his \$34 million mess?, (December 17, 2020)
11 <https://www.sacbee.com/opinion/editorials/article247894900.html>.

12 47. Padilla’s considerable investment of taxpayer dollars to a Biden-ticket
13 associated firm, when he presumably stood to personally benefit from that ticket’s
14 elevation to higher office, smacked of a conflict of interest. *Id.*

15 48. Further, Fabian Núñez, former Assembly Democratic speaker and partner
16 at losing bidder Mercury Public Affairs, also raised significant questions regarding the
17 contract award. Emily Hoeven, Will state stick ‘Team Biden’ firm with \$35 million tab
18 after Yee balks at Padilla vote contract?, CALMATTERS.ORG (November 23, 2020),
19 [https://calmatters.org/politics/2020/11/biden-firm-california-vote-contract-padilla-](https://calmatters.org/politics/2020/11/biden-firm-california-vote-contract-padilla-yee/)
20 [yee/](https://calmatters.org/politics/2020/11/biden-firm-california-vote-contract-padilla-yee/).

21 49. Núñez filed a formal protest with the Secretary of State stating SKDK’s
22 proposal contained “material violations” that led to SKDK having a “significant and
23 profound unfair advantage in winning the work.” *Id.*

24 50. Núñez requested the Secretary of State administer “[a] fair bidding
25 process in which all responsible bidders are evaluated by the exact same rules [as] the
26 public and all bidders expect.” *Id.*

27 //

28 //

1 51. Padilla’s office rejected Núñez’s protest on Sept. 1, stating that “common
2 procedures or practices applicable to competitive bid agreements ... do not apply for
3 the process used for an emergency contract.” *Id.*

4 52. In addition to a suspect process, Padilla awarded this contract despite
5 having no budgetary authority for it.

6 53. Padilla’s lack of budgetary authority to award the contract led California
7 State Controller Betty Yee to reject paying SKDK in a public and drawn-out battle over
8 the state’s budgetary authority. Associated Press, California lawmakers ok payment for
9 voter outreach campaign, FOX 40 (February 23, 2021, 9:21 AM)
10 [https://fox40.com/news/california-connection/california-lawmakers-ok-payment-for-](https://fox40.com/news/california-connection/california-lawmakers-ok-payment-for-voter-outreach-campaign/)
11 [voter-outreach-campaign/](https://fox40.com/news/california-connection/california-lawmakers-ok-payment-for-voter-outreach-campaign/).

12 54. SKDK did not receive payment until February 2021, after Padilla’s
13 elevation to be California’s next Senator. *Id.*

14 55. In February 2021, by a party line vote, the California legislature agreed to
15 pay Padilla’s past due bills to SKDK. *Id.*

16 56. While the controversy over the contract raged, SKDK rapidly went to
17 work as a hatchet for hire to target Padilla’s political enemies, relabeling even
18 innocuous speech that criticized Padilla’s handling of election administration as “false”
19 and “dangerous” attempts at voter suppression and voter fraud.

20 57. Using state funds, SKDK created political hit lists of disfavored speech,
21 which Defendants called a “Misinformation Daily Briefing.”

22 58. These “Misinformation Daily Briefings” were sent via email to
23 Defendants Paula Valle Castañon, Jenna Dresner, Sam Mahood, and Akilah Jones at
24 the California Secretary of State’s communications office. A true and correct copy of
25 one such “Misinformation Daily Briefing” from November 13, 2020, is attached to this
26 complaint as Exhibit 6.

27 59. The OEC curated the “misinformation” contained in the misinformation
28 daily briefings for submission to social media companies.

1 60. The OEC reported “misinformation” to social media companies directly.

2 61. The OEC also reported “misinformation” to social media companies
3 through NASS.

4 62. Alex Padilla was proud of the OEC’s speech-censoring activities and
5 track record, as was NASS.

6 63. NASS has an annual award called the Innovation, Dedication, Excellence
7 & Achievement in Service (“IDEAS”) award, recognizing “significant state
8 contributions to the mission of NASS.”

9 64. The California Secretary of State’s office won NASS’s 2020 award for
10 the OEC’s work. Specifically noted in OEC’s IDEAS award application was the
11 following:

12 The Office of Election Cybersecurity created VoteSure, which was a first-of-its-kind public education initiative to promote
13 trusted, accurate, and official sources of election information on Facebook, Instagram, and Twitter. The goal of
14 VoteSure was to increase voter awareness about election misinformation online and provide official, trusted election
15 resources.

16 ...

17 Election security continues to be a top priority for the Secretary of State’s office, and we are continuing to work around the
18 clock to protect the integrity of our systems ahead of Election 2020 and to combat misinformation through our Office of
19 Election Cybersecurity.

20 ...

21 The Office of Election Cybersecurity discovered nearly 300 erroneous or misleading social media posts that were
22 identified and forwarded to Facebook and Twitter to review and 98 percent of those posts were

23 promptly removed for violating the respective social media company’s community standards.
24
25
26
27
28

65. Alex Padilla also stated his support for the OEC’s speech-censoring activities in response to receiving the award, touting the initiative’s “proactive social media monitoring”:

We worked in partnership with social media platforms to develop more efficient reporting procedures for potential misinformation. Misinformation identified by our office or voters was promptly reviewed and, in most cases, removed by the social media platforms.

A true and correct copy of the OEC’s NASS 2020 IDEAs award submission and NASS’s press release announcing presentation of the award are attached as Exhibits 7 and 8.

66. Defendants’ carefully crafted propaganda campaign, or as they called it, “national narrative,” suppressed the protected speech of citizens who might seek greater government accountability or ask questions regarding election processes.

67. This self-serving “national narrative,” conveniently, also bolstered and protected certain Defendants’ political fortunes.

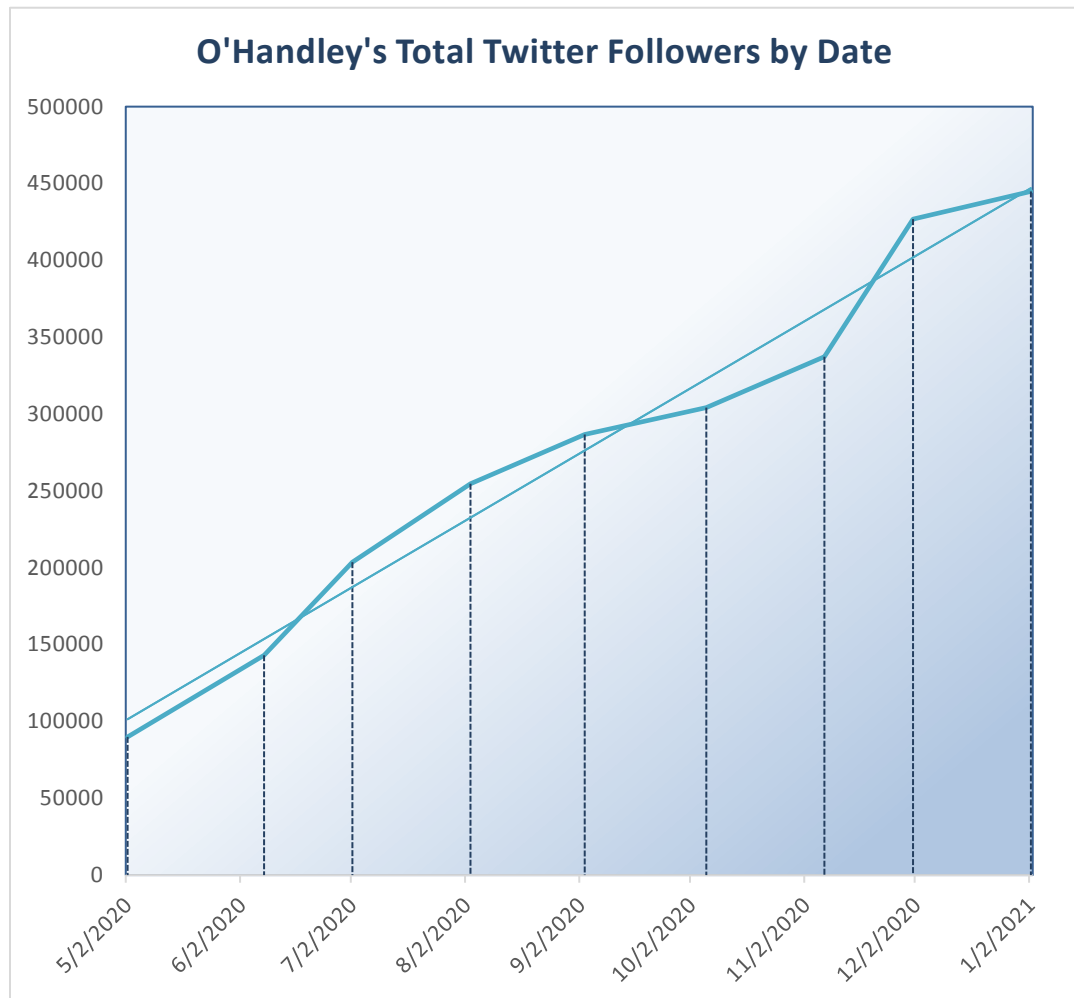
68. The “national narrative” advanced by the California censorship scheme included supporting the victory of SKDK’s client Joe Biden, the elevation of California Senator Kamala Harris to the Vice Presidency, and creating an opening for Padilla himself to be elevated to the position of United States Senator from California. Padilla’s “one simple trick” of awarding an ultra vires censorship contract to a political ally, created a Rube-Goldberg-like contraption catapulting him to Washington, D.C.

