

**No. 22-15071**

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

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ROGAN O' HANDLEY,

*Plaintiff-Appellant,*

v.

SHIRLEY WEBER in her official capacity as California Secretary of State;  
TWITTER INC., a Delaware corporation;

*Defendants-Appellees.*

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 OPENING BRIEF**

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## INTRODUCTION

*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).

Under the First Amendment, the only permissible government response to alleged misinformation is more speech, not censorship. This constitutional truth, and the State of California (the “State”) and Twitter, Inc.’s (collectively, “Appellees”) open disregard of it by their censorship partnership program, lies at the center of this case.

In 2018, California enacted California Election Code § 10.5, creating a Ministry of Truth—given the friendly appellation of Office of Election Cybersecurity (the “OEC”)—within the Secretary of State’s office. The OEC’s statutory mandate included authority to “counteract” “false or misleading” election information. The OEC took this as both a license and invitation to quash politically disfavored speech—notwithstanding that political speech enjoys the highest constitutional protection under the First Amendment.

The OEC embraced its speech-censoring role with gusto, celebrating it with chilling frankness: “[O]ur 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.*” 3-ER-477; 484, ¶¶24–25 (emphasis added). Thus, OEC described its intention to engage in both prior

restraint and post facto censorship of social media “election misinformation” by “working closely”—that is, directing—private companies regarding what speech satisfied the OEC’s vision of political, or “election,” truth.

For its part, Twitter was all in. In furtherance of what Secretary of State Padilla termed its “partnership” with the OEC, 3-ER-454; 491, ¶65, Twitter created a dedicated reporting channel (the “Partner Support Portal”) to route the OEC’s censorship directives to Twitter with totalitarian efficiency. Twitter’s Partner Support Portal bumped the OEC’s directives “to the head of the [censorship] queue,” and, for all practical purposes, Twitter “promptly removed” every social-media post which the OEC reported as “misinformation.” 3-ER-454; 485, ¶29; 459; 490, ¶64 (citing social media’s 98% censorship response rate). Appellees’ definition of “misinformation” was expansive, including not only factual claims, but also political opinions. 3-ER-493, ¶72. Practically speaking, the OEC labeled opinions that could reflect poorly on Democrats—including then-California Secretary of State Alex Padilla—as “misinformation,” especially if they in any way touched on election integrity. In contrast, identical claims from self-described liberal voices were consistently left undisturbed. 3-ER-480, ¶2; 493, ¶72.

On November 12, 2020—a week after the 2020 election was over and, presumably, the OEC’s writ had ceased to run—Appellant Rogan O’Handley unknowingly defied the speech police in a tweet expressing his opinion that

California should conduct an election audit. 3-ER-493, ¶72. The OEC deemed this black-letter expression of a political opinion as “misinformation,” for which the OEC reported O’Handley to Twitter through the dedicated Partner Support Portal. 3-ER-494, ¶76. Twitter dutifully acted to censor O’Handley, first limiting the dissemination of his tweet in the short term, and eventually banning him from Twitter completely for his speech that challenged the official narrative that California, or the rest of the nation, had just experienced “the most secure election in history.”

The State of California and Twitter’s conspiracy to censor disfavored speech violated the First Amendment, the Fourteenth Amendment, and the California Constitution. As Justice Brandeis stated in *Whitney v. California*, “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.” 274 U.S. 357, 377 (1927), *overruled in part on other grounds by Brandenburg v. Ohio*, 395 U.S. 444 (1969). Labeling disfavored speech “misinformation” does not give government permission to silence it. “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).

The State violated this bedrock principle of our constitutional order when, under the guise of protecting a gullible public from election “misinformation,” it conspired and jointly acted with Twitter to censor O’Handley’s disfavored opinions. And the determination of the district court that, notwithstanding the well-pleaded and thoroughly documented allegations of this conspiracy, Appellant failed to state a claim for which relief could be granted was error and should be reversed.

### **JURISDICTIONAL STATEMENT**

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and 1367(a). On January 10, 2022, the district court entered an order dismissing O’Handley’s Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure (“Order”) and a judgment for Appellees (“Judgment”). The Order, which dismissed O’Handley’s federal-law claims with prejudice, and his state-law claim without prejudice under § 1367(c)(3), was a “final decision” under § 1291. Thus, this Court has jurisdiction over this appeal. *See Wakefield v. Thompson*, 177 F.3d 1160, 1162 (9th Cir. 1999) (“[D]ismissals with prejudice generally constitute final orders . . . .”); *see also Long v. Cnty. of Los Angeles*, 442 F.3d 1178, 1184 (9th Cir. 2006) (concluding that dismissal without prejudice of state law claims under § 1367 does not preclude finality of otherwise final decision).

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## **ISSUES PRESENTED**

1. Did the district court impermissibly weigh evidence rather than accepting O’Handley’s well-pleaded facts as true?
2. Did the district court err in concluding that O’Handley’s allegations of joint action and nexus insufficiently alleged state action and injuries traceable to the State?
3. Did the district court err in determining O’Handley failed to state plausible claims for relief?
4. Did the district court err in concluding that Twitter, in its capacity as a joint actor with the state, itself has a First Amendment right to discriminate against its users, and does 47 U.S.C. § 230(c)(1) immunize Twitter from liability for such discrimination?

## **STATEMENT OF THE CASE**

### **Factual Background**

#### The Office of Election Cybersecurity

In 2018, in the wake of allegations of foreign influence in the 2016 presidential election, California enacted Election Code § 10.5, which created the OEC within the California Secretary of State’s office. 3-ER-479, ¶ 1; 483 ¶19. The OEC’s statutory mandates included “monitor[ing] and counteract[ing] false or misleading [online] information regarding the electoral process . . . that may

suppress voter participation or cause confusion and disruption of the orderly and secure administration of elections.” 3-ER-483, ¶20; *see also* Cal. Elec. Code § 10.5. The statute directed the OEC to undertake three functions: (1) “assess . . . false or misleading information regarding the electoral process”; (2) “mitigate the false or misleading information”; and (3) “educate voters . . . with valid information.” 3-ER-483, ¶20; Cal. Elec. Code § 10.5.

In pursuit of its mandate, the OEC coordinated with various social media companies to facilitate the identification and removal of information from their websites that the OEC considered to be election “misinformation.” 3-ER-484, ¶¶24–25. As the OEC explained, “[w]e work closely and proactively with social media companies to keep misinformation from spreading [and to] take down sources of information as needed.” *Id.*, ¶25. Then-Secretary of State Alex Padilla described this symbiotic relationship between the OEC and social media companies like Twitter as a “partnership.” 3-ER-491, ¶65.

#### The OEC Partners with Twitter

“Twitter is a microblogging and social networking service with roughly 330 million monthly active users.” 3-ER-483, ¶17. It is the “primary social platform for political commentary and news” in the United States today. 3-ER-499, ¶90. Twitter users post messages to Twitter—called “tweets”—with which other users can interact, including by replying to the tweet with their own tweet, “liking” the tweet,

or “retweeting” the tweet (*i.e.*, copying the tweet to their own account). 3-ER-293–294.

Twitter was one of the social media companies with which the OEC “partner[ed].” 3-ER-491, ¶65. Twitter created a dedicated communication portal—the Partner Support Portal—for state election officials, including OEC officials, to “flag” concerns to Twitter about tweets allegedly containing election misinformation. 3-ER-485, ¶28. “Flag” was a code word meaning a “request” (more accurately, based on results, deemed a directive) to take down users’ tweets. 3-ER-486, ¶34. Twitter created the Partner Support Portal to ensure that election officials’ concerns about so-called misinformation on Twitter’s platform would be “bumped to the head of the queue” so Twitter could expeditiously resolve these censorship requests. 3-ER-485, ¶¶29, 33.

The OEC regularly used Twitter’s Partner Support Portal to identify tweets allegedly containing misinformation and to instruct Twitter to act against those tweets. These were not subtle suggestions: OEC told Twitter what to “take down,” *see, e.g.*, 3-ER-485–487, ¶¶33–35 (email from California official to Twitter stating “[w]e would like this tweet taken down ASAP to avoid the spread of election misinformation”), and Twitter complied dutifully. 3-ER-489–490, ¶¶58–60. The OEC publicly boasted that Facebook and Twitter “promptly removed” 98% of the posts the OEC “flagged.” 3-ER-490, ¶64.

