

22-15071

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

No. 3:21-cv-07063-CRB
The Honorable Charles R. Breyer, Judge

**ANSWERING BRIEF OF DEFENDANT-APPELLEE CALIFORNIA
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INTRODUCTION

In response to widespread concern over the proliferation of misinformation about the electoral process, the California Legislature established the Office of Election Cybersecurity (OEC) within the California Secretary of State's Office. Section 10.5 of the California Elections Code directs the OEC to identify and mitigate misinformation that could suppress voter turnout, sow confusion among voters, or disrupt the orderly administration of elections. Plaintiff-appellant Rogan O'Handley, a self-described "social media influencer," alleges that he posted a tweet in November 2020 decrying "rampant" voter fraud nationwide, calling California "one of the culprits," and demanding that all votes cast in California be audited. He further alleges that the OEC contacted Twitter to "flag" the tweet as containing false or misleading election information, and that Twitter later labeled the tweet as "disputed." Several months after that, he continues, Twitter permanently suspended his account for repeated violations of the company's policies against spreading election misinformation on its platform.

Based on the OEC's lone report to Twitter about this single tweet, O'Handley asks this Court to infer a sweeping conspiracy between the OEC

and Twitter aimed at suppressing O’Handley’s constitutional rights under the Free Speech, Due Process, and Equal Protection Clauses.

The district court correctly dismissed O’Handley’s federal claims, which fail for multiple reasons. First, O’Handley lacks Article III standing to press his federal claims against the Secretary because he does not and cannot adequately allege that the OEC’s limited interaction with Twitter led Twitter to suspend O’Handley’s account—or take any action against O’Handley. Twitter, and Twitter alone, had the power to do so.

Second, the complaint fails to allege facts establishing that Twitter, a private actor, applied its content-moderation policies or otherwise acted on behalf of, or in concert with, the government; thus, there is no state action, and no potentially viable claim under 42 U.S.C. § 1983.

Third, even putting aside the lack of state action, the complaint does not state any plausible federal claims. The OEC’s report to Twitter about a tweet it viewed as false and misleading constitutes government speech, not a “restriction” or “abridgement” of O’Handley’s speech. Therefore, his First Amendment claim fails. The void-for-vagueness claim fails because section 10.5 of the Elections Code merely sets out the OEC’s mission and does not restrict O’Handley’s (or anyone’s) speech in any way. Regardless, O’Handley’s attempts to show that the terms “false or misleading” are

vague, and that section 10.5 therefore grants the OEC “unfettered” discretion, are unavailing. O’Handley’s remaining federal claims—for violations of the Due Process and Equal Protection Clauses, and for conspiracy to interfere with his civil rights under 42 U.S.C. § 1985—are unsupported by plausible factual allegations necessary to state a claim for relief. Their dismissal with prejudice should be affirmed.

Having dismissed all federal claims, the district court properly declined to exercise supplemental jurisdiction over O’Handley’s remaining claim that the suspension of his account violates the Liberty of Speech Clause of the California Constitution. Although the district court did not reach the issue, the Eleventh Amendment squarely bars O’Handley from suing Secretary Weber under the California Constitution. This Court can and should affirm on that basis. Regardless, O’Handley shows no error. He fails to question whether the district court abused its discretion and instead contends only that he stated a plausible claim. He did not, and it would be for the district court to make that assessment in the first instance in any event.

The Court should affirm in full.

JURISDICTIONAL STATEMENT

Secretary Weber agrees that the district court had original jurisdiction pursuant to 28 U.S.C. § 1331 over O’Handley’s first through fifth claims for relief arising under federal law. It also had jurisdiction to determine its own subject matter jurisdiction over O’Handley’s sixth claim for relief under California law. *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396 (9th Cir. 1996).

The district court entered final judgment on January 10, 2022, 1-ER-2, and O’Handley timely appealed on January 14, 2022. 3-ER-510. The Secretary agrees that this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly dismiss O’Handley’s federal claims against Secretary Weber for lack of standing, where O’Handley has failed to plead facts that would establish any harm that is fairly traceable to the Secretary?