69. Mr. O’Handley, under the social media handle “DC_Draino,” was one of the many speakers targeted by Defendants for his speech about the election, supposedly too dangerous for a gullible public to be allowed to read.

70. Mr. O’Handley has a law degree from the University of Chicago Law School and is licensed to practice law in the state of California. After six-plus years practicing corporate and entertainment law, Mr. O’Handley left private practice in order to better utilize his legal education in defense of liberty and constitutional ideals.

1 His primary efforts focus on social media postings, public speaking at colleges and
2 political conferences, and being a political commentator. As one measure of his
3 influence, he has had over 75 national news network appearances in the last year and
4 half. Mr. O’Handley’s combined social media following across all his accounts
5 currently reaches over 3 million people. He was invited to the White House social
6 media summit in 2019, which focused, ironically, on the censorship of conservative
7 voices on social media.

8 71. By the end of November 2020, Mr. O’Handley had approximately
9 420,000 Twitter followers. Just six months prior in May 2020, Mr. O’Handley had
10 approximately 89,000 Twitter followers, meaning Mr. O’Handley had over a 371%
11 increase in followers in the lead up to the 2020 election and in the following weeks as
12 votes were counted and state legislatures certified the electoral college.



72. Mr. O’Handley authored a November 12, 2020, Twitter post stating:



(Hereinafter, the “Post”).

73. Mr. O’Handley’s Post expressed an opinion widely held by California voters. An October 2020 poll by Berkeley’s Institute of Government Studies released found that four in ten Californians “express[ed] skepticism that [the 2020] presidential election [would] be conducted in a way that’s fair and open.”

74. Despite the Post’s expression of Mr. O’Handley’s personal opinion regarding the need for greater accountability in election processes—core political speech directly questioning Padilla’s administration of and fitness for his political office—SKDK labeled the Post as “misinformation,” and flagged the Post for the OEC to potentially target with its broad government powers:

To: Valle, Paula [REDACTED]; Dresner, Jenna [REDACTED]; Mahood, Sam [REDACTED]; Jones, Akilah [REDACTED]
Cc: Heather Wilson [REDACTED]; Emily Campbell [REDACTED]; Jason Rosenbaum [REDACTED]; Iania Mercado [REDACTED]; Grace Gill [REDACTED]
Julia Schechter [REDACTED]
From: Zeke Sandoval [REDACTED]
Sent: Fri 11/13/2020 4:43:28 PM (UTC-08:00)
Subject: Misinformation Daily Briefing: 11/13

@DC_Draino tweeted, "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."

75. The OEC, following the recommendation of the Democrat operatives at SKDK, flagged the Post as “Case# 0180994675” under the indicator of “voter fraud,” and color coded it as an “orange” level threat in internal OEC documents. Upon information and belief, an orange threat level indicates moderately problematic speech between yellow and red.

76. On November 17, 2020, at 12:31 PM, a Secretary of State agent or staff member sent Twitter the following message regarding Mr. O’Handley’s Post:

Case# 0180994675: partner_election [ref:00DA0000000K0 A8.5004w0000225CN h:ref]	11/17/20	12:31 PM	Hi, We wanted to flag this Twitter post: https://twitter.com/DC_Draino/status/1327073866578096129 From user @DC_Draino. In this post user claims California 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.
--	----------	----------	--

77. Shortly after Padilla’s agent or staff member “flagged” Mr. O’Handley’s post to Twitter, Twitter subsequently appended commentary asserting that Mr. O’Handley’s claim about election fraud was disputed. A true and correct copy of OEC’s comments, as obtained through public record request, is attached to this complaint as Exhibit 9.

78. Twitter then added a “strike” to Mr. O’Handley’s account.

79. Twitter utilizes a strike system, whereby users incurring “strikes” face progressive penalties, culminating in removal from Twitter altogether after five strikes.

80. The OEC tracked Twitter’s actions on internal spreadsheets and noted that Twitter had acted upon the request to censor Mr. O’Handley’s speech.

81. Prior to OEC requesting Twitter censor the Post, Twitter had never before suspended Mr. O’Handley’s account or given him any strikes. He suddenly became a target of Twitter’s speech police, at the behest of Defendants.

//

1 82. Between November 2020 and January 2021, Mr. O’Handley’s Twitter
2 following continued to grow. By January 2021, Mr. O’Handley had over 444,000
3 Twitter followers.

4 83. During this time period, Mr. O’Handley was far from the only speaker on
5 Twitter suggesting the need for an audit or the existence of voter fraud in the aftermath
6 of the 2020 election. Countless individuals suggesting the need for audits, including
7 both Democrat and Republican voices upset at perceived problems. Numerous
8 commentators, appearing to support Democrats, voiced their opinion of a need to audit
9 results in conservative areas where Republicans fared better in down ballot races than
10 expected. Yet, Defendants focused their speech censorship efforts on conservative
11 requests for transparency in election processes rather than the same calls from self-
12 identified political liberals.

13 84. On January 18, 2021, Mr. O’Handley posted the following tweet, for
14 which Twitter gave Mr. O’Handley a strike.



85. On January 21, 2021, Mr. O’Handley posted another Tweet, for which Twitter gave Mr. O’Handley a strike.



1 86. On January 22, 2021, Mr. O’Handley suggested via Tweet that the
2 government consider facilitating a 9/11-style commission to study the 2020 election,
3 stating it is an “emergency” issue when half the country stops believing in the integrity
4 of the vote. Twitter again gave Mr. O’Handley a strike and locked his account for seven
5 days, stating the Tweet included a claim of election fraud which was disputed.



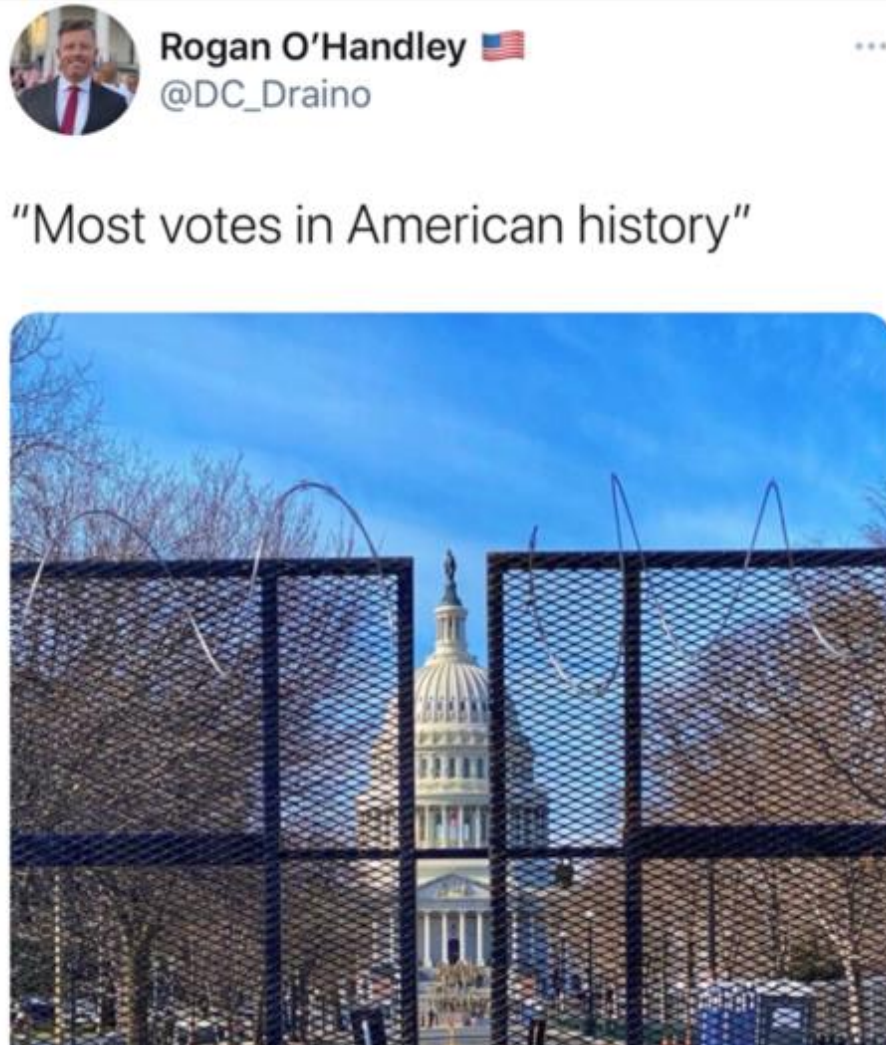
Rogan O’Handley 🇺🇸
@DC_Draino

11
12 How about a 9/11 commission-style
13 report on what the hell just happened
14 this past election?!