### The OEC Wields its Authority as a Political Weapon

The OEC went beyond its statutory mandate to combat alleged “misinformation” through affirmatively providing accurate information. Instead, it treated its mission as a license to kill political commentary on social media from users with conservative viewpoints. 3-ER-479, ¶1; 484, ¶¶22–23.<sup>1</sup> And because, in the aftermath of the 2020 presidential election, there was extensive discussion on Twitter from “both Democrat and Republican voices upset at perceived problems” with the administration of the election, the OEC believed its role extended beyond “securing” an election that was already over. Rather, its dubious mission crept into “focus[ing its] speech censorship efforts on conservative requests for transparency in election processes, rather than the same calls from self-identified liberals.” 3-ER-495, ¶83.

### Appellees Take Down O’Handley

Rogan O’Handley was a victim of OEC’s content- and viewpoint-based discrimination and political retaliation. O’Handley is a licensed attorney, political commentator, and major social media influencer. 3-ER-481, ¶9. At its zenith, his Twitter account had over 440,000 “followers.” 3-ER-493, ¶71; 499, ¶92.

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<sup>1</sup> At the time of the 2020 presidential election, Mr. Padilla was “under consideration to fill then Vice-Presidential candidate Kamala Harris’s California seat” if the Biden/Harris ticket prevailed, and he thus “stood to personally benefit from that ticket’s elevation to higher office.” 3-ER-488 ¶¶ 46–47.

On November 12, 2020, notably after election day, O’Handley tweeted the following:



3-ER-493, ¶72. Significantly, Twitter took no action against O’Handley for this tweet—every word of which is political rhetoric, however highly charged—which obviously violated none of Twitter’s terms of service. 3-ER-494, ¶76. On November 17, 2020, however, an unknown OEC staff member “flagged” the tweet to Twitter through Twitter’s Partner Support Portal. Based, again, on Appellees’ established history of cooperation and partnership, this “flagging” constituted a directive by the OEC for Twitter to take action against the tweet. *Id.*

On or about that same day, Twitter complied with the OEC’s directive, appending commentary to the tweet (the writing in blue ink in the image above) stating that “the claim” was “disputed.” Twitter further reduced the visibility of the tweet to its users and preventing it from being recommended. Twitter also secretly assessed a “strike” against O’Handley’s account. 3-ER-493, ¶¶72; 494 ¶¶77, 78; *see also* 3-ER-304–306 (noting that Twitter will take the above actions in “most cases” involving a policy violation). Under Twitter’s strike system, each strike results in progressive penalties, and an account that incurs five strikes is removed from Twitter. 3-ER-494, ¶¶79–80.

Users are typically not informed of their “strike” until it is too late for them. And, in fact, before the OEC directed Twitter to suppress O’Handley’s November 12 tweet, Twitter had never taken any disciplinary action against O’Handley. 3-ER-494, ¶81. After the OEC put O’Handley on Twitter’s radar, however, Twitter began to apply a heightened level of scrutiny to O’Handley’s Twitter activity. 3-ER-494–498, ¶¶81–87. In January and February 2021, Twitter assessed four more strikes against O’Handley’s account for similar tweets expressing political opinions about the 2020 election. 3-ER-495–498, ¶¶84–87. And on February 22, 2021, Twitter completed the process instigated by the OEC’s direction to suppress O’Handley’s political speech by permanently suspending his account. 3-ER-498–

499, ¶¶87–89. O’Handley’s final tweet—which resulted in his fifth strike and permanent ban from Twitter—read as follows:



Rogan O’Handley   
@DC\_Draino



“Most votes in American history”



*Id.*, ¶87. In response to this tweet, Twitter informed O’Handley that it was permanently suspending his account for “manipulating or interfering with elections.” *Id.*, ¶88. Appellees have not explained how O’Handley’s tweets “manipulat[ed] or interfer[ed] in” any election, much less the one that had taken place three months before he tweeted his commentary. *Id.*, ¶89.

## **PROCEDURAL HISTORY**

O’Handley filed his Complaint on June 17, 2021. As relevant here, the Complaint alleged claims under 42 U.S.C. § 1983 for violations of the Free Speech Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment; a claim under 42 U.S.C. § 1985(3); and a claim under the Liberty of Speech Clause of the California Constitution.

On October 5, 2021, Appellees moved to dismiss under Rule 12(b)(6). On December 16, 2021, the district court held a remote hearing on the motions to dismiss. The district court entered its Order granting the motions to dismiss on January 10, 2022, and it entered its Judgment that same day.

On January 14, 2022, O’Handley timely filed a notice of appeal.<sup>2</sup>

## **SUMMARY OF THE ARGUMENT**

The district court erred in granting Appellees’ motions to dismiss. O’Handley plausibly alleged that Appellees conspired together, jointly acted, and worked in close nexus to censor O’Handley’s speech, making Twitter a state actor under § 1983. The scope of their joint action and conspiracy to censor O’Handley’s speech included the State’s directive to Twitter to censor O’Handley’s tweet

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<sup>2</sup> In addition to Appellees, O’Handley’s Complaint named other parties as defendants. O’Handley appeals only the dismissal of Appellees.



through the parties' dedicated speech censorship portal, and Twitter's nearly immediate response to limit the visibility of O'Handley's tweet and add a "strike" to O'Handley's account—one of five strikes that ultimately led to O'Handley's Twitter ban. The district court found otherwise, but to make this finding the district court had to disregard its obligation to accept the well-pleaded allegations, and the reasonable inferences that flow from them, as true at the pleadings stage.

Twitter's acts of censoring O'Handley's tweet and ultimately removing O'Handley from its platform are directly traceable to the State's initial request to censor O'Handley's speech.

O'Handley plausibly alleged that Appellees' actions violated the Free Speech Clause of the First Amendment because they imposed content- and viewpoint-based restrictions on O'Handley's political speech without satisfying strict scrutiny. Further, Appellees retaliated against O'Handley for the content of his speech.

O'Handley plausibly alleged that Appellees violated the Equal Protection Clause because they focused their speech censorship efforts on conservative requests for election transparency rather than the same calls from self-proclaimed political liberals. Appellees also violated the Due Process Clause by excluding O'Handley from Twitter and interfering with his ability to pursue his chosen occupation of social media influencer without due process of law.

O’Handley plausibly alleged that Elections Code § 10.5 is void for vagueness as applied to O’Handley because the OEC interpreted that statute as giving it power to censor speech it found, in its sole discretion, to be “false or misleading.”

O’Handley plausibly alleged that Appellees violated § 1985(3) by conspiring to deprive O’Handley of equal protection under the laws for his expressed conservative viewpoint and injuring him through censoring his protected speech.

O’Handley also plausibly alleged a violation of California’s Liberty of Speech Clause. Twitter’s sole purpose is hosting speech, and it is open to the public for that purpose. Indeed, Twitter is the public forum for our digital age.

Further, because Twitter is a state actor on the facts alleged here, its First Amendment rights cannot infringe on O’Handley’s constitutional rights. Yet even if Twitter had been acting as a private actor, its First Amendment rights would not protect Twitter here.

Finally, Twitter enjoys no immunity under § 230 because that section does not apply to constitutional claims, and it only immunizes websites from damages arising out of the publication of a third party’s content. O’Handley makes a first-party claim, which is not covered by § 230.

For these reasons, the Court should REVERSE the Order and Judgment of the district court and REMAND for further proceedings.

## STANDARD OF REVIEW

This Court reviews *de novo* dismissals for failure to state a claim under Rule 12(b)(6). *Ortez v. Washington Cnty.*, 88 F.3d 804, 807 (9th Cir. 1996). To survive a Rule 12(b)(6) motion, a complaint must only plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially 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.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When evaluating a Rule 12(b)(6) motion, 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).

## ARGUMENT

### **I. O’HANDLEY PLAUSIBLY ALLEGED JOINT ACTION AND A CLOSE NEXUS BETWEEN APPELLEES SUCH THAT TWITTER’S ACTIONS MAY BE FAIRLY TREATED AS THOSE OF THE STATE.**

“[M]ost rights secured by the Constitution are protected only against infringement by governments”; therefore, for a private party to be responsible for the deprivation of a constitutional right, “the conduct allegedly causing the deprivation . . . [must] be fairly attributable to the State.” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982) (internal citation omitted); *see also Pasadena*

*Republican Club v. W. Just, Ctr.*, 985 F.3d 1161, 1167 (9th Cir. 2021) (“The ultimate issue in determining whether a person is subject to suit under § 1983 is [whether] the alleged infringement of federal rights [is] attributable to the government.”). Actions by private parties may be treated as state action “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.” *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 297 (2000) (cleaned up).

In *Lugar*, the Supreme Court set forth a two-part test to resolve whether private conduct may be “fairly attributable” to the state. 457 U.S. at 937. First, “the deprivation must be 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 for whom the State is responsible.” *Id.* Second, “the party charged with the deprivation must be a person who may be fairly said to be a state actor.” *Id.* Below, Twitter argued only that it was not a state actor. 1-ER-15:5–8. Thus, only the second prong of the *Lugar* test is at issue here.