2. Did the district court correctly dismiss O’Handley’s claims under the Free Speech, Equal Protection, and Due Process Clauses, and for conspiracy under 42 U.S.C. § 1985(3), because the complaint does not plausibly allege facts demonstrating that Twitter is a state actor under the “joint action” or “nexus” tests? Alternatively, was the dismissal proper on grounds that O’Handley failed to state a claim?

3. Did the district court correctly dismiss O’Handley’s conspiracy claim because the complaint fails to plausibly allege a “meeting of the minds” between the OEC and Twitter to suppress O’Handley’s constitutional rights?

4. Did the district court correctly dismiss O’Handley’s claims that Elections Code section 10.5 is void for vagueness because the statute does not regulate the conduct of private individuals?

5. Is O’Handley’s claim against Secretary Weber under the California Constitution’s Liberty of Speech Clause barred by the Eleventh Amendment? Alternatively, did the district court abuse its discretion in declining to exercise supplemental jurisdiction over O’Handley’s claim under the Liberty of Speech Clause?

STATUTORY AUTHORITIES

Pertinent statutory authorities are set forth in the Addendum bound with this brief.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The OEC’s Mandate to Combat the Spread of False and Misleading Election Information

In 2018, in response to growing concerns about election interference during and after the 2016 presidential race, the California Legislature

established the OEC within the California Secretary of State’s Office to monitor and respond to potential interference with election security and integrity. 2018 Cal. Stat. c. 241 (A.B. 3075). Although the OEC has many functions, its “primary mission,” as relevant here, is “[t]o monitor and counteract false or misleading information regarding the electoral process that is published online or on other platforms and that may suppress voter participation or cause confusion and disruption of the orderly and secure administration of elections.” Cal. Elec. Code § 10.5(b)(2). The OEC shall “[a]ssess the false or misleading information regarding the electoral process described in paragraph (2) of subdivision (b), mitigate the false or misleading information, and educate voters, especially new and unregistered voters, with valid information from elections officials such as a county elections official or the Secretary of State.” *Id.* § 10.5(c)(8).

B. Twitter’s Policies for Moderating Harmful and Misleading Information on its Platform

Twitter is a private company that operates an Internet communications service used for posting and broadcasting short messages known as “tweets.” In order to use Twitter’s services, users must agree to the terms of Twitter’s User Agreement, which incorporates Twitter’s Terms of Service as well as a

series of content-moderation policies known as the Twitter Rules.² 3-ER-320; 3-ER-323. The Terms of Service and Twitter Rules are available on Twitter’s website. 3-ER-339.

The Twitter Rules are designed to minimize the reach of harmful and misleading information. 3-ER-312–15. They include a Civic Integrity Policy that prohibits posting “false or misleading information intended to undermine public confidence in an election or other civil process.” 3-ER-302; 3-ER-314.³ Under the Terms of Service, Twitter reserves the right to remove content posted to Twitter that, in its judgment, violates its Civil Integrity Policy. 3-ER-326.

Any U.S.-based user of Twitter can report a tweet for violating the Civic Integrity Policy (among other Twitter Rules) by clicking on an icon on Twitter’s web page or in its app. 3-ER-303–04.

In the aftermath of the January 6, 2021 insurrection at the U.S. Capitol, Twitter amended its Civic Integrity Policy in order “to protect the

² The district court took judicial notice of the terms of Twitter’s User Agreement, including its Terms of Service and multiple iterations of its Civic Integrity Policy. 1-ER-004, n.4.