15
16 When half our country stops believing
17 in the integrity of our vote, that’s an
18 *emergency* issue

19
20 ⚠️ This claim of election fraud is disputed,
21 and this Tweet can’t be replied to,
22 Retweeted, or liked due to a risk of violence >

87. On February 22, 2021, Mr. O’Handley Tweeted the following:



1 88. In response, Twitter permanently suspended Mr. O’Handley’s account
2 stating:



5 Hello,

6
7 Your account, DC_Draino has been
8 suspended for violating the [Twitter Rules](#).

9 Specifically, for:

10
11 **Violating our rules about [election](#)**
12 **[integrity](#).**

13 You may not use Twitter’s services for the
14 purpose of manipulating or interfering in
15 elections. This includes posting or sharing
16 content that may suppress voter turnout or
mislead people about when, where, or how
to vote.

17 89. Twitter never elaborated on how Mr. O’Handley’s five-word Tweet and
18 photograph of the U.S. Capitol (incidentally, Mr. Padilla’s new workplace)—which
19 was posted well after the 2020 election had been certified and a new President installed
20 in office—manipulated or interfered with an election, suppressed voter turnout, or
21 misled people about when, where, or how to vote. Indeed, at the time of the post, the
22 next national general election was nearly two years away.

23 90. Twitter serves as the primary social channel for political commentary and
24 news in American society at present.

25 91. As a rising political commentator, Twitter’s ban has had a direct and
26 detrimental impact on Mr. O’Handley’s ability to make a living in his chosen
27 profession.

28 92. In January 2021, O’Handley had well over 440,000 followers on Twitter.

1 93. O’Handley’s reach, which was growing exponentially at the time of his
2 permanent ban, had garnered him paid media contract offers, numerous media
3 appearances, paid speaking opportunities, valuable professional networking,
4 endorsements, and advertising dollars.

5 94. Mr. O’Handley lost his platform to communicate with his followers,
6 irreparably damaging his business, which depends on the reach of his audience for
7 revenue.

8 95. Asking to audit an election to protect the integrity of elections is not “voter
9 fraud.” It is a regular practice of election administration.

10 96. Suggesting the country consider a non-partisan commission to study the
11 election in an attempt to restore the country’s trust in the integrity of the voting process
12 is not a factual claim, and certainly not one that includes a risk of violence.

13 97. The statement “Most votes in American history” is a true fact about the
14 2020 presidential election.

15 98. Truthful speech and opinion about elections and elected officials has been
16 protected by the First Amendment since our nation’s founding. The right to criticize
17 the government is the basis upon which this country was founded. Yet Defendants
18 targeted Mr. O’Handley’s speech for censorship because of his criticism of the
19 government, a direct affront to our constitutional ideals.

20 99. Upon information and belief, discovery will show Twitter’s stated reasons
21 for suspending Mr. O’Handley were pretextual. Twitter’s real reasons for suspending
22 Mr. O’Handley do not stem from a violation of Twitter’s terms of service, but from the
23 content of his speech raising concerns about election administration and integrity,
24 specifically concerns related to the work of then-California Secretary of State Alex
25 Padilla. The trigger for Twitter’s censorship of Mr. O’Handley was its coordination
26 and conspiracy with other Defendants to silence the protected speech of many
27 Americans.

28 //

100. Defendants’ government censorship of speech seeking to hold elected officials accountable for the exercise of their office is anathema to the Constitution. It strikes directly at the heart of the First Amendment.

CLAIMS

First Claim for Relief

First Amendment – Free Speech (42 U.S.C. § 1983)

(By Plaintiff Against All Defendants)

101. Mr. O’Handley incorporates by reference and re-alleges herein all Paragraphs above.

102. California Election Code § 10.5, as-applied by Defendants, violates the Free Speech clause of the First Amendment.

103. Defendants also used California Election Code § 10.5 to retaliate against Mr. O’Handley for his speech.

104. Political speech is core First Amendment speech, critical to the functioning of our republic.

105. Political speech rests on the highest rung of the hierarchy of First Amendment values.

106. Defendants weaponized California Election Code § 10.5 and the OEC to censor Plaintiff’s political speech.

107. State action designed to retaliate against and chill political expression strikes at the heart of the First Amendment.

108. Defendants’ actions directly abridged Mr. O’Handley’s protected political speech.

109. Defendants jointly acted in concert to abridge Mr. O’Handley’s freedom of speech and deprive Mr. O’Handley of his First Amendment rights.

110. Defendants Twitter, SKDK, and NASS willfully and cooperatively participated in the government Defendants’ efforts to censor Mr. O’Handley’s political speech.

1 111. Defendants Alex Padilla, Paula Valle Castañon, Jenna Dresner, Sam
2 Mahood, Akilah Jones deprived Mr. O’Handley of his First Amendment free speech
3 rights acting under color of state law, and Mr. O’Handley’s free speech rights were
4 clearly established at the time of Defendants’ speech chilling actions.

5 112. Defendants Alex Padilla, Paula Valle Castañon, Jenna Dresner, Sam
6 Mahood, Akilah Jones, acting in their official capacities, took action, jointly with
7 SKDK, Twitter, and NASS, against Mr. O’Handley with the intent to retaliate against,
8 obstruct, or chill Mr. O’Handley’s First Amendment rights.

9 113. Mr. O’Handley engaged in constitutionally protected activity through his
10 speech questioning the conduct of elections and the actions of elected officials.

11 114. Defendants targeted and censored Mr. O’Handley’s speech.

12 115. Defendants’ actions would chill a person of ordinary firmness from
13 continuing to engage in protected activity.

14 116. The protected activity, Mr. O’Handley’s speech which Defendants found
15 objectionable, was a substantial motivating factor in Defendants’ decision to censor
16 Mr. O’Handley’s speech.

17 117. Defendants’ speech-chilling actions specifically and objectively infringed
18 Mr. O’Handley’s speech rights under the United States Constitution.

19 118. There was a clear nexus between Defendants’ actions and the intent to
20 chill Mr. O’Handley’s speech.

21 119. Mr. O’Handley suffered economic and reputational injuries, among
22 others, as a result.

23 120. Defendants’ restriction of Mr. O’Handley’s speech was content-based.

24 121. Defendants had no compelling state interest for that content-based
25 restriction.

26 122. Defendants’ blanket speech restriction was not narrowly tailored.

27 //

28 //

1 132. Mr. O’Handley’s speech did not interfere with Twitter’s normal business
2 operations.

3 133. Twitter is an essential and invaluable forum for the rights of free speech
4 and petition.

5 134. Twitter, therefore, may not prohibit expressive activity which impinges
6 on constitutional rights.

7 135. Quashing Mr. O’Handley’s speech criticizing election processes and
8 elected officials violates Mr. O’Handley’s liberty of speech rights under the California
9 Constitution.

10 136. Mr. O’Handley has no adequate remedy at law and will suffer serious and
11 irreparable harm to his constitutional rights unless Defendants are enjoined.

12 137. Mr. O’Handley finds it necessary to engage the services of private counsel
13 to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of
14 attorney fees and costs pursuant to California Code of Civil Procedure Section 1021.5.

15 **Third Claim for Relief**

16 **Fourteenth Amendment - Equal Protection Discrimination (42 U.S.C. § 1983)**

17 **(By Mr. O’Handley Against All Defendants)**

18 138. Mr. O’Handley incorporates by reference and re-alleges herein all
19 Paragraphs above.

20 139. Defendants acted to censor Mr. O’Handley’s speech with discriminatory
21 intent based on the content of his speech.

22 140. Defendants’ actions bear no rational relation to a legitimate end as
23 Defendants’ conduct here was malicious, irrational, or plainly arbitrary.

24 141. Even if Defendants did have a rational basis for their acts, their alleged
25 rational basis was a pretext for an impermissible motive.

26 142. Defendants discriminatorily enforced the statute against Mr. O’Handley
27 based on his viewpoint.

28 143. Defendants’ enforcement had a discriminatory effect.

1 144. Defendants were motivated by a discriminatory purpose.

2 145. Similarly situated individuals were not censored for their speech.