Courts use four separate tests to determine whether a private party is a state actor: 1) the “public function” test, 2) the “state compulsion” test, 3) the “nexus” test, and 4) the “joint action” test. *Lugar*, 457 U.S. at 939; *Rawson v. Recovery*

*Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020). Here, Twitter is a state actor under the joint action and nexus tests.

**A. O’Handley alleged facts sufficient plausibly to establish Appellees jointly acted to “counteract election misinformation.”**

The joint action test is satisfied when a complaint alleges that state officials and private actors “acted in concert in effecting a particular deprivation of constitutional rights.” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012). 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). A plaintiff may establish a conspiracy by alleging a defendant was a “willful participant” in “an agreement or meeting of the minds to violate constitutional rights” and that a 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). Participants need not know “exact details of the plan” so long as they share “the common objective of the conspiracy.” *Franklin*, 312 F.3d at 441. Agreement may be inferred based on circumstantial evidence. *Mendocino Env’tl Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1301 (9th Cir. 1999).

O’Handley’s Complaint clearly and plausibly alleges that Twitter was a willful participant in the OEC’s mission and was entwined, interdependent,

cooperated, and conspired with the OEC. 3-ER-484, ¶¶24–25; 472–477. As the OEC explained, “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.” *Id.* (emphasis added). Twitter created “direct channels of communication” for the OEC to report “misinformation” quickly to those who could carry out the censorship. 3-ER-470–471; 481, ¶9; 490, ¶64. Far from being treated just like any other member of the public, the Complaint demonstrates that OEC’s censorship requests were “bumped to the head of the queue” and had a 98% takedown success rate. *Id.*

The interconnectedness of the OEC and Twitter is further demonstrated by an email exchange, included in the Complaint, between Sam Mahood, an official within the OEC, and Twitter employee Kevin Kane on December 30, 2019. 3-ER-470–471; 482 ¶14; 486, ¶34. In the email, Mahood “flagged” a tweet to Kane and said: “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.” *Id.* ¶34. Mahood sent his email at 9:05 PM, and Kane responded before 8:00 AM the next morning, which was New Year’s Eve: “*Thank you for reporting, this Tweet has been removed. Please don’t hesitate to contact me if there is anything else we can do.*” *Id.* ¶35 (emphasis added). As efficient as this process was—the OEC spoke, and Twitter nearly immediately made it so—over

the next eleven months, the conspirators streamlined their speech takedown processes through the dedicated Twitter Partner Support Portal. *Id.* ¶36. This was, as described by the Secretary of State, a “partnership” in censorship. 3-ER-491, ¶65. On these specific and plausible allegations, there is nothing “speculative” about Appellees’ joint conduct and common objective.

Even then, there is more. The Complaint also alleges that, in November 2020, the OEC used the Twitter Partner Support Portal to “flag” one of O’Handley’s tweets to its “partner” Twitter. 3-ER-486, ¶34. The system worked as designed; the OEC’s request to censor O’Handley’s speech jumped to the “head of the queue.” 3-ER-453–462; 491, ¶65; 493–494, ¶¶74–80. Twitter understood its role, and, as the OEC claimed social media companies did 98% of the time, Twitter censored the tweet and, eventually, O’Handley entirely. *Id.* On these facts, O’Handley has set forth sufficient non-conclusory facts 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” of censoring political speech about election administration with which the Appellees disagreed.

*Mendocino Env’tl Ctr.*, 192 F.3d at 1301.

The district court nonetheless declined to credit O’Handley’s allegations of Appellees’ history of coordination, despite the Complaint’s extensive reliance on and reference to admissions by Appellees and documentation generated by them

which directly corroborates his claims. Instead, the district court characterized as mere “generalized statements about working together” the many acknowledgments proclaiming Appellees’ close “partnership” for “tak[ing] down sources of misinformation,” the emails demonstrating precisely how the parties communicated and coordinated to facilitate censorship, the creation of a dedicated reporting portal solely to streamline government-initiated speech censorship efforts, and the OEC’s boasts of great success for their “partnership” owing to the 98% censorship success rate. 1-ER-19:1–3.

The district court erred. At the motion to dismiss phase, the district court was required to “presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of [O’Handley].” *Usher*, 828 F.2d at 561. Despite this obligation, the district court impermissibly took off its robe and climbed into the jury box, refusing to presume O’Handley’s allegations were true despite their extensive sourcing; further, the district court weighed evidence to not only refuse, improperly, to make every permissible inference in O’Handley’s favor, but to advance arguments *not even made* by Appellees as more credible than O’Handley’s allegations.

For example, the district court found that “[w]hile O’Handley contends that Twitter complied with the State defendants’ requests to remove content 98% of the time ... the underlying materials are less clear” and “[t]he 98% number is also in



conflict with the OEC spreadsheet.” 1-ER-6:3–7, 20:13–15. It is not surprising that Appellees did not argue this point below, considering that the 98% figure came from the OEC’s *own statement* about its coordination with social media companies. 3-ER-490, ¶64. Further, in its process of improperly weighing evidence on this 12(b)(6) motion, the district court assumed that the OEC spreadsheet at issue contained information about *all* of the Twitter posts the State sought to remove, which O’Handley did not allege. The district court’s comment to the effect that “the underlying materials are less clear” is also profoundly telling, because a lack of “clarity,” far from militating in favor of dismissal, militates against it as it demonstrates a contested issue of fact.

In sum, the district court erroneously inserted itself as a fact finder, a province reserved for the jury alone, and in this impermissible posture, determined O’Handley’s allegations asserting that social media companies censored speech 98% of the time the OEC requested it—claims which O’Handley quoted directly from official OEC statements—should not be credited as true, as all plausible allegations must be under Fed. R. Civ. P. 12(b)(6).

The district court made several additional findings of fact that contradict the allegations in the Complaint or the reasonable inferences drawn therefrom, including:

- The “OEC’s message [to Twitter regarding O’Handley’s November 12 tweet] did not direct or even request that Twitter take any particular action in

response to the tweet.” 1-ER-17:4–6; contradicting the allegations and reasonable inferences drawn from 1-ER-484, ¶25; 486, ¶¶ 34–36; 490–491, 64–65; 494, ¶¶76–77.

- The OEC’s message to Twitter regarding O’Handley’s November 12 tweet was nothing more than “one party supplying information to another party.” 1-ER-17:4–6; contradicting the allegations and reasonable inferences drawn from 3-ER-484, ¶25; 486, ¶¶ 34–36; 494, ¶¶76–77.
- “Regardless of the percentage of flagged tweets that Twitter ultimately removed, there is ample evidence that it was Twitter who decided whether to remove them.” 1-ER-20:16–17; contradicting the allegations and reasonable inferences drawn from 3-ER-484, ¶25; 486, ¶¶ 34–36; 490–491, 64–65; 494, ¶¶76–77.
- O’Handley’s “allegations do not support any of the conspiracies alleged . . . , particularly given the evidence discussed above that Twitter made content decisions based on its own application of its own Rules.” contradicting the allegations and reasonable inferences drawn from 1-ER-24:9-11; 3-ER-484, ¶25; 486, ¶¶ 34–36; 490–491, 64–65; 494, ¶¶76–77.

Besides being questionable judgment calls that would constitute error even on a Rule 56 motion for summary judgment, these factual findings violate Rule 12’s well-established definition of the district court’s role at this stage in the proceedings and constituted clear error.

The district court also misconstrued the Ninth Circuit’s holding in *Mathis v. Pacific Gas Co.*, 75 F.3d 498 (9th Cir. 1996), to suggest that *Mathis* precludes the existence of joint action here. In *Mathis*, an undercover governmental narcotics task force worked closely with PG&E to investigate the plaintiff, a PG&E worker, for drug-related activity. *Id.* at 501. PG&E later barred the plaintiff from its premises after its own independent investigation was complete. *Id.* On appeal after

trial, this Court concluded there was no state action because the plaintiff had not introduced any evidence that the task force was involved in the decision to bar him from PG&E premises. *Id.* Here, by contrast, O’Handley has alleged facts to allow the plausible inference that the State exercised sufficient power over Twitter to infer the presence of state action, which Appellees, based on the allegations of the Complaint, essentially admitted. Thus, the facts here are more like those in *Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291 (9th Cir.1987), in which this Court held that a private company was a state actor because the government had “directed a specific entity to take a specific (allegedly unconstitutional) action against a specific person.” *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 843 (9th Cir. 1999) (discussing *Carlin*, 827 F.2d at 1295). As this Court concluded, the “[a]ction of a private defendant performed pursuant to such particularized state participation is fairly attributable to the state.” *Id.* Here, as in *Carlin*, the OEC directed a specific entity, Twitter, to take a specific action, that is to censor “election misinformation,” against a specific person, Rogan O’Handley. The analogy to *Mathis*, where there was no evidence even of *involvement* by the task force in the private entity’s decision, does not hold.