³ Twitter’s Civic Integrity Policy has been amended from time to time. The version of the policy cited above was in effect when the OEC allegedly reported a single tweet by O’Handley to Twitter on November 17, 2020. *See infra* 8–10; 3-ER-494, ¶ 76; 3-ER-339, ¶ 5; 3-ER-301–304.

conversation on our service from attempts to incite violence, organize attacks, and share deliberately misleading information about the election outcome.” 3-ER-296. The January 2021 amendments introduced a new, strike-based system of “progressive penalties, culminating in removal,” against users who violate the policy. 3-ER-297; *compare* 3-ER-294 (Jan. 2021 version), *with* 3-ER-309–10 (Oct. 2020 version); 1-ER-003–4, nn.3–4. Under this new policy, users accrue strikes for violating the Civil Integrity Policy. 3-ER-293–294. Accruing two, three, or four strikes results in an “account lock” lasting from 12 hours to seven days. 3-ER-294. Five or more strikes results in permanent suspension of the user’s account. *Id.*

C. The Complaint Allegations

O’Handley is a licensed California attorney who claims to have left the private practice of law to “better utilize his legal education in defense of liberty and constitutional ideals” as a political activist and “social media influencer.” 3-ER-491–492, ¶ 70. O’Handley does not allege an affiliation with any particular political party or interest group. Over 444,000 people allegedly followed O’Handley’s Twitter account, “@DC_Draino,” at the height of its popularity in early 2021. 3-ER-492, ¶ 71.

On November 12, 2020, O’Handley posted the following tweet in reference to the 2020 presidential election:

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[.]

3-ER-493, ¶ 72.

SKDKnickerbocker (SKDK), a contractor working for the California Secretary of State on voter outreach and related matters, listed O’Handley’s “rampant” fraud tweet in a summary it prepared of recent press coverage, statements by elected officials, and conversations on social media concerning election misinformation. 3-ER-493, ¶ 74. These summaries typically included references to stories and posts by a wide range of media outlets, including the New York Times, CNN, and others, as well as on Twitter, Facebook, and other social media sites. *E.g.*, 3-ER-462–63.

On November 17, 2020, an unnamed “agent or staff member” of the OEC contacted Twitter about O’Handley’s “rampant” fraud tweet. 3-ER-494, ¶ 76. The OEC’s message stated that “[w]e wanted to flag this Twitter post,” and explained how the tweet contained misinformation about the voting process—including by stating that California is responsible for “rampant” voter fraud and implying that California does not already audit election results—that “creates disinformation and distrust among the general

public.”⁴ *Id.* In accordance with its Civic Integrity Policy, Twitter applied a label below to O’Handley’s tweet stating that “[t]his claim about election fraud is disputed” and thus cannot be “liked,” replied to, or “retweeted.” 3-ER-494, ¶ 77; -301–302.

Apart from the OEC’s November 2020 message to Twitter, the complaint does not allege any action on the part of the OEC concerning O’Handley. It also does not allege that any further communications took place between the OEC and Twitter concerning O’Handley.

Nor does the complaint allege that O’Handley suffered any harm as a result of Twitter’s labeling his tweet “disputed.” To the contrary, it alleges that, during the weeks immediately following his “rampant” fraud tweet, O’Handley continued to use his Twitter account and gained tens of thousands of new followers. 3-ER-494–95, ¶¶ 81–83.

On January 18, 20, and 21, 2021, O’Handley posted three tweets attacking the results of the 2020 presidential elections. 3-ER-495–97,

⁴ The complaint alleges that Twitter operates an online portal, the “Partner Support Portal,” where state and local elections officials and others can report potential violations of Twitter’s Civic Integrity Policy. 3-ER-485, ¶ 28. Twitter asked the National Association of Secretaries of State (NASS), a professional organization of which the California Secretary of State is a member, to notify its members about the portal, 3-ER-485, ¶ 28, which NASS did in August 2020. The complaint does not specifically allege that the OEC used this portal to contact Twitter about his “rampant” fraud tweet.

¶¶ 84–86. Twitter did not take down any of these tweets, but it labeled all three as making disputed claims about election fraud, in accordance with its Civic Integrity Policy. *Id.*; 3-ER-290–91. In response to the third tweet, which claimed that “half our country stop[ped] believing in the integrity of our vote,” Twitter allegedly locked O’Handley’s account for seven days. 3-ER-497, ¶ 86.