3 146. Mr. O’Handley has no adequate remedy at law and will suffer serious and
4 irreparable harm to his constitutional rights unless Defendants are enjoined from
5 violating his constitutional rights.

6 147. Pursuant to 42 U.S.C. §§ 1983 and 1988, Mr. O’Handley is entitled to
7 declaratory relief and temporary, preliminary, and permanent injunctive relief.

8 148. Mr. O’Handley finds it necessary to engage the services of private counsel
9 to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of
10 attorneys’ fees pursuant to 42 U.S.C. § 1988.

11 **Fourth Claim for Relief**

12 **Fourteenth Amendment - Due Process Clause (42 U.S.C. § 1983)**

13 **(By Mr. O’Handley Against Defendants California Secretary of State Shirley N.**
14 **Weber in her official capacity, SKDK, Twitter, Alex Padilla, Paula Valle**
15 **Castañon, Jenna Dresner, Sam Mahood, and Akilah Jones)**

16 149. Mr. O’Handley incorporates by reference and re-alleges herein all
17 Paragraphs above.

18 150. Mr. O’Handley had a property interest in pursuing his occupation as a
19 Twitter influencer and commentator.

20 151. Mr. O’Handley also had a recognized protected interest in his business
21 goodwill.

22 152. The California Secretary of State, SKDK, Alex Padilla, Paula Valle
23 Castañon, Jenna Dresner, Sam Mahood, and Akilah Jones set in motion a series of acts
24 which they knew or reasonably should have known would cause Twitter to inflict the
25 constitutional injury of depriving Plaintiff of his occupation and taking the business
26 goodwill he had garnered through his Twitter account.

27 153. OES actions intentionally solicited Twitter to suspend Mr. O’Handley’s
28 account.

1 154. Some kind of hearing is required before depriving Mr. O’Handley either
2 of his occupation or his property interest in his business goodwill.

3 155. Mr. O’Handley was not given the opportunity to be heard at a meaningful
4 time and in a meaningful manner.

5 156. Mr. O’Handley has no adequate remedy at law and will suffer serious and
6 irreparable harm to his constitutional rights unless Defendants are enjoined from
7 violating his constitutional rights.

8 157. Pursuant to 42 U.S.C. §§ 1983 and 1988, Mr. O’Handley is entitled to
9 declaratory relief and temporary, preliminary, and permanent injunctive relief.

10 158. Mr. O’Handley finds it necessary to engage the services of private
11 counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an
12 award of attorneys’ fees pursuant to 42 U.S.C. § 1988.

13
14 **Fifth Claim for Relief**

15 **Fourteenth Amendment – Void for Vagueness (42 U.S.C. § 1983)**

16 **(By Mr. O’Handley Against Defendant California Secretary of State**

17 **Shirley N. Weber in her official capacity and Defendants Alex Padilla, Paula**

18 **Valle Castañon, Jenna Dresner, Sam Mahood, and Akilah Jones**

19 **in their personal capacities)**

20 159. Mr. O’Handley incorporates by reference and re-alleges herein all
21 Paragraphs above.

22 160. Defendants’ enforcement of California Elections Code §10.5 violates the
23 Due Process Clause of the Fourteenth Amendment as-applied to Mr. O’Handley.

24 161. Mr. O’Handley should not have been punished for behavior he could not
25 have known allegedly violated the law.

26 162. California Elections Code §10.5 is impermissibly vague because it fails
27 to provide a reasonable opportunity to know what conduct is prohibited or is so
28 indefinite as to allow arbitrary and discriminatory enforcement.

//

1 163. This statute is capable of, and did in fact, reach expression sheltered by
2 the First Amendment, therefore requiring greater specificity.

3 164. Mr. O’Handley has no adequate remedy at law and will suffer serious and
4 irreparable harm to his constitutional rights unless Defendants are enjoined from
5 violating his constitutional rights.

6 165. Pursuant to 42 U.S.C. §§ 1983 and 1988, Mr. O’Handley is entitled to
7 declaratory relief and temporary, preliminary, and permanent injunctive relief.

8 166. Mr. O’Handley finds it necessary to engage the services of private counsel
9 to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of
10 attorneys’ fees pursuant to 42 U.S.C. § 1988.

11
12 **Sixth Claim for Relief**

13 **Civil Conspiracy to Interfere with Civil Rights (42 U.S.C. § 1985)**

14 **(By Mr. O’Handley Against All Defendants)**

15 167. Mr. O’Handley incorporates by reference and re-alleges herein all
16 Paragraphs above.

17 168. Defendants had a meeting of the minds to violate the constitutional
18 rights of individuals who questioned election processes and outcomes — or in
19 Defendants’ words, spread “misinformation.”

20 169. Defendants, through agreements and processes they jointly created to
21 seek out and swiftly censor speech with which they disagreed, intended to
22 accomplish the unlawful objective of abridging these individuals’ freedom of speech.

23 170. SKDK, Twitter, and NASS joined with the state agents to jointly deprive
24 Mr. O’Handley of his rights.

25 171. Each conspiracy participant shared the common objective of the
26 conspiracy, to censor speech which they found objectionable or “misleading.”

27 172. As a result of their agreement, Defendants actually deprived Mr.
28 O’Handley of his First and Fourteenth Amendment rights, as described herein.

//

1 173. Mr. O’Handley suffered economic and reputational injuries, among
2 others, as a result.

3 174. Mr. O’Handley has no adequate remedy at law and will suffer serious
4 and irreparable harm to his constitutional rights unless Defendants are enjoined from
5 violating his constitutional rights.

6 175. Pursuant to 42 U.S.C. §§ 1983, 1985, and 1988, Mr. O’Handley is
7 entitled to declaratory relief and temporary, preliminary, and permanent injunctive
8 relief.

9 176. Mr. O’Handley finds it necessary to engage the services of private
10 counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an
11 award of attorneys’ fees pursuant to 42 U.S.C. § 1988.

12 PRAYER FOR RELIEF

13 WHEREFORE, Mr. O’Handley prays this Court grant the relief requested
14 herein, specifically that the Court render the following judgment in Mr. O’Handley’s
15 favor and against Defendants:

16 i. Declaratory Judgment: For entry of a Declaratory Judgment that
17 California Election Code § 10.5, as applied to Mr. O’Handley, violates Mr.
18 O’Handley’s state and federal constitutional rights to free speech, equal protection,
19 and due process;

20 ii. Injunctive Relief: For entry of a Permanent Injunction stating that the
21 Secretary of State and the OEC may not censor speech, work to take down the speech
22 of private speakers, selectively enforce speech restrictions, or discriminate against
23 those who seek to hold the current office holder accountable for perceived defects in
24 election administration;

25 iii. Damages: general, nominal, statutory (pursuant to Cal. Civ. Code § 52)
26 and exemplary damages, in an amount to be determined at trial;

27 iv. Attorneys’ fees and costs: awarded pursuant to 42 U.S.C. § 1988;
28 California Code of Civil Procedure Section 1021.5; Cal. Civ. Code § 52; and

v. Pursuant to 42 U.S.C. §§ 1983, 1985, and 1988, Plaintiff is entitled to declaratory relief; temporary, preliminary, and permanent injunctive relief invalidating and restraining Defendants' enforcement of California Election Code § 10.5; damages from the businesses and persons sued in their personal capacities; and attorneys' fees.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands trial by jury in this action of all issues so triable.

DHILLON LAW GROUP INC.

Date: June 17, 2021

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Attorneys for Plaintiff ROGAN
O'HANDLEY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA SAN FRANCISCO DIVISION

**Form 1. Notice of Appeal from a Judgment or Order of a
United States District Court**

U.S. District Court case number:

Notice is hereby given that the appellant(s) listed below hereby appeal(s) to the United States Court of Appeals for the Ninth Circuit.

Date case was first filed in U.S. District Court:

Date of judgment or order you are appealing:

Docket entry number of judgment or order you are appealing:

Fee paid for appeal? (*appeal fees are paid at the U.S. District Court*)

☒ Yes ☐ No ☐ IFP was granted by U.S. District Court

List all Appellants (*List each party filing the appeal. Do not use "et al." or other abbreviations.*)

Is this a cross-appeal? ☐ Yes ☒ No

If yes, what is the first appeal case number?

Was there a previous appeal in this case? ☐ Yes ☒ No

If yes, what is the prior appeal case number?

Your mailing address (if pro se):

City: State: Zip Code:

Prisoner Inmate or A Number (if applicable):

Signature



Date

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 6. Representation Statement

Appellant(s) (List *each* party filing the appeal, do not use “et al.” or other abbreviations.)

Name(s) of party/parties:

Rogan O'Handley

Name(s) of counsel (if any):

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Is counsel registered for Electronic Filing in the 9th Circuit? ☒ Yes ☐ No

Appellee(s) (List only the names of parties and counsel who will oppose you on appeal. List separately represented parties separately.)