**B. The First Amendment does not permit the State to censor speech based on viewpoint.**

Notwithstanding its strained attempt to disconnect OEC’s “flagging” from Twitter’s acts of censorship, the district court ultimately agreed that O’Handley’s

allegations “support the notion that [Appellees] collaborated to counteract election misinformation generally” and establish that there was a “meeting of the minds to promptly address election misinformation,” which—separate from the district court’s adoption of the OEC’s misleading “election misinformation” rubric—is precisely what O’Handley claims. 1-ER 21:22–23; 24:6-7. The district court, therefore, *agreed* O’Handley sufficiently alleged joint action between the OEC and Twitter to “counteract election misinformation.” *Id.* But, as may have been detected from its adoption of the “misinformation” nomenclature to describe free speech, the district court bizarrely went on to conclude that Appellees’ meeting of the minds to censor “election misinformation” based on content and viewpoint was not a meeting of the minds to violate constitutional rights. The Court offered no legal support for what would, if affirmed, constitute an extraordinary sea change in First Amendment jurisprudence: the proposition that speech may be censored and speakers may be banned from speaking if the state deems what they have to say regarding public or political matters as “misleading.”

“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.” *Rosenberger v. Rector and Visitors*, 515 U.S. 819, 828 (1995). This principle is a “self-evident or universally recognized truth” that “should be and is obvious to everyone.” *Metro Display Advert., Inc. v. City of Victorville*, 143 F.3d 1191, 1196 (9th Cir. 1998). “[T]he

government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.”

*Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

There is no carveout in the First Amendment allowing the government to censor political opinions it thinks are misleading. *Id.* For this reason, the OEC and Twitter’s meeting of the minds to censor “election misinformation” was a meeting of the minds *to violate constitutional rights*. They are one and the same. The district court cannot save the unconstitutional actions of the OEC and Twitter merely by adopting their tactic of slapping an “election misinformation” on speech they find disagreeable.

“Election misinformation” is speech. It happens to be speech with which Twitter and the State disagreed. But asserting that Appellees disagree with the content of O’Handley’s speech does not make their coordinated censorship of O’Handley’s speech constitutional. Instead, it proves the egregious nature of their unconstitutional acts.

Appellees acted jointly to censor O’Handley’s speech solely based on the content and viewpoint O’Handley espoused, a violation of the First Amendment that should be “obvious to everyone.” *Metro Display*, 143 F.3d at 1196. The district court erred in finding otherwise.

## II. TWITTER’S CENSORSHIP OF O’HANDLEY’S SPEECH IS DIRECTLY TRACEABLE TO THE STATE’S CENSORSHIP REQUEST TO TWITTER

To cause an injury in fact, a defendant need not be the injury’s “sole source” or “proximate cause” as long as the link between the conduct and the harm asserted 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 v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (citation omitted).

O’Handley alleged multiple injuries in his Complaint arising out of Twitter’s censorship of his November 2020 tweet and his ultimate removal from Twitter soon thereafter. In holding that O’Handley could not proceed with his claims against the State because he lacked standing, the district court conceptualized O’Handley’s injury as arising solely from “the permanent suspension of his Twitter account.” 1-ER-30:7–8. But this limited conceptualization of O’Handley’s injury not only conflicts with the allegations in the Complaint, 3-ER-494, ¶¶75–80, it conflicts with the Court’s own opinion, which observed that O’Handley’s claims are based on, among other things, the “imposition of strikes on his account,” the “limitation on the reach of his tweets,” and his “ultimate removal of his account from the platform.” 1-ER-25:11–15.

In finding O’Handley had not plausibly alleged traceability from the State’s actions to O’Handley’s injuries, the district court ignored the injuries arising out of Twitter’s actions with respect to O’Handley’s November 2020 tweet alone and misconstrued the State’s role in O’Handley’s ultimate removal from Twitter. The chains leading from the State’s acts and O’Handley’s injuries are far from hypothetical or tenuous, and they are amply described in the Complaint.

**A. The OEC requested Twitter censor O’Handley’s tweet, and Twitter responded by doing what the State asked.**

There is a direct causal chain between the State’s request to Twitter to censor O’Handley’s tweet and Twitter’s decision to censor O’Handley’s tweet. The OEC used the Twitter Partner Support Portal to request Twitter censor O’Handley’s tweet, and Twitter responded by censoring the tweet as requested. 3-ER-486, ¶¶34–36; 489, ¶¶56–57; 491, ¶68; 493, ¶74. A chain of causation does not get much more direct than that.

**B. Twitter issued a strike against O’Handley in response to the State’s censorship request, and this strike was one of five that led to O’Handley’s dismissal from Twitter.**

The link between the State’s request to censor O’Handley’s speech and Twitter’s ultimate removal of O’Handley is not tenuous or abstract. The State’s actions were part of a causal link leading to O’Handley’s Twitter removal. The OEC asked Twitter to censor O’Handley. *Id.* Twitter did so by, among other things, adding a strike to O’Handley’s account. 3-ER-494, ¶78. This first strike

was counted against O’Handley as one of his five strikes leading to his ultimate removal. 3-ER-494–499, ¶¶78–88. Thus, the State’s actions responsible for creating the first strike, are directly linked to O’Handley’s removal.

### **III. O’HANDLEY STATED PLAUSIBLE CLAIMS FOR RELIEF**

#### **A. O’Handley Plausibly Alleged a First Amendment Violation**

The First Amendment provides that government shall not “abridg[e] the freedom of speech.” U.S. CONST. amend. I. The First Amendment affords the “broadest protection” to political speech, which is at the “core” of the First Amendment’s concerns. *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 First Amendment contains two relevant prohibitions. First, the government may not impose content- or viewpoint-based restrictions on political speech unless it can satisfy strict scrutiny. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010); *Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 745 (9th Cir. 2012); *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1277 (9th Cir. 2017). To satisfy strict scrutiny, restrictions must “further[] a compelling interest” and be “narrowly tailored to achieve that interest.” *Citizens United*, 558 U.S. at 340. The government bears the burden of proving that its restrictions satisfy strict scrutiny. *Id.*; *see also Reed v. Town of Gilbert*, 576 U.S.



155, 163 (2015) (“Content-based laws . . . are presumptively unconstitutional . . .”).

Second, the government may not retaliate based on protected expression. *Perry v. Sindermann*, 408 U.S. 593, 598 (1972); *see also CarePartners, LLC v. Lashway*, 545 F.3d 867, 877 (9th Cir. 2008) (“[S]tate action designed to retaliate against and chill political expression strikes at the heart of the First Amendment.” (cleaned up)). To state a First Amendment retaliation claim, the plaintiff must allege that: (1) he “engaged in constitutionally protected activity”; (2) “the defendant’s actions would chill a person of ordinary firmness from continuing to engage in the protected activity”; and (3) “the protected activity was a substantial motivating factor in the defendant’s conduct.” *Ariz. Students’ Assn. v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016) (cleaned up).

Here, O’Handley plausibly alleges that Appellees violated both these prohibitions. Appellees censored O’Handley’s tweets based on their content and the viewpoint they professed. 3-ER-480, ¶3; 493–499, ¶¶72–88; 501, ¶¶104–106; 502, 120. Appellees’ censorship was not merely content-based, but also based on the message O’Handley conveyed. *Reed*, 576 U.S. at 168 (noting that “the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker” constitutes viewpoint discrimination). The Complaint alleges that, starting with his November 12 tweet, Appellees began taking

measures against O’Handley, including: reducing the visibility of his tweets and preventing them from being recommended; imposing strikes against his account; and, ultimately, banning him from Twitter’s platform based on the content of his tweets. 3-ER-495–501, ¶¶72–88; *see* 3-ER-306–307 at 4–5. O’Handley’s tweets were protected political speech, *Mills v. State of Ala.*, 384 U.S. 214, 218-19 (1966) (observing that protected “political speech” includes all “matters relating to political processes”), and his allegations thus establish that Appellees imposed content- and viewpoint-based restrictions on protected political speech. Because Appellees did not attempt to satisfy strict scrutiny, O’Handley stated a plausible claim of content- and viewpoint-based discrimination, and the district court erred in finding otherwise.