On February 22, 2021, O’Handley tweeted an image of the U.S. Capitol Building encircled by security fencing, along with the phrase “[m]ost votes in American history” in quotations. 3-ER-498, ¶ 87. In response to this tweet, Twitter notified O’Handley that his account had been suspended for violating Twitter’s Civic Integrity Policy. 3-ER-499, ¶ 88.

On June 17, 2021, O’Handley filed his complaint against Twitter, SKDK, NASS and Secretary Weber, in her official capacity, along with five other current and former members of the Secretary of State’s Office named in their personal capacities.⁵ 3-ER-478. The complaint alleged that all

⁵ The only government defendant still in this case is Secretary Weber, in her official capacity. O’Handley did not appeal the dismissal of his claims against the remaining members of the Secretary of State’s Office: former California Secretary of State and current U.S. Senator Alex Padilla; Jenna Dresner; Akilah Jones; Sam Mahood; and Paula Valle. AOB 12, n.2. This brief refers to all six original defendants from the Secretary of State’s Office collectively as “State Defendants.”

defendants conspired to “censor” O’Handley’s political speech with the intent to retaliate against him and discriminate against his viewpoint in violation of the First Amendment, Equal Protection Clause, and article I, section 2, of the California Constitution (first, second, and third claims for relief). 3-ER-501–05. It further alleged that all defendants engaged in a civil conspiracy to interfere with O’Handley’s First and Fourteenth Amendment rights in violation of 42 U.S.C. § 1985 (sixth claim for relief). 3-ER-507–08. It also claimed that the suspension of his account deprived O’Handley of liberty and property interests in violation of the Due Process Clause of the Fourteenth Amendment (fourth claim for relief against Twitter, the State Defendants, and SKDK). 3-ER-505–06. Finally, it asserted that section 10.5 of the California Elections Code is void for vagueness (fifth claim for relief against the State Defendants).⁶ 3-ER-506–07.

By way of relief, the complaint requested a declaration that section 10.5, as applied to O’Handley, violates his state and federal constitutional

⁶ Both the fourth and fifth claims for relief invoke the Due Process Clause. This brief refers to the fourth claim, alleging that the suspension of his account deprived O’Handley of liberty and property interests in his occupation and business goodwill, in violation of due process, as the “due process claim” or “Due Process Clause claim,” and the fifth claim, alleging that Elections Code section 10.5 is unconstitutionally vague in violation of due process, as the “vagueness” claim.

rights, along with entry of a permanent injunction against Secretary Weber and damages against Twitter, NASS, SKDK, and the other State Defendants. 3-ER-508–09.

II. THE DISTRICT COURT’S RULING DISMISSING ALL CLAIMS

On October 5, 2022, all defendants moved to dismiss O’Handley’s complaint. Twitter moved to dismiss the complaint on the grounds that it failed to allege facts demonstrating state action, that the requested relief interfered with Twitter’s First Amendment rights to moderate content posted on its platform, and that Twitter’s conduct was protected under section 230 of the Communications Decency Act. 3-ER-349–51.⁷

The State Defendants moved to dismiss based on lack of standing, lack of state action, failure to state a claim, and qualified immunity (of the five State Defendants named in their personal capacities). SER-009. SKDK moved to dismiss for lack of standing, lack of state action, and failure to state a claim. 3-ER-415. NASS moved to dismiss for lack of personal jurisdiction, lack of state action, and failure to state a claim. 3-ER-394.

⁷ Twitter also filed a separate anti-SLAPP motion directed at the Liberty of Speech Clause claim under the California Constitution, which the trial court declined to decide. 1-ER-028–29.