Name(s) of party/parties:

Shirley N. Weber, in her official capacity as California Secretary of State.

Name(s) of counsel (if any):

Rob Bonta, Attorney General of California; Kristin A. Liska, Deputy Attorney General; Anna Ferrari, Deputy Attorney General

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Email(s): Anna.Ferrari@doj.ca.gov

To list additional parties and/or counsel, use next page.

Continued list of parties and counsel: *(attach additional pages as necessary)*

Appellants

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Is counsel registered for Electronic Filing in the 9th Circuit? ☒ Yes ☐ No

Appellees

Name(s) of party/parties:

Twitter, Inc.

Name(s) of counsel (if any):

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Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

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ADRMOP,APPEAL,CLOSED

**U.S. District Court
California Northern District (San Francisco)
CIVIL DOCKET FOR CASE #: 3:21-cv-07063-CRB**

Rogan O Handley v. Alex Padilla et al
Assigned to: Judge Charles R. Breyer
Case in other court: US Court of appeals for the 9th circuit, 22-15071
California Central, 2:21-cv-04954
Cause: 28:1983

Date Filed: 09/14/2021
Date Terminated: 01/10/2022
Jury Demand: Plaintiff
Nature of Suit: 950 Constitutional - State Statute
Jurisdiction: Federal Question

Plaintiff

Rogan O Handley

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V.

Defendant

Alex Padilla
in his personal capacity

represented by **Anna Theresa Ferrari**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

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a Delaware company

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Defendant

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in her personal capacity

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Defendant

Jenna Dresner
in her personal capacity

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Defendant

Sam Mahood
in his personal capacity

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Defendant

Akilah Jones
in her personal capacity

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Defendant

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Defendant

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Defendant

National Association of Secretaries of State
a professional nonprofit organization

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ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
06/17/2021	1	COMPLAINT Receipt No: ACACDC-31487145 - Fee: \$402, filed by Plaintiff Rogan O'Handley. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9) (Attorney Harmeet K. Dhillon added to party Rogan O'Handley(pty:pla))(Dhillon, Harmeet) (Entered: 06/17/2021)
06/17/2021	2	CIVIL COVER SHEET filed by Plaintiff Rogan O'Handley. (Dhillon, Harmeet) (Entered: 06/17/2021)
06/17/2021	3	NOTICE of Interested Parties filed by Plaintiff Rogan O'Handley, (Dhillon, Harmeet) (Entered: 06/17/2021)
06/21/2021	4	NOTICE OF ASSIGNMENT to District Judge Michael W. Fitzgerald and Magistrate Judge Patricia Donahue. (ghap) (Entered: 06/21/2021)
06/21/2021	5	NOTICE TO PARTIES OF COURT-DIRECTED ADR PROGRAM filed. (ghap) (Entered: 06/21/2021)
06/21/2021	6	NOTICE OF PRO HAC VICE APPLICATION DUE for Non-Resident Attorney Ronald D Coleman on behalf on Plaintiff. A document recently filed in this case lists you as an out-of-state attorney of record. However, the Court has not been able to locate any record that you are admitted to the Bar of this Court, and you have not filed an application to appear Pro Hac Vice in this case. Accordingly, within 5 business days of the date of this notice, you must either (1) have your local counsel file an application to appear Pro Hac Vice (Form G-64) and pay the applicable fee, or (2) complete the next section of this form and return it to the court at cacd_attyadm@cacd.uscourts.gov . You have been removed as counsel of record from the docket in this case, and you will not be added back to the docket until your Pro Hac Vice status has been resolved. (ghap) (Entered: 06/21/2021)
06/21/2021	7	NOTICE OF PRO HAC VICE APPLICATION DUE for Non-Resident Attorney Mark E. Trammell on behalf on Plaintiff. A document recently filed in this case lists you as an out-of-state attorney of record. However, the Court has not been able to locate any record that you are admitted to the Bar of this Court, and you have not filed an application to appear Pro Hac Vice in this case. Accordingly, within 5 business days of the date of this notice, you must either (1) have your local counsel file an application to appear Pro Hac Vice (Form G-64) and pay the applicable fee, or (2) complete the next section of this form and return it to the court at cacd_attyadm@cacd.uscourts.gov . You have been removed as counsel of record from the docket in this case, and you will not be added back to the docket until your Pro Hac Vice status has been resolved. (ghap) (Entered: 06/21/2021)
06/22/2021	8	ORDER TO REASSIGN CASE due to self-recusal pursuant to General Order 21-01 by Judge Michael W. Fitzgerald. Case transferred from Judge Michael W. Fitzgerald to the calendar of Judge Ronald S.W. Lew for all further proceedings. Case number now reads as 2:21-cv-04954 RSWL(PDx). (rn) (Entered: 06/22/2021)
06/22/2021	9	ORDER RETURNING CASE FOR REASSIGNMENT by Judge Ronald S.W. Lew. ORDER case returned to the Clerk for random reassignment pursuant to General Order 21-01. Case randomly reassigned from Judge Ronald S.W. Lew to Judge Consuelo B. Marshall for all further proceedings. The case number will now reflect the initials of the transferee Judge 2:21-cv-04954 CBM(PDx). (rn) (Entered: 06/23/2021)
06/23/2021	10	Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening), 1 , Civil Cover Sheet (CV-71) 2 , Notice to Parties of Court-Directed ADR Program (ADR-8)

		- optional html form 5 , Certificate/Notice of Interested Parties 3 filed by Plaintiff Rogan O Handley. (Dhillon, Harmeet) (Entered: 06/23/2021)
06/24/2021	11	21 DAY Summons Issued re Complaint (Attorney Civil Case Opening), 1 as to Defendants Paula Valle Castaon, Jenna Dresner, Akilah Jones, Sam Mahood, National Association of Secretaries of State, Alex Padilla, Skdknickerbocker, LLC, Twitter, Inc., Shirley N. Weber. (et) (Entered: 06/24/2021)
06/29/2021	12	RESPONSE filed by Pro Hac Vice attorney Mark E. Trammell on behalf of Plaintiff Rogan O Handley. RE: Notice of Filing Fee Due. PHV fee N/A. Have requested copies of certificates of standing but have not yet received and request additional time. (lt) (Entered: 06/29/2021)
06/29/2021	13	RESPONSE filed by Pro Hac Vice attorney Ronald D. Coleman on behalf of Plaintiff Rogan O Handley. RE: Notice of Filing Fee Due. PHV fee N/A. Have requested copies of certificates of standing but have not yet received and request additional time. (lt) (Entered: 06/29/2021)
07/01/2021	14	STANDING ORDER upon filing of the complaint by Judge Consuelo B. Marshall. READ THIS ORDER CAREFULLY. It controls this case and may differ in some respects from the Local Rules. (ys) (Entered: 07/01/2021)
07/12/2021	15	NOTICE of Appearance filed by attorney David C Marcus on behalf of Defendant Twitter, Inc. (Attorney David C Marcus added to party Twitter, Inc.(pty:dft))(Marcus, David) (Entered: 07/12/2021)
07/12/2021	16	CORPORATE DISCLOSURE STATEMENT filed by Defendant Twitter, Inc. (Marcus, David) (Entered: 07/12/2021)
07/12/2021	17	STIPULATION Extending Time to Answer the complaint as to Twitter, Inc. answer now due 8/16/2021, re Complaint (Attorney Civil Case Opening), 1 filed by Defendant Twitter, Inc..(Marcus, David) (Entered: 07/12/2021)
07/14/2021	18	NOTICE of Appearance filed by attorney Bruce V Spiva on behalf of Defendant Skdknickerbocker, LLC (Attorney Bruce V Spiva added to party Skdknickerbocker, LLC(pty:dft))(Spiva, Bruce) (Entered: 07/14/2021)
07/14/2021	19	Joint STIPULATION Extending Time to Answer the complaint as to Skdknickerbocker, LLC answer now due 8/16/2021, re Complaint (Attorney Civil Case Opening), 1 filed by Defendant Skdknickerbocker, LLC.(Spiva, Bruce) (Entered: 07/14/2021)
07/16/2021	20	NOTICE of Appearance filed by attorney Lalitha D Madduri on behalf of Defendant Skdknickerbocker, LLC (Attorney Lalitha D Madduri added to party Skdknickerbocker, LLC(pty:dft))(Madduri, Lalitha) (Entered: 07/16/2021)
07/16/2021	21	NOTICE of Change of firm name and address by Lalitha D Madduri attorney for Defendant Skdknickerbocker, LLC. Changing firm name to Perkins Coie LLP and address to 700 Thirteenth St. NW, Suite 800, Washington, DC 20005. Filed by Defendant Skdknickerbocker, LLC. (Madduri, Lalitha) (Entered: 07/16/2021)
07/21/2021	22	WAIVER OF SERVICE Returned Executed filed by Plaintiff Rogan O Handley. upon Sam Mahood waiver sent by Plaintiff on 7/12/2021, answer due 9/10/2021. Waiver of Service signed by Anna Ferrari. (Dhillon, Harmeet) (Entered: 07/21/2021)
07/21/2021	23	WAIVER OF SERVICE Returned Executed filed by Plaintiff Rogan O Handley. upon Paula Valle Castaon waiver sent by Plaintiff on 7/12/2021, answer due 9/10/2021. Waiver of Service signed by Anna Ferrari. (Dhillon, Harmeet) (Entered: 07/21/2021)
07/21/2021	24	WAIVER OF SERVICE Returned Executed filed by Plaintiff Rogan O Handley. upon