Second, O’Handley plausibly alleges that Appellees retaliated against him based on the content of his tweets. As discussed, O’Handley’s tweets were protected activity. *Mills*, 384 U.S. at 218-19. In addition, Appellees’ actions would chill a person of ordinary firmness from continuing to speak. To satisfy this element, the plaintiff “need only show that the defendant intended to interfere with [his] First Amendment rights and that [he] suffered some injury as a result.” *Ariz. Students’ Assn.*, 824 F.3d at 868 (emphasis added). O’Handley has alleged that Appellees targeted him for reprisal based on his speech, and that Appellee’s actions impeded his speech, restricting the reach of his message and ultimately

resulting in his ban from Twitter. 3-ER-495, ¶¶83; 500, ¶¶99; 502, ¶¶112, 115. Those actions have “had a direct and detrimental impact on [his] ability to make a living in his chosen profession,” 3-ER-499, ¶90, and would chill a person of ordinary firmness from exercising their rights. *Ariz. Students’ Assn*, 824 F.3d at 868 (noting that courts recognize “a wide variety of conduct that impermissibly interferes with speech” for purposes of a First Amendment retaliation claim).

Finally, O’Handley plausibly alleges that his tweets were a substantial motivating factor behind Appellees’ conduct. This can hardly be gainsaid. The Complaint alleges that Appellees acted against O’Handley—beginning on November 17, 2020, and ending with his ban in February 2021—precisely because of the content of his tweets. 3-ER-493, ¶72; 495–499, ¶¶84–88; 502, ¶116 (“O’Handley’s speech . . . was a substantial motivating factor in [Appellees’] decision to” ban him from Twitter). The Complaint also alleges that the State’s motive in coordinating Twitter’s actions against O’Handley was to quiet his speech because it raised “concerns about election administration and integrity.” 3-ER-480, ¶3; 495, ¶83; 500, ¶99. These allegations, which in the context of the rich factual record presented by the Complaint are eminently plausible, readily establish causation.

For these reasons, O’Handley has plausibly alleged claims for content- and viewpoint-based discrimination and retaliation under the First Amendment, and the district court erred in dismissing them.

**B. O’Handley Plausibly Alleged an Equal Protection Violation**

The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV. This Clause requires 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, the plaintiff must first establish “that the statute [at issue], either on its face or in the manner of its enforcement, results in members of a certain group being treated differently from other persons.” *United States v. Lopez-Flores*, 63 F.3d 1468, 1472 (9th Cir. 1995). Next, the plaintiff must establish that the classification violates the applicable level of scrutiny. *Country Classic Dairies, Inc. v. Montana, Dep’t of Com. Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988). For “classifications affecting fundamental rights,” such as the freedom of speech, the government must satisfy strict scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *OSU Student All. v. Ray*, 699 F.3d 1053, 1067 (9th Cir. 2012). As in the First Amendment context, the

government bears the burden of proving its classification satisfies strict scrutiny.

*Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310 (2013).

Here, the Complaint alleges that Appellees focused “their censorship efforts on *conservative* requests for transparency in election processes rather than the same calls from self-identified political *liberals*,” 3-ER-495, ¶83 (emphases added), an allegation that establishes differential treatment based on political affiliation, which in these circumstances is a protected category. *See Abcarian v. McDonald*, 617 F.3d 931, 938 (7th Cir. 2010) (identifying “political affiliation” as a protected category); *see also 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”); *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.”); *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 529 (1st Cir. 2009) (“[G]overnment officials may not sanction a citizen because of his political affiliation . . .”). Moreover, because Appellees’ classification affects speech, the classification must be judged according to strict scrutiny. *Clark*, 486 U.S. at 461. As in the First Amendment context, Appellees have not demonstrated that their actions satisfy strict scrutiny.

Even if Appellees' classification were not subject to heightened scrutiny (and it is), their differentiation in treatment between conservative and liberal speakers would not satisfy even rational basis review. Appellees argued below that they took the actions they did to advance the legitimate state interest in "protecting the integrity and accuracy of elections." 3-ER-434:16–18. While this may indeed be a legitimate state interest, the argument fails because it does not explain the "basis for the classification" between conservative and liberal voices. *See Lazy Y Ranch v. Behrens*, 546 F.3d, 580, 589 (9th Cir. 2008) (concluding that a statute is impermissibly discriminatory if it is "applied in a discriminatory manner or imposes different burdens on different classes of people"). Indeed, "the rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary," *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990), which is precisely what O'Handley has alleged.

Thus, O'Handley has stated a plausible equal protection claim.

### **C. O'Handley Plausibly Alleged a Due Process Violation**

The Due Process Clause of the Fourteenth Amendment provides that States may not "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV. Among the substantive rights protected by this clause is the right to pursue one's chosen profession. *Schwabe v. Board of Bar Examiners*, 353 U.S. 232, 238–39 (1957) ("A State cannot exclude a person from .

. . . any . . . occupation [without sufficient justification.]”); *see also Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999) (same). Importantly, the Due Process Clause protects more than traditional “9-5” occupations. *See Benigni v. City of Hemet*, 879 F.2d 473, 478 (9th Cir. 1989) (holding plaintiff had protectible interest in operating restaurant and bar); *Chalmers v. Los Angeles*, 762 F.2d 753, 756 (9th Cir.1985) (same as to “selling T-shirts from a vending cart”). In today’s world, “social media is becoming so influential that being a social media influencer is now a profession.” *Godwin v. Facebook, Inc.*, 160 N.E.3d 372, 387 (Ohio. Ct. App. 8th 2020).

Here, the Complaint alleges that O’Handley is a (very successful) social media influencer, which involves making “social media postings, public speaking at colleges and political conferences, and being a political commentator.” 3-ER-491–492, ¶70; 499, ¶92. On the facts alleged, this occupation gives rise to a protectible interest under the Due Process Clause.

O’Handley has also alleged that Appellees infringed on that interest. To state a substantive due process claim, the plaintiff must allege that the government’s interference with his chosen profession “was clearly arbitrary and unreasonable.” *Lebbos v. Judges of Superior Ct., Santa Clara Cnty.*, 883 F.2d 810, 818 (9th Cir. 1989) (cleaned up). Here, for reasons already discussed, Appellees had no valid basis for their interference with O’Handley’s Twitter account. *See also id.* at 812

(holding plaintiff stated a claim for violating the right to engage in chosen profession based on the government “invading [the plaintiff’s] business affairs” and “seizing real property”).

Along with its substantive component, the Due Process Clause also provides procedural protections when the state deprives individuals of certain life, liberty, or property interests. *Paul v. Davis*, 424 U.S. 693, 711 (1976). With regard to liberty interests, “[w]hen a State would directly impinge upon interests in free speech . . . the opportunity for a fair adversary hearing must precede the [deprivation].” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 575 n.14 (1972). With regard to property interests, such interests exist through “existing rules and understandings that stem from an outside source such as state law.” *Id.* at 577.

O’Handley has alleged Appellees deprived him of protectable liberty and property interests without due process. Appellees’ actions—restricting how users could interact with O’Handley’s tweets, stifling the reach of his tweets and preventing them from being recommended, imposing strikes against his Twitter account, and banning him from Twitter—infringed on his liberty interest in free speech. *Id.* at 575 n.14. In addition, under California law, business goodwill is a protected property interest. Bus. & Prof. Code § 14100 (defining business goodwill as “the expectation of continued public patronage”). Appellees infringed O’Handley’s right in his business goodwill by interfering with his business as a



social media influencer to his financial detriment. 3-ER-500, ¶¶94; 505, ¶150.

Because Appellees deprived O’Handley of these rights without a pre-deprivation hearing, they violated the procedural component of the Due Process Clause. *Roth*, 408 U.S. at 577 (noting that due process requires that “some form of hearing [be provided] before deprivation of a protected interest” occurs).

O’Handley has therefore stated a plausible due process claim.

**D. O’Handley Plausibly Alleged that Elections Code § 10.5 is Void for Vagueness as Applied to him.**

“[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 reasonable opportunity to know what is prohibited.” *Id.* When a statute “is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts.” *Lane v. Salazar*, 911 F.3d 942, 950 (9th Cir. 2018) (quoting *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010)).

In an as-applied challenge, a statute is void for vagueness (and thus an unconstitutional deprivation of due process) if the statute (1) does not define the conduct it prohibits with sufficient definiteness and (2) does not establish minimal guidelines to govern enforcement. *United States v. Wyatt*, 408 F.3d 1257, 1260 (9th Cir. 2005) (quoting *United States v. Rodriguez*, 360 F.3d 949, 953 (9th Cir. 2004)).