After a hearing on defendants' motions, the district court granted all defendants' motions to dismiss O'Handley's complaint. First addressing Twitter's motion, the district court held that the complaint failed to allege facts demonstrating that Twitter is a state actor, and that this required dismissal of the First Amendment, equal protection, and due process claims. 1-ER-023. The district court determined that the OEC's outreach to Twitter about the election misinformation in O'Handley's tweet amounted to no more than "general 'consultation and information sharing'" that fell short of "substantial cooperation" with, or the exercise of "coercive power" over, Twitter. 1-ER-019 (quoting *Mathis v. Pacific Gas Co.*, 75 F.3d 498, 501 (9th Cir. 1996)); 1-ER-017.

The district court rejected O'Handley's argument that, because Twitter had established a portal for reporting violations of its Civic Integrity Policy (*supra* note 4), it should infer that Twitter could not and did not exercise independent judgment over how to apply its Civic Integrity Policy. 1-ER-019–20. Likewise, the complaint's allegations that the OEC made public statements about working proactively with social media companies to mitigate election misinformation did not amount to a "meeting of the minds" with Twitter (or anyone else) to suppress O'Handley's constitutional rights. 1-ER-021–22. O'Handley's failure to plead facts plausibly demonstrating

joint action or a conspiracy with a state actor also warranted dismissal of his conspiracy claim under 42 U.S.C. § 1985 on the same grounds. 1-ER-024.

The district court further held that dismissal of the First Amendment, equal protection, due process, and conspiracy claims was warranted on the alternative ground that they would interfere with Twitter's own First Amendment expressive rights to moderate content on its platform. 1-ER-028.

The district court declined to exercise supplemental jurisdiction over O'Handley's claim under the Liberty of Speech Clause of the California Constitution, in light of the dismissal of all claims over which the court had original jurisdiction and the fact that it presented a novel issue of state law. 1-ER-024; 28 U.S.C. § 1367(c)(1), (3). It dismissed the claim without prejudice to O'Handley's ability to re-file it in state court.

The district court also granted the State Defendants' motion to dismiss, finding that O'Handley had failed to plead facts establishing a causal link between his claimed injuries and the State Defendants' alleged conduct, and thus lacked standing. 1-ER-029–32. For the same reasons it gave in granting Twitter's motion, it also dismissed O'Handley's First Amendment, equal protection, due process, and conspiracy claims, and declined to hear O'Handley's liberty of speech claim. 1-ER-032–33. The district court

agreed with the State Defendants that the complaint failed to state a claim that section 10.5 is void for vagueness because the statute does not regulate individual conduct and is clear enough for its meaning to be understood. 1-ER-033–35. The district court further held that the five State Defendants named in their individual capacities were entitled to qualified immunity. 1-ER-035–36.

The district court granted SKDK’s motion to dismiss, agreeing that O’Handley lacked standing and failed to state any plausible claims. 1-ER-038; 1-ER-041. Finally, the district court dismissed the complaint against NASS for lack of personal jurisdiction and failure to state any claim. 1-ER-041.

O’Handley timely filed a notice of appeal of the district court’s ruling with respect to Twitter and Secretary Weber. 3-ER-510. O’Handley does not appeal the dismissal of the five other State Defendants, SKDK, or NASS. AOB 12, n.2.

SUMMARY OF ARGUMENT

The district court properly dismissed all of O’Handley’s claims against Secretary Weber for lack of standing. O’Handley failed to allege a causal connection between any alleged harm and the Secretary, as any harm resulting from Twitter’s independent enforcement of its content-moderation

policies is not fairly traceable to the OEC—a ruling that applies whether O’Handley’s claimed injury stems only from the ultimate suspension of his account, or actions taken by Twitter in connection with one or more of his tweets. 1-ER-030–32.

Even if O’Handley had pled facts sufficient to establish standing to sue the Secretary, the district court properly dismissed the bulk of his federal claims on the ground that Twitter is not a state actor on any theory. 1-ER-017–23. Although this disposes of his First Amendment, equal protection, due process, and section 1985 claims (first, third, fifth and sixth claims for relief), those claims also fail on the merits, as set forth below.⁸

The district court also correctly determined that O’Handley’s fourth claim for relief—that Elections Code section 10.5 fails under the void-for-vagueness doctrine—fails as a matter of law because the statute simply sets forth the OEC’s mandate and does not proscribe any conduct on O’Handley’s part. 1-ER-033–35.