		Jenna Dresner waiver sent by Plaintiff on 7/12/2021, answer due 9/10/2021. Waiver of Service signed by Anna Ferrari. (Dhillon, Harmeet) (Entered: 07/21/2021)
07/21/2021	<u>25</u>	WAIVER OF SERVICE Returned Executed filed by Plaintiff Rogan O Handley. upon Alex Padilla waiver sent by Plaintiff on 7/12/2021, answer due 9/10/2021. Waiver of Service signed by Anna Ferrari. (Dhillon, Harmeet) (Entered: 07/21/2021)
07/21/2021	<u>26</u>	WAIVER OF SERVICE Returned Executed filed by Plaintiff Rogan O Handley. upon Akilah Jones waiver sent by Plaintiff on 7/12/2021, answer due 9/10/2021. Waiver of Service signed by Anna Ferrari. (Dhillon, Harmeet) (Entered: 07/21/2021)
07/21/2021	<u>27</u>	WAIVER OF SERVICE Returned Executed filed by Plaintiff Rogan O Handley. upon Shirley N. Weber waiver sent by Plaintiff on 7/12/2021, answer due 9/10/2021. Waiver of Service signed by Anna Ferrari. (Dhillon, Harmeet) (Entered: 07/21/2021)
07/21/2021	<u>28</u>	PROOF OF SERVICE Executed by Plaintiff Rogan O Handley, upon Defendant National Association of Secretaries of State served on 7/8/2021, answer due 7/29/2021. Service of the Summons and Complaint were executed upon Stacy Dodd, Authorized Agent in compliance with Federal Rules of Civil Procedure by personal service.Original Summons NOT returned. (Dhillon, Harmeet) (Entered: 07/21/2021)
07/27/2021	<u>29</u>	STIPULATION Extending Time to Answer the complaint as to National Association of Secretaries of State answer now due 8/30/2021, re Complaint (Attorney Civil Case Opening), <u>1</u> filed by Defendant National Association of Secretaries of State.(Attorney Don Willenburg added to party National Association of Secretaries of State(pty:dft)) (Willenburg, Don) (Entered: 07/27/2021)
08/05/2021	<u>30</u>	STIPULATION for Extension of Time to File filed by Plaintiff Rogan O Handley. (Attachments: # <u>1</u> Proposed Order)(Dhillon, Harmeet) (Entered: 08/05/2021)
08/12/2021	<u>31</u>	ORDER GRANTING STIPULATION TO CONSOLIDATE BRIEFING DEADLINES OF PARTIES, <u>30</u> by Judge Consuelo B. Marshall: IT IS HEREBY ORDERED that: 1. All Defendants shall have until September 10, 2021, to file their initial responsive pleadings and/or dispositive motions; 2. Plaintiff shall have until October 12, 2021, to file his opposition/response to any dispositive motion filed by any Defendant; 3. Defendants shall have until November 1, 2021, to file any reply briefs in support of their respective dispositive motions; and 4. Hearing date for motions shall be heard on November 23, 2021 at 10:00 A.M. IT IS SO ORDERED. (shb) (Entered: 08/13/2021)
09/01/2021	<u>32</u>	Notice of Appearance or Withdrawal of Counsel: for attorney Lalitha D Madduri counsel for Defendant Skdknickerbocker, LLC. Lalitha D. Madduri is no longer counsel of record for the aforementioned party in this case for the reason indicated in the G-123 Notice. Filed by Defendant SKDKnickerbocker, LLC. (Madduri, Lalitha) (Entered: 09/01/2021)
09/09/2021	<u>33</u>	STIPULATION to Transfer Case to US District Court for the Northern District of California filed by Defendant Twitter, Inc.. (Attachments: # <u>1</u> Proposed Order)(Marcus, David) (Entered: 09/09/2021)
09/09/2021	<u>34</u>	STIPULATION for Order to Extend the Parties' Briefing Schedule and Continue the November 23, 2021 Hearing filed by Defendant Twitter, Inc.. (Attachments: # <u>1</u> Declaration of David C. Marcus in Support, # <u>2</u> Proposed Order)(Marcus, David) (Entered: 09/09/2021)
09/10/2021	<u>35</u>	ORDER by Judge Consuelo B. Marshall transferring case to Northern District of California. Original file, certified copy of the transfer order and docket sheet sent electronically. (MD JS-6. Case Terminated.) (shb) (Entered: 09/10/2021)
09/14/2021	<u>36</u>	Case transferred in from District of California Central; Case Number 2:21-cv-04954. Original file certified copy of transfer order and docket sheet received. (Entered: 09/14/2021)

		09/14/2021)
09/14/2021	37	Initial Case Management Scheduling Order with ADR Deadlines: Case Management Statement due by 12/9/2021. Initial Case Management Conference set for 12/16/2021 10:00 AM in San Francisco, Courtroom G, 15th Floor. (cv, COURT STAFF) (Filed on 9/14/2021) (Entered: 09/14/2021)
09/20/2021	38	NOTICE of Appearance by Thomas G. Sprankling <i>on behalf of Defendant Twitter, Inc.</i> (Sprankling, Thomas) (Filed on 9/20/2021) (Entered: 09/20/2021)
09/20/2021	39	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number 0971-16410540.) filed by Twitter Inc.. (Carome, Patrick) (Filed on 9/20/2021) (Entered: 09/20/2021)
09/20/2021	40	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number 0971-16410637.) filed by Twitter Inc.. (Holtzblatt, Ari) (Filed on 9/20/2021) (Entered: 09/20/2021)
09/20/2021	41	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number 0971-16410699.) filed by Twitter Inc.. (Ellsworth, Felicia) (Filed on 9/20/2021) (Entered: 09/20/2021)
09/20/2021	42	STIPULATION WITH PROPOSED ORDER <i>Regarding Schedule for Briefing Motions in Response to the Complaint and for Initial Case Management Activities</i> filed by Twitter Inc.. (Sprankling, Thomas) (Filed on 9/20/2021) (Entered: 09/20/2021)
09/21/2021	43	ORDER by Magistrate Judge Thomas S. Hixson granting 39 Motion for Pro Hac Vice re Patrick J. Carome. (rmm2S, COURT STAFF) (Filed on 9/21/2021) (Entered: 09/21/2021)
09/21/2021	44	ORDER by Magistrate Judge Thomas S. Hixson granting 40 Motion for Pro Hac Vice re Ari Holtzblatt. (rmm2S, COURT STAFF) (Filed on 9/21/2021) (Entered: 09/21/2021)
09/21/2021	45	ORDER by Magistrate Judge Thomas S. Hixson granting 41 Motion for Pro Hac Vice re Felicia H. Ellsworth. (rmm2S, COURT STAFF) (Filed on 9/21/2021) (Entered: 09/21/2021)
09/21/2021	46	CLERKS NOTICE Re Consent or Declination: Plaintiff(s) and Defendant(s) shall file a consent or declination to proceed before a magistrate judge by 9/29/2021. Note that any party is free to withhold consent to proceed before a magistrate judge without adverse substantive consequences. The forms are available at: http://cand.uscourts.gov/civilforms <i>(This is a text-only entry generated by the court. There is no document associated with this entry.)</i> (rmm2S, COURT STAFF) (Filed on 9/21/2021) (Entered: 09/21/2021)
09/27/2021	47	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by Twitter Inc... (Carome, Patrick) (Filed on 9/27/2021) (Entered: 09/27/2021)
09/27/2021	48	CLERK'S NOTICE OF IMPENDING REASSIGNMENT TO A U.S. DISTRICT COURT JUDGE: The Clerk of this Court will now randomly reassign this case to a District Judge because either (1) a party has not consented to the jurisdiction of a Magistrate Judge, or (2) time is of the essence in deciding a pending judicial action for which the necessary consents to Magistrate Judge jurisdiction have not been secured. You will be informed by separate notice of the district judge to whom this case is reassigned.