Section 10.5, which created the OEC and purported to define its mission, is void for vagueness because it does not give persons of ordinary intelligence a reasonable opportunity to know what is prohibited and to provide explicit standards for those who apply them. The district court concluded that § 10.5 did not prohibit any conduct, and instead, “simply sets out the mission of the OEC.” 1-ER-34:9–10. The Court is correct that the statute itself prohibits nothing, but the OEC saw things differently, which is why O’Handley brings an as-applied challenge rather than a facial challenge. The OEC interpreted § 10.5 as prohibiting “false and misleading” election misinformation, such that the OEC could actually censor speech it found—in its sole discretion and subject to no further guidelines—to be “false or misleading.” O’Handley had no way of knowing what would constitute “false or misleading” speech such that OEC would respond to censor his speech.

The district court rejected O’Handley’s argument that “false and misleading” were vague terms, pointing to three cases discussing those terms. 1-ER-34–35. In *First Resort*, this Court concluded that the terms “false and misleading” were not impermissibly vague by considering the law as a whole. 860 F.3d at 1274–75. *First Resort* held that “otherwise imprecise terms may avoid vagueness problems *when used in combination with terms that provide sufficient clarity.*” *Id.* (emphasis added). Unlike § 10.5, however, the statute in *First Resort* included elaboration

such as “hypothetical examples,” a discussion of what was regulated, and other protections to ensure that the prohibitions did not intrude on protected speech.

Section 10.5, in contrast, includes no further clues on which O’Handley could have relied to determine what speech the OEC would censor as false or misleading.

The other two cases cited by the district court upheld criminal statutes where prohibitions on making false statements were determined not to be vague. *United States v. Matanky*, 482 F.2d 1319, 1321–22 (9th Cir. 1973); *United States v. Rodriguez-DeHaro*, 192 F. Supp. 2d 1031, 1038–39 (E.D. Cal. 2002). Similar to the analysis above, O’Handley does not contend that the term “false” in and of itself is vague. Instead, how the OEC *applied* the term to censor O’Handley’s speech led to the void for vagueness claim as there are no provably false statements of fact within O’Handley’s tweets.

The Supreme Court has discussed the difference between a fact able to be proven false and protected opinion related to matters of public concern in these terms: “a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.” *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990). The Court elaborated that to protect “imaginative expression” and “rhetorical hyperbole” which has “traditionally added much to the discourse of our Nation,” there is

“protection for statements that cannot ‘reasonably be interpreted as stating actual facts.’” *Id.* (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)).

O’Handley expressed his opinion on Twitter that “Election Fraud is rampant nationwide.” 3-ER-480, ¶3. The Court, without providing any elaboration (or referencing any argument asserted by Appellants as none made this claim), concluded that this was not an opinion, but “an assertion of fact.” 1-ER-35:28. But O’Handley’s statement contains no factual assertions that could be determined false. “Rampant,” is not associated with a specific number; it is defined as “growing,” “prevailing,” or “unchecked.” *Rampant*, dictionary.com, <https://www.dictionary.com/browse/rampant> (accessed on April 12, 2022). Unless the Court has evidence that there were zero cases of election fraud nationwide, there is no way this statement can be proven false. The statement was purely an expression of O’Handley’s opinion, the sort of polemic that abounds on Twitter and elsewhere, and not susceptible to being proven true or false.

“Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem . . . .” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). Section 10.5, however, grants the OEC the power to “counteract false or misleading information”—terms that are not defined in the statute. The OEC, though, interpreted the word “counteract” as a license to censor First Amendment-protected speech it considered, in its sole discretion, to be “false or misleading.”

O’Handley had no way of knowing what would constitute something false or misleading in the minds of OEC staff at any given time, and OEC officials had unbridled discretion to determine what speech warranted action. The obvious, inherent danger in this combination of ambiguity and unbridled government discretion was realized in the OEC’s actions to censor O’Handley’s speech. *See Hunt v. City of Los Angeles*, 638 F.3d 703, 712 (9th Cir. 2011).

Section 10.5 was void for vagueness as applied by the OEC to O’Handley.

**E. The District Court Erred in Concluding O’Handley did not Plausibly Allege a Violation of § 1985(3)**

Section 1985(3) creates a right of action for a conspiracy to deprive the plaintiff of his constitutional rights. The elements of a § 1985(3) claim 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 state action, § 1985(3) extends to purely private action so long as one co-conspirator is a state actor. *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 831-32 (1983); *Pasadena Republican Club v. W. Just. Ctr.*, 985 F.3d 1161, 1171 (9th Cir. 2021).

Here, the district court dismissed O’Handley’s § 1985(3) claim because it concluded that O’Handley failed to allege the existence of a conspiracy. 1-ER-23–24. This conclusion was erroneous. Whether a conspiracy exists under § 1985(3) is determined by the same standard for determining whether a private party can be liable under § 1983 for conspiring with a state actor. *Compare Scott v. Ross*, 140 F.3d 1275, 1284-85 (9th Cir. 1998) (concluding that § 1985(3) conspiracy requires an “agreement” to “violate [the plaintiff’s] civil rights”) *with Crowe v. Cnty. of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010) (“To establish liability for a conspiracy in a § 1983 case, a plaintiff must demonstrate the existence of an agreement or meeting of the minds to violate constitutional rights.” (cleaned up)). As demonstrated in Section I above, O’Handley has sufficiently alleged that Appellees entered into an agreement to deprive him of his constitutional rights. For the same reasons, O’Handley’s § 1985(3) claim also alleged the existence of a conspiracy.

O’Handley’s Complaint also alleged the other elements under § 1985(3). First, by his allegation that Appellees discriminated against him based on his conservative political views and speech concerning the 2020 presidential election, 3-ER-495, ¶83, O’Handley alleged the existence of “class-based” animus. *Griffin*, 403 U.S. at 102; *see also Reichardt*, 591 F.2d at 505 (noting that discrimination based on plaintiffs’ status as either (1) “political opponents” of defendants or (2) “supporters of a [different] political candidate” was sufficiently “class-based” to

state a claim under § 1985(3)"); *see also McLean v. Int'l Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir. 1987) (discrimination based on "political beliefs or associations" is prohibited by § 1985(3)); *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 v. Wilson*, 522 F.2d 833, 836 (8th Cir. 1975) (holding § 1985(3) claim available for allegations of discrimination against political opponents); *Stevens v. Rifkin*, 608 F. Supp. 710, 725 (N.D. Cal. 1984) (concluding that § 1985(3) creates federal protection for "the rights of persons from deprivation on account of their lawful political beliefs, activities, and associations").

Second, O'Handley alleged Appellees took acts in furtherance of their conspiracy, including the OEC flagging O'Handley's November 12 tweet, Twitter restricting users' ability to interact with that and other tweets, Twitter issuing strikes against O'Handley's account, and Twitter banning him from its platform. 3-ER-494, ¶¶76, 78; 495–499, ¶¶84–88.

Third, O'Handley alleged that the conspiracy injured him. A plaintiff may satisfy § 1985(3)'s injury requirement by alleging either "personal injury" or "a deprivation of any right or privilege." *Griffin*, 403 U.S. at 103. Here, as set forth in Sections III.A-D above, O'Handley alleged that Appellees' actions resulted in the deprivation of his constitutional rights. In addition, O'Handley alleged that

Appellees’ actions “had a direct and detrimental impact on [his] ability to make a living” because it impacted his ability to enter into “media contract[s], . . . media appearances, paid speaking opportunities, valuable professional networking, endorsements, and advertising dollars. 3-ER-499–500, ¶¶90–94. These allegations plead a cognizable injury under § 1985(3).

The district court thus erred in concluding that O’Handley’s allegations were insufficient to state a claim under § 1985(3).

**F. O’Handley Plausibly Alleged a Violation of the California Liberty of Speech Clause**

The district court declined to consider O’Handley’s claim under California’s Liberty of Speech Clause, concluding that, once it dismissed O’Handley’s federal claims, it lacked supplemental jurisdiction over the Liberty of Speech claim under 28 U.S.C. § 1367(c)(3). 1-ER-24. Because, as demonstrated, the district court erroneously dismissed O’Handley’s federal claims, the district court’s dismissal under § 1367 was also erroneous.

Like the federal constitution’s Free Speech Clause, the Liberty of Speech Clause prohibits content-based restrictions on speech and retaliation based on speech. *Keenan v. Superior Ct. of Los Angeles Cnty.*, 27 Cal. 4th 413, 436 (2002) (concluding that the Liberty of Speech Clause prohibits content-based restrictions on speech); *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719, 728 (C.D. Cal. 1996) (concluding that the Liberty of Speech Clause precludes the



government from restricting speech on the ground that it is “negatively critical” of a government employee). For the same reasons as discussed in O’Handley’s First Amendment claim, O’Handley has also alleged a plausible claim under the Liberty of Speech Clause.