Finally, the Eleventh Amendment categorically bars O’Handley from suing Secretary Weber under the California Constitution’s Liberty of Speech

⁸ If the Court affirms the district court’s ruling that there was no state action here, it need not reach the Secretary’s arguments that these claims fail as a matter of law regardless.

Clause, and this Court should affirm on that basis. Even if the Court reaches the issue, the district court did not abuse discretion in declining to exercise supplemental jurisdiction over that claim, having dismissed all federal claims, and due to the novel issues of state law it presents. 1-ER-024.

STANDARD OF REVIEW

A federal appellate court reviews de novo a district court's decision to grant a motion to dismiss under either Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6). *Rhoades v. Avon Products, Inc.*, 504 F.3d 1151, 1156 (9th Cir. 2007). Review is limited to the allegations raised in the complaint, *Hansen v. Dep't of Treasury*, 528 F.3d 597, 599 (9th Cir. 2007). "A claim has facial plausibility 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) (citations and internal quotation marks omitted). A "[p]leading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action,'" however, cannot survive a motion to dismiss. *Id.* (citation omitted). This Court views the facts presented in the pleadings and the inferences to be drawn from them in the light most favorable to the nonmoving party, *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir.

2008), and can affirm on any basis fairly supported by the record, *Wood v. City of San Diego*, 678 F.3d 1075, 1086 (9th Cir. 2012).

A district court's decision pursuant to 28 U.S.C. § 1367(c)(3) not to retain supplemental jurisdiction over state claims once it has dismissed all of the plaintiff's federal claims is reviewed for abuse of discretion. *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1187 (9th Cir. 2001).

ARGUMENT

I. O'HANDLEY LACKS STANDING

The district court correctly dismissed all of O'Handley's claims against Secretary Weber for lack of standing.

Article III of the U.S. Constitution confines the jurisdiction of federal courts "to the resolution of cases and controversies." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 471 (1982) (internal quotation marks omitted). One of the "landmarks" used by courts to identify cases "that are of the justiciable sort referred to in Article III . . . is the doctrine of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, O'Handley must demonstrate three "rigorous" elements: (1) A concrete "injury in fact"; (2) that the injury is fairly traceable to the defendant's alleged conduct; (3) and a likelihood that the injury will be redressed by a favorable decision. *Valley Forge*, 454 U.S.

at 475; *Lujan*, 504 U.S. at 560–61; *see also Laird v. Tatum*, 408 U.S. 1, 13 (1972) (holding that “to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action”) (quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937)).

The district court correctly determined that the complaint failed to plead facts establishing a causal connection between O’Handley’s claimed injury and the OEC’s conduct. 1-ER-030. Indeed, the complaint itself concedes that *Twitter* imposed all strikes against O’Handley and ultimately suspended his account.⁹ 3-ER-493–94, ¶¶ 77–79; 3-ER-495–99, ¶¶ 84–88; 3-ER-500, ¶ 99; 3-ER-505, ¶ 152. The complaint is also devoid of allegations that anyone acting at Secretary Weber’s behest directed *Twitter* to take any particular action in response to O’Handley’s “rampant” fraud tweet, or any of his subsequent tweets. That the OEC allegedly called *Twitter*’s attention to a single tweet (AOB 27–28)—several months (and

⁹ Although the complaint alleges that *Twitter* applied a “strike” to O’Handley’s account after the “rampant” fraud tweet, 3-ER-494, ¶ 78, according to *Twitter*’s internal policies (of which the district court took judicial notice), the “strike” system did not go into effect until two months later. 3-ER-290, 3-ER-294, 3-ER-297; *and see supra* at 7–8.

multiple tweets) before Twitter ultimately suspended his account—does not render the alleged harm any more traceable to Secretary Weber.¹⁰