		<p>ALL HEARING DATES PRESENTLY SCHEDULED BEFORE THE CURRENT MAGISTRATE JUDGE ARE VACATED AND SHOULD BE RE-NOTICED FOR HEARING BEFORE THE JUDGE TO WHOM THIS CASE IS REASSIGNED.</p> <p><i>This is a text only docket entry; there is no document associated with this notice.</i> (rmm2S, COURT STAFF) (Filed on 9/27/2021) (Entered: 09/27/2021)</p>
09/28/2021	<u>49</u>	<p>ORDER REASSIGNING CASE. Case reassigned using a proportionate, random, and blind system pursuant to General Order No. 44 to Judge Charles R. Breyer for all further proceedings. Magistrate Judge Thomas S. Hixson no longer assigned to case, Notice: The assigned judge participates in the Cameras in the Courtroom Pilot Project. See General Order No. 65 and http://cand.uscourts.gov/cameras.. Signed by Clerk on 09/28/2021. (Attachments: # <u>1</u> Notice of Eligibility for Video Recording) (mbcS, COURT STAFF) (Filed on 9/28/2021) (Entered: 09/28/2021)</p>
09/29/2021	<u>50</u>	<p>NOTICE of Appearance by Anna Theresa Ferrari (Ferrari, Anna) (Filed on 9/29/2021) (Entered: 09/29/2021)</p>
09/30/2021	<u>51</u>	<p>ORDER Regarding Schedule for Briefing Motions in Response to the Complaint and for Initial Case Management Activities by Judge Charles R. Breyer: Granting <u>42</u> Stipulation. (lsS, COURT STAFF) (Filed on 9/30/2021) (Entered: 09/30/2021)</p>
10/04/2021	<u>52</u>	<p>STIPULATION WITH PROPOSED ORDER <i>Regarding Page Limits For Motion To Dismiss</i>, filed by Twitter Inc.. (Carome, Patrick) (Filed on 10/4/2021) (Entered: 10/04/2021)</p>
10/04/2021	<u>53</u>	<p>STIPULATION WITH PROPOSED ORDER <i>Regarding Page Limits for Defendant National Association of Secretaries of State's Motion to Dismiss</i> filed by National Association of Secretaries of State. (Wheatley, Christine) (Filed on 10/4/2021) (Entered: 10/04/2021)</p>
10/05/2021	<u>54</u>	<p>ORDER by Judge Charles R. Breyer: Granting <u>52</u> Stipulation. (lsS, COURT STAFF) (Filed on 10/5/2021) (Entered: 10/05/2021)</p>
10/05/2021	<u>55</u>	<p>ORDER REGARDING PAGE LIMITS FOR DEFENDANT NATIONAL ASSOCIATION OF SECRETARIES OF STATES MOTION TO DISMISS by Judge Charles R. Breyer: Granting <u>53</u> Stipulation. (lsS, COURT STAFF) (Filed on 10/5/2021) (Entered: 10/05/2021)</p>
10/05/2021	<u>56</u>	<p>NOTICE of Appearance by Torryn Marie Taylor (Taylor, Torryn) (Filed on 10/5/2021) (Entered: 10/05/2021)</p>
10/05/2021	<u>57</u>	<p>First MOTION to Dismiss filed by SKDKNICKERBOCKER, LLC. Responses due by 11/5/2021. Replies due by 12/1/2021. (Spiva, Bruce) (Filed on 10/5/2021) (Entered: 10/05/2021)</p>
10/05/2021	<u>58</u>	<p>MOTION to Dismiss <i>Plaintiff's Complaint Pursuant to Federal Rule of Court 12(b)(2) and 12(b)(6)</i> filed by National Association of Secretaries of State. Motion Hearing set for 12/16/2021 10:00 AM in San Francisco, Courtroom 06, 17th Floor before Judge Charles R. Breyer. Responses due by 10/19/2021. Replies due by 10/26/2021. (Attachments: # <u>1</u> Declaration of Leslie Reynolds, # <u>2</u> Proposed Order)(Wheatley, Christine) (Filed on 10/5/2021) (Entered: 10/05/2021)</p>
10/05/2021	<u>59</u>	<p>MOTION to Dismiss <i>Complaint</i> filed by Paula Valle Castaon, Jenna Dresner, Akilah Jones, Sam Mahood, Alex Padilla, Shirley N Weber. Motion Hearing set for 12/16/2021 10:00 AM before Judge Charles R. Breyer. Responses due by 11/5/2021. Replies due by 12/1/2021. (Attachments: # <u>1</u> Request for Judicial Notice, # <u>2</u> Proposed Order)(Ferrari, Anna) (Filed on 10/5/2021) (Entered: 10/05/2021)</p>

10/05/2021	60	MOTION to Dismiss filed by Twitter Inc.. Motion Hearing set for 12/16/2021 10:00 AM in San Francisco, Courtroom 06, 17th Floor before Judge Charles R. Breyer. Responses due by 10/19/2021. Replies due by 10/26/2021. (Attachments: # 1 Declaration of Thomas G. Sprankling in Support Thereto, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F, # 8 Proposed Order)(Carome, Patrick) (Filed on 10/5/2021) (Entered: 10/05/2021)
10/05/2021	61	MOTION to Strike <i>Count II</i> , filed by Twitter Inc.. Motion Hearing set for 12/16/2021 10:00 AM in San Francisco, Courtroom 06, 17th Floor before Judge Charles R. Breyer. Responses due by 10/19/2021. Replies due by 10/26/2021. (Attachments: # 1 Declaration of Thomas G. Sprankling in Support Thereto, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F, # 8 Proposed Order)(Carome, Patrick) (Filed on 10/5/2021) (Entered: 10/05/2021)
10/06/2021		Set/Reset Deadlines as to 57 First MOTION to Dismiss. Motion Hearing set for 12/16/2021 at 10:00 AM in San Francisco - Videoconference Only before Judge Charles R. Breyer. (lsS, COURT STAFF) (Filed on 10/6/2021) (Entered: 10/06/2021)
10/06/2021	62	First MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number 0971-16470398.) filed by SKDKNICKERBOCKER, LLC. (Svoboda, Brian) (Filed on 10/6/2021) (Entered: 10/06/2021)
10/08/2021	63	ORDER by Judge Charles R. Breyer: Granting 62 Motion for Pro Hac Vice, Brian Svoboda. (lsS, COURT STAFF) (Filed on 10/8/2021) (Entered: 10/08/2021)
10/28/2021	64	First MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-16562911.) filed by SKDKNICKERBOCKER, LLC. (Command, Stephanie) (Filed on 10/28/2021) (Entered: 10/28/2021)
11/01/2021	65	ORDER by Judge Charles R. Breyer: Granting 64 Motion for Pro Hac Vice, Stephanie Command. (ls, COURT STAFF) (Filed on 11/1/2021) (Entered: 11/01/2021)
11/05/2021	66	OPPOSITION/RESPONSE (re 57 First MOTION to Dismiss) <i>SKDK</i> filed byRogan O Handley. (Attachments: # 1 Proposed Order)(Dhillon, Harmeet) (Filed on 11/5/2021) (Entered: 11/05/2021)
11/05/2021	67	OPPOSITION/RESPONSE (re 58 MOTION to Dismiss <i>Plaintiff's Complaint Pursuant to Federal Rule of Court 12(b)(2) and 12(b)(6)</i>) <i>NASS</i> filed byRogan O Handley. (Attachments: # 1 Proposed Order)(Dhillon, Harmeet) (Filed on 11/5/2021) (Entered: 11/05/2021)
11/05/2021	68	OPPOSITION/RESPONSE (re 59 MOTION to Dismiss <i>Complaint</i>) filed byRogan O Handley. (Attachments: # 1 Proposed Order)(Dhillon, Harmeet) (Filed on 11/5/2021) (Entered: 11/05/2021)
11/05/2021	69	OPPOSITION/RESPONSE (re 60 MOTION to Dismiss) <i>Twitter</i> filed byRogan O Handley. (Attachments: # 1 Proposed Order)(Dhillon, Harmeet) (Filed on 11/5/2021) (Entered: 11/05/2021)
11/05/2021	70	OPPOSITION/RESPONSE (re 61 MOTION to Strike <i>Count II</i> ,) <i>Twitter</i> filed byRogan O Handley. (Attachments: # 1 Proposed Order)(Dhillon, Harmeet) (Filed on 11/5/2021) (Entered: 11/05/2021)
11/08/2021	71	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-16604775.) filed by Rogan O Handley. (Attachments: # 1 Certificate of Good Standing)(Coleman, Ronald) (Filed on 11/8/2021) (Entered: 11/08/2021)
11/09/2021	72	ORDER by Judge Charles R. Breyer: Granting 71 Motion for Pro Hac Vice, Ronald D. Coleman. (ls, COURT STAFF) (Filed on 11/9/2021) (Entered: 11/09/2021)