In addition, the Liberty of Speech Clause grants “broader rights to free expression than does the First Amendment,” meaning that “private property”—including, most famously, a shopping center—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.” *Fashion Valley Mall, LLC v. Nat’l Labor Relations Bd.*, 42 Cal. 4th 850, 857-858 (2007); *see also Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 910 (1979) (“*Pruneyard I*”), *aff’d sub nom. PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (“*Pruneyard II*”). As the California Supreme Court has held, under *Pruneyard I*, “[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 (cleaned up).

In evaluating whether private property is subject to the *Pruneyard* doctrine, California courts evaluate three factors: (1) “the nature, purpose, and primary use of the property”; (2) “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.” *Park Mgmt. Corp. v. In Def. of Animals*, 36 Cal. App. 5th 649, 664 (Ct. App. 2019) (holding exterior portion of amusement park was a public forum under *Pruneyard* doctrine), *review denied* (Sept. 25, 2019). Applying these factors here, Twitter is a public forum under the Liberty of Speech Clause.

First, “Twitter serves as the primary social channel for political commentary in American news” and “is an essential and invaluable forum for the rights of free speech[.]” 3-ER-499, ¶¶90; 504, ¶¶133. Indeed, unlike a shopping center, whose common areas are incidental its primary purpose of housing retail stores, Twitter’s *sole purpose* is hosting public discourse making Twitter more like a traditional public forum than a shopping center. *See Fashion Valley*, 42 Cal. 4th at 857-858; *Pruneyard I*, 23 Cal. 3d at 910.<sup>3</sup>

Second, like a shopping center, Twitter is open to all members of the public to use its platform for discourse, 24 hours a day, 7 days a week, 365 days a year. *Price v. City of New York*, No. 15 CIV. 5871 (KPF), 2018 WL 3117507, at \*15 (S.D.N.Y. June 25, 2018) (observing that Twitter is “open to the public”); *Ctr. for Med. Progress v. Planned Parenthood Fed'n of Am.*, No. 20 CIV. 7670 (CM),

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<sup>3</sup> As the United States Supreme Court recently observed, “[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace . . . and social media in particular.” *Packingham v. North Carolina*, --- U.S. ---, 137 S. Ct. 1730, 1735 (2017).

2021 WL 3173804, at \*9 (S.D.N.Y. July 27, 2021) (same); *Pruneyard*, 23 Cal. 3d at 905 (basing holding on the ground that shopping centers are “open to the public”).

Third, because Twitter’s sole purpose is to be a forum for public discourse, allowing O’Handley’s speech is not incongruous with that purpose. *Park Mgmt.*, 36 Cal. App. 5th at 664; *cf. Van v. Target Corp.*, 155 Cal. App. 4th 1375, 1388 (2007) (holding area outside entrance to group of retail stores was not a public forum in part because the stores used those areas “to sell merchandise”).

The principles of free speech embodied in the Liberty of Speech Clause are not limited to the streets, parks, and town squares that would have been known to its framers. Instead, those principles apply to what is indisputably the public forum of our digital age. Indeed, the California Supreme Court has tacitly acknowledged this fact in its statutory interpretation, *see, e.g., White v. Square, Inc.*, 7 Cal. 5th 1019, 1030 (2019) (holding that websites are covered by the Unruh Civil Rights Act); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 41 n.4 (2006) (holding that websites are “public forums” under the anti-SLAPP statute), and this Court should follow suit and acknowledge that Twitter is a public forum under the Liberty of Speech Clause.

For these reasons, O’Handley has plausibly alleged that Twitter is a public forum and that the acts it took against him infringed his rights under the Liberty of

Speech Clause. *Fashion Valley*, 42 Cal. 4th at 865 (holding that content-based restrictions on speech in a public forum are subject to strict scrutiny).<sup>4</sup>

#### **IV. TWITTER HAS NO FIRST AMENDMENT RIGHTS ON THE FACTS ALLEGED HERE**

The district court erroneously concluded that, even if O’Handley had stated viable claims, Twitter’s acts were protected by the First Amendment because it is a private entity. 1-ER-25–28. As shown in Section I, however, Twitter was a state actor through its joint action with the State, meaning any First Amendment right it may have must give way to O’Handley’s constitutional rights. *See 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); *see also Manhattan Cmty. Access Corp. v. Halleck*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 1921, 1926 (2019) (“The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors.”).

Even if Twitter were not a state actor on the facts here (and it is), Twitter does not have a First Amendment right to do what it did to O’Handley. In *Rumsfeld v. Forum for Academic and Institutional Rts., Inc.* (“FAIR”), the

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<sup>4</sup> In the alternative, the Court should certify the question of whether Twitter is a public forum under the *Pruneyard* doctrine to the California Supreme Court. *See Int’l Soc. for Krishna Consciousness of California Inc. v. City of Los Angeles*, 530 F.3d 768, 769 (9th Cir. 2008) (certifying question of whether airport is public forum).

Supreme Court unanimously held that private law schools did not have a First Amendment right to refuse to host military recruiters even though the law schools disagreed with the military’s “don’t ask don’t tell policy.” 547 U.S. 47, 70 (2006). In *Pruneyard II*, the Supreme Court held that shopping center owners did not have a First Amendment right to refuse to allow persons to speak on their property, which had been deemed a public forum under the California Constitution’s *Pruneyard* doctrine. 447 U.S. at 87.

Under the reasoning of *FAIR* and *Pruneyard II*, the actions that Twitter took against O’Handley—reducing the visibility of his tweets and preventing them from being recommended, imposing strikes on his account, and banning him from its platform—were *conduct* by Twitter, and not *speech*. See *FAIR*, 547 U.S. at 61–62 (noting that compelled hosting “affects what law schools must do . . . not what they may or may not say”); see also *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022, 1059 (N.D. Cal. 2007) (“Simply ‘publishing’ information written by [third parties by putting it on the internet] does not suffice to transform defendants’ . . . conduct into speech.” (cleaned up)). Accordingly, any compelled speech concerns that might arise out of O’Handley’s claims are “incidental” to the regulation of Twitter’s conduct. *FAIR*, 547 U.S. at 62; see also *Pruneyard II*, 447 U.S. at 87 (noting that case involved “no specific message [that] is dictated by the State to be displayed on appellants’ property”); *Butler*, 486 F. Supp. 2d at 1059 (holding that

requiring adoption website to host a user’s profile does not “compel [the website owner] to say anything”).

Second, holding Twitter responsible for its conduct would not interfere with Twitter’s speech in any way. A host for the speech of others—which is what Twitter is—only has First Amendment rights when the host’s own speech is either “affected” by or “identified with” the speech it is hosting. *FAIR*, 547 U.S. at 63–64; *Pruneyard II*, 447 U.S. at 87. Twitter’s ability to speak was in no way “affected” by O’Handley’s tweets, and Twitter’s interface and layout makes it clear that the tweets at issue were O’Handley’s speech, not Twitter’s. 3-ER-493, ¶¶72; 495–498, ¶¶84–87. Thus, no one viewing Twitter would think that O’Handley’s tweets were somehow Twitter’s speech.

Third, Twitter was free to “publicly dissociate” itself from O’Handley’s tweets if it wanted to. *Pruneyard II*, 447 U.S. at 88. Indeed, Twitter did just that by appending commentary to O’Handley’s tweets. 3-ER-493, ¶¶72; 495–498, ¶¶84–87. This fact defeats Twitter’s First Amendment argument. *Pruneyard II*, 447 U.S. at 88; *see also FAIR*, 547 U.S. at 60; *Butler*, 486 F. Supp. 2d at 1059 (same for compelled hosting on adoption website).

The district court concluded Twitter’s actions here were expressive because O’Handley’s claim included an argument that Twitter improperly “append[ed] labels to his tweets” distancing itself from those tweets. 1-ER-25, 27. At oral

argument, however, O’Handley *expressly disavowed* any suggestion that his claim was based on Twitter’s labeling of his tweets. 1-ER-88:11–21. A plaintiff is the “master of his claim,” *Effects Assocs., Inc. v. Cohen*, 817 F.2d 72, 73 (9th Cir.1987), and he thus retains the freedom to “abandon a theory of liability” at any time, *Feemster v. Dehtjer*, 661 F.2d 87, 90 (8th Cir. 1981). The district court erred in refusing to allow O’Handley to clarify any confusion surrounding an argument that Twitter’s labelling of his tweets was unlawful, and the Court compounded that error by basing its holding that Twitter’s conduct was expressive on this withdrawn argument.

The district court also concluded that *Miami Herald Publ’g Company v. Tornillo* and *Pac. Gas & Electric Co. v. Public Utilities Comm’n of California* (“*PG&E*”) establish that Twitter has a First Amendment right to take the actions it did here. Those cases, however, are readily distinguishable.

In *Tornillo*, the Supreme Court held that a “right of reply” statute requiring newspapers to publish replies by political candidates to articles critical of them violated a newspaper’s First Amendment right to decide what articles to publish. 418 U.S. 241 (1974). In *PG&E*, the Supreme Court disallowed a state agency rule requiring a utility company to mail a consumer group’s newsletter, which was critical of the utility company’s practices, to its customers. 475 U.S. 1 (1986) (plurality opinion). As the Supreme Court observed in *FAIR*, the regulations in

*Tornillo* and *PG&E* violated the First Amendment because they “alter[ed] the message the [newspaper and utility company] wished to express.” 547 U.S. at 64.

Unlike a newspaper, however, which speaks through the articles it selects for publication, or correspondence to customers, which expresses a point of view, Twitter does not have a message that it conveys through its platform as a whole. Instead, Twitter is merely a host for the speech of others, which involves billions upon billions of tweets discussing topics as varied as the human mind can imagine, often with diametrically opposite points of view.<sup>5</sup> Because of this cacophony of varied voices, Twitter does not convey any message through its platform. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989) (holding that First Amendment applies only to expressive conduct where “an intent to convey a *particularized* message was present” and “the likelihood [is] great that the message would be understood by those who view it” (emphasis added)). Further, because Twitter does not review tweets before they are posted, it cannot reasonably be said to convey a message through the tweets that it never sees.

Moreover, unlike a right-of-reply statute or the forced inclusion of a newsletter, a determination that Twitter does not have a First Amendment right to take the actions it did would not interfere with any message Twitter may wish to

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<sup>5</sup> As Twitter admits, “Twitter account holders post hundreds of millions of Tweets daily.” 3-ER-354. Assuming Twitter users post 200 million tweets per day, this means that Twitter users post 73 billion tweets per year.



convey. A statute requiring a newspaper to publish an article it does not want to publish necessarily alters the message the newspaper wishes to convey because, due to spatial limitations, something will have to be left out. *Tornillo*, 418 U.S. at 257. Unlike a newspaper or newsletter, however, Twitter is not spatially limited in the material it can publish. Thus, requiring Twitter to host tweets it disagrees with does not require Twitter to remove tweets it might otherwise want to host or otherwise sacrifice “column inches” or “real estate” that could affect its revenue or its ability to communicate.

Further, the statutes at issue in *Tornillo* and *PG&E* were content-based in a way that an order awarding O’Handley relief would not be. The “right to reply” statute in *Tornillo* was triggered only when the newspaper published an article critical of a candidate, 418 U.S. at 257, and the agency rule in *PG&E* applied only to the consumer group’s newsletter critical of the utility company, 475 U.S. at 13, 15. Here, by contrast, a court order awarding O’Handley relief would not be based on the content of his tweets but based on the fact that Twitter violated the law by taking action against him. Thus, there is no concern here about Twitter being forced to convey any particular message.

The district court sidestepped these clear distinctions in *Tornillo* and *PG&E*, concluding that “a Twitter user encountering O’Handley’s tweets would indeed think that Twitter was the kind of place that allows such tweets on its platform.” 1-

ER-27:22–24. That conclusion, however, proves too much, for it could always be said that someone “encountering [hosted speech] would indeed think that [the host] was the kind of place that allows such [speech].” Indeed, exactly the same thing could be said about a hypothetical shopper encountering organized speech at a shopping mall in California or a law student encountering military recruiters on campus. This fact, however, would not give mall owners or law schools a First Amendment right to exclude the speech in *Pruneyard II* and *FAIR*. It also makes no sense considering the virtually infinite number of voices, points of view and shades of meaning emitted by Twitter’s 330 million users. If every tweet on Twitter could be viewed as an expression of approved speech by Twitter, the platform would at best be doing no more than, as the Supreme Court described a similar argument in another case, “babbling prodigiously and incoherently.” *See, Matal v. Tam*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1744, 1748 (2017) (“if trademarks become government speech when they are registered, the Federal Government is babbling prodigiously and incoherently”).

The district court also failed to appreciate the application of *Turner Broad. Systems, Inc. v. FCC* to this case. There, the Supreme Court concluded that, although cable operators were engaged in speech through their selection of channels to carry on their networks, a “must-carry” statute requiring them to carry local broadcast stations did not violate the First Amendment. 512 U.S. 622 (1994). Even

though the “must-carry” statute interfered with cable operators’ selection of channels, the Supreme Court held the statute did not violate the First Amendment because it did not “force cable operators to alter their own messages to respond to the broadcast programming they are required to carry” as there was “little risk that viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator.” *Id.* The same is true for Twitter here.

Given Twitter’s status as the “primary social channel for political commentary and news in American society,” 3-ER-499, ¶90, and its consequent control over Americans’ ability to participate in public discourse, the district court erred by interpreting the First Amendment in a way that allows private entities to “restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.” *Turner*, 512 U.S. at 656. Indeed, it is no less true today than in *Turner* that it is “a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” *Id.* at 663. With this thumb on the scale favoring more speech—not less—the Court should not interpret the First Amendment to allow Twitter to censor its users based on simply its whim. *Id.* at

567 (“The potential for abuse of this private power over a central avenue of communication cannot be overlooked.”)<sup>6</sup>

## V. TWITTER IS NOT IMMUNE UNDER § 230(c)(1)

Twitter argues that it is immune under § 230(c)(1), but that statute “does not immunize a defendant from constitutional claims.” *Fed. Agency of News LLC v. Facebook*, 432 F. Supp. 3d 1107, 1116 (N.D. Cal. 2020); *see also Mainstream Loudon v. Board of Trustees*, 2 F. Supp. 2d 783, 790 (E.D. Va. 1998) (same). Section 230 was enacted to keep the internet “unfettered by federal or state regulation,” 47 U.S.C. § 230(b)(2), not to insulate governmental actions toward internet speech from constitutional challenge. 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”). Thus, 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 the scope of § 230(c)(1),

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<sup>6</sup> Under the canon of constitutional avoidance, this Court should only reach Twitter’s First Amendment argument if it concludes that O’Handley has stated a claim. *Harvey v. Brewer*, 605 F.3d 1067, 1078 (9th Cir. 2010) (noting that courts “will not pass on a constitutional question if there is some other ground upon which the case may be disposed”). Thus, if this Court determines that O’Handley has not stated a plausible claim (and he has), it should, at least, vacate that portion of the district court’s order holding that Twitter has a First Amendment right to engage in the conduct it did here.

which immunizes websites from damages arising out of the publication of content *by a third party*. In *Barnes v. Yahoo!, Inc.*, for example, the plaintiff sued Yahoo under a state law theory like 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). This Court held that prevailing under § 230(c)(1) requires the existence of three elements: “(1) a [covered website] (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 against Yahoo: the plaintiff’s ex-boyfriend. *Id.* at 1101. As a result, this Court concluded that § 230(c)(1) applied. *Id.* at 1103.

Here, by contrast, the content at issue—O’Handley’s tweets—was not created by “another” content provider. Instead, it was created by *O’Handley himself*. Unlike the situation in *Barnes*, O’Handley’s claim is a *first-party* claim—*i.e.*, a claim by the originator of the content at issue. Because § 230(c)(1) does not apply to first-party claims, Twitter may not invoke that section here.

In the alternative, *Barnes*’ second element is an incorrect interpretation of § 230. That element requires a website to be a “publisher or speaker” of the information, which the Court interpreted to mean “reviewing, editing, and deciding whether to publish or *withdraw from publication* third-party content.” 570 F.3d

1096 at 1099 (emphasis added). The phrase “publisher or speaker,” however, applies only to *affirmative* acts of publication (as that term is understood under the common law of defamation) and not for *removal* of content. *See, e.g., Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, --- U.S. ---, 141 S. Ct. 13, 14 (2020) (Thomas, J.) (criticizing *Barnes* on this ground). While the panel assigned to hear this case is bound by *Barnes*, O’Handley reserves the right to argue that this Court should overrule *Barnes* en banc should the need arise.

### CONCLUSION

For these reasons, O’Handley respectfully asks this Court to REVERSE the district court’s Order and Judgment and REMAND to the district court for further proceedings.

April 25, 2022

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 because it contains 13,272 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 25, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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