11/09/2021		<p>Set/Reset Hearing - Motion to Dismiss/Motion to Strike Hearing set for 12/16/2021 at 10:00 AM in San Francisco - Video conference Only before Judge Charles R. Breyer. This proceeding will be held via a Zoom webinar.</p> <p>Webinar Access: All counsel, members of the public, and media may access the webinar information at https://www.cand.uscourts.gov/crb</p> <p>Court Appearances: Advanced notice is required of counsel or parties who wish to be identified by the court as making an appearance or will be participating in the argument at the hearing. A list of names and emails must be sent to the CRD at crbrd@cand.uscourts.gov no later than December 13, 2021 at 3:00 PM PST.</p> <p>General Order 58. Persons granted access to court proceedings held by telephone or videoconference are reminded that photographing, recording, and rebroadcasting of court proceedings, including screenshots or other visual copying of a hearing, is absolutely prohibited.</p> <p>Zoom Guidance and Setup: https://www.cand.uscourts.gov/zoom/.</p> <p>Motion Hearing set for 12/16/2021 10:00 AM in San Francisco, - Videoconference Only before Judge Charles R. Breyer. (ls, COURT STAFF) (Filed on 11/9/2021) (Entered: 11/09/2021)</p>
11/12/2021	73	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-16620221.) filed by Rogan O Handley. (Attachments: # 1 Certificate of Good Standing)(Trammell, Mark) (Filed on 11/12/2021) (Entered: 11/12/2021)
11/16/2021	74	ORDER by Judge Charles R. Breyer: Granting 73 Motion for Pro Hac Vice, Mark E. Trammell. (ls, COURT STAFF) (Filed on 11/16/2021) (Entered: 11/16/2021)
11/17/2021	75	NOTICE of Appearance by Gregory Richard Michael <i>for Plaintiff Rogan O Handley</i> (Michael, Gregory) (Filed on 11/17/2021) (Entered: 11/17/2021)
12/01/2021	76	REPLY (re 58 MOTION to Dismiss <i>Plaintiff's Complaint Pursuant to Federal Rule of Court 12(b)(2) and 12(b)(6)</i>) filed byNational Association of Secretaries of State. (Wheatley, Christine) (Filed on 12/1/2021) (Entered: 12/01/2021)
12/01/2021	77	REPLY (re 57 First MOTION to Dismiss) filed bySKDKNICKERBOCKER, LLC. (Spiva, Bruce) (Filed on 12/1/2021) (Entered: 12/01/2021)
12/01/2021	78	REPLY (re 59 MOTION to Dismiss <i>Complaint</i>) filed byPaula Valle Castaon, Jenna Dresner, Akilah Jones, Sam Mahood, Alex Padilla, Shirley N Weber. (Ferrari, Anna) (Filed on 12/1/2021) (Entered: 12/01/2021)
12/01/2021	79	REPLY (re 60 MOTION to Dismiss) filed byTwitter Inc.. (Carome, Patrick) (Filed on 12/1/2021) (Entered: 12/01/2021)
12/01/2021	80	REPLY (re 61 MOTION to Strike <i>Count II</i> ,) filed byTwitter Inc.. (Carome, Patrick) (Filed on 12/1/2021) (Entered: 12/01/2021)
12/02/2021	81	NOTICE of Appearance by Danielle Serbin (Serbin, Danielle) (Filed on 12/2/2021) (Entered: 12/02/2021)
12/10/2021	82	MOTION for leave to appear in Pro Hac Vice (Filing fee \$ 317, receipt number ACANDC-16707683.) filed by Rogan O Handley. (Attachments: # 1 Certificate of Good Standing)(Dixon, Joshua) (Filed on 12/10/2021) (Entered: 12/10/2021)
12/13/2021	83	ORDER by Judge Charles R. Breyer: Granting 82 Motion for Pro Hac Vice, Joshua Wallace Dixon. (ls, COURT STAFF) (Filed on 12/13/2021) (Entered: 12/13/2021)

12/14/2021	<u>84</u>	NOTICE of Appearance by Joshua Wallace Dixon (Dixon, Joshua) (Filed on 12/14/2021) (Entered: 12/14/2021)
12/16/2021	<u>85</u>	Minute Entry for proceedings held before Judge Charles R. Breyer: Motion Hearing held by Zoom on 12/16/2021 - Re <u>58</u> Motion to Dismiss Plaintiff's Complaint Pursuant to Federal Rule of Court 12(b)(2) and 12(b)(6) filed by National Association of Secretaries of State; <u>57</u> First Motion to Dismiss filed by SKDKNICKERBOCKER, LLC; <u>60</u> Motion to Dismiss filed by Twitter Inc.; <u>59</u> Motion to Dismiss Complaint filed by Shirley N Weber, Jenna Dresner, Alex Padilla, Paula Valle Castaon, Akilah Jones, Sam Mahood; <u>61</u> Motion to Strike Count II, filed by Twitter Inc. Motions taken under submission. The Court will issue an order. (Total Time in Court: 1 Hour and 10 Minutes) Court Reporter: Marla Knox. Plaintiff Attorney: Karin M. Sweigart, Gregory Michael, Joshua Dixon. Defendant Attorney: Anna Ferrari, Bruce Spiva, Patrick J. Carome, Felicia H. Ellsworth, Ari Holtzblatt, Don Willenburg. <i>(This is a text-only entry generated by the court. There is no document associated with this entry.)</i> (ls, COURT STAFF) (Date Filed: 12/16/2021) (Entered: 12/17/2021)
01/10/2022	<u>86</u>	ORDER by Judge Charles R. Breyer granting <u>57</u> SKDK Motion to Dismiss; granting <u>58</u> NASS Motion to Dismiss; granting <u>59</u> State Motion to Dismiss; granting <u>60</u> Twitter Motion to Dismiss; deferring ruling on <u>61</u> Motion to Strike. (crblc1, COURT STAFF) (Filed on 1/10/2022) (Entered: 01/10/2022)
01/10/2022	<u>87</u>	JUDGMENT. Signed by Judge Charles R. Breyer on 1/10/2022. (crblc1, COURT STAFF) (Filed on 1/10/2022) (Entered: 01/10/2022)
01/13/2022	<u>88</u>	TRANSCRIPT ORDER for proceedings held on 12/16/2021 before Judge Charles R. Breyer by Rogan O Handley, for Court Reporter Marla Knox. (Dhillon, Harmeet) (Filed on 1/13/2022) (Entered: 01/13/2022)
01/14/2022	<u>89</u>	NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Rogan O Handley. Appeal of Judgment <u>87</u> , Order on Motion to Dismiss,,,,,,, Order on Motion to Strike, <u>86</u> (Appeal fee of \$505 receipt number ACANDC-16806721 paid.) (Coleman, Ronald) (Filed on 1/14/2022) (Entered: 01/14/2022)
01/19/2022	<u>90</u>	USCA Case Number 22-15071 US Court of appeals for the 9th circuit for <u>89</u> Notice of Appeal to the Ninth Circuit, filed by Rogan O Handley. (cv, COURT STAFF) (Filed on 1/19/2022) (Entered: 01/19/2022)
01/20/2022	<u>91</u>	TRANSCRIPT ORDER for proceedings held on 12/12/2021 before Judge Charles R. Breyer by Twitter Inc., for Court Reporter Marla Knox. (Trevor, Maurice) (Filed on 1/20/2022) (Entered: 01/20/2022)
01/28/2022	<u>92</u>	MOTION to Withdraw as Attorney filed by SKDKNICKERBOCKER, LLC. Responses due by 2/11/2022. Replies due by 2/18/2022. (Attachments: # <u>1</u> Proposed Order)(Spiva, Bruce) (Filed on 1/28/2022) (Entered: 01/28/2022)
01/28/2022	<u>93</u>	ORDER by Judge Charles R. Breyer: Granting <u>92</u> Motion to Withdraw as Attorney, Bruce V. Spiva. (ls, COURT STAFF) (Filed on 1/28/2022) (Entered: 01/28/2022)
01/31/2022	<u>94</u>	Transcript of Videoconference Proceedings held on December 16, 2021, before Judge Charles R. Breyer. Court Reporter, Marla F. Knox, RPR, CRR, RMR, telephone number (602) 391-6990/email marla_knox@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerk's Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction. After that date it may be obtained through PACER.

		Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. (Re 91 Transcript Order) Release of Transcript Restriction set for 5/2/2022. (Related documents(s) 91) (mfk, COURT STAFF) (Filed on 1/31/2022) (Entered: 01/31/2022)
02/11/2022	95	TRANSCRIPT ORDER for proceedings held on 12/16/2021 before Judge Charles R. Breyer by Twitter Inc., for Court Reporter Marla Knox. (Carome, Patrick) (Filed on 2/11/2022) (Entered: 02/11/2022)

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