Absent facts demonstrating a plausible causal connection between the OEC’s alleged actions and any harm to O’Handley, the complaint does not confer standing. *See Allen v. Wright*, 468 U.S. 737, 759 (1984) (where “[t]he links in the chain of causation between the challenged Government conduct and the asserted injury” are a series of “independent decisions” by unrelated actors, they “are far too weak for the chain as a whole to sustain [plaintiff’s] standing”); *see also Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 (2013) (expressing reluctance about allegations that “rest on speculation about the decisions of independent actors”). Because O’Handley’s claimed injury “results from the independent action of some third party”—here, Twitter—there is no standing. *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 42 (1976).

Indeed, the chain of causation alleged in the complaint contains no fewer than eight distinct steps involving the independent acts of four different parties. First, the California Secretary of State awarded a voter outreach contract to SKDK for vague reasons of “cronyism and

¹⁰ As explained below (*infra* at 31–40, 61–66) Twitter also failed to adequately allege joint action or a conspiracy between the OEC and Twitter.

partisanship.” 3-ER-487–88, ¶¶ 37–47. Second, SKDK identified O’Handley’s tweet of November 12, 2020 in an email to OEC staff. 3-ER-493, ¶ 74. Third, Twitter established an online portal that state and local elections officials could use to report violations of Twitter’s Civic Integrity Policy. 3-ER-485, ¶ 28. Fourth, NASS sent a general notice to its members, including then-Secretary of State Padilla, encouraging them to register to use Twitter’s reporting channel. Fifth, an unspecified OEC staff member reported O’Handley’s “rampant” fraud tweet to Twitter as containing false or misleading information. 3-ER-494, ¶ 76. Sixth, Twitter appended a label to the “rampant” fraud tweet indicating that its content was disputed. 3-ER-494, ¶ 76. (After this step, Twitter allegedly took no action on O’Handley’s activity on Twitter for a two-month period. 3-ER-494–95, ¶¶ 76–84.) Seventh, following changes to Twitter’s Civic Integrity Policy in January 2021 (*see* 7–8, *supra*), Twitter applied additional labels to three new tweets by O’Handley, one of which resulted in a seven-day suspension. 3-ER-496–97; ¶¶ 84–86. Eighth and finally, in February 2021 Twitter suspended O’Handley’s account in response to a different tweet. 3-ER-498–99, ¶¶ 87–88. Each of these steps involved a unilateral decision by an independent actor, and no overarching causal relationship can be inferred among them.

On appeal, O’Handley seeks to recast the chain of causation in two significant respects. First, he has abandoned his claims against alleged co-conspirators SKDK and NASS, as well as all of the State Defendants named in their personal capacities. In doing so, O’Handley either concedes that they played no role in the alleged conspiracy or foregoes his claims against them in order to advance less convoluted arguments on standing and state action. But in either scenario, he still cannot bridge the chasm between the OEC’s alleged conduct and Twitter’s own, independent enforcement of its Civic Integrity Policy.

Second, O’Handley contends that the district court erred in limiting its “conceptualization of O’Handley’s injury” to the permanent suspension of his Twitter account. AOB 26. This argument misconstrues the district court’s order in an effort to characterize O’Handley’s injuries more expansively than the complaint did.¹¹ The only specific injuries alleged—that O’Handley “lost his platform to communicate with his followers” as well as his “ability to make a living in his chosen profession” on account of “Twitter’s ban”—are unmistakably concerned with Twitter’s suspension of

¹¹ O’Handley also failed to argue this point in response to the State Defendants’ motion, so it is both meritless and waived. *Momox-Caselis v. Donohue*, 987 F.3d 835, 842–43 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 402 (2021).

O’Handley’s account. 3-ER-499–500, ¶¶ 91, 93, 94. The complaint pleads no harm short of his permanent suspension. On the contrary, it contends that the total number of users following his Twitter account grew faster than ever after Twitter began labeling his tweets as disputed. 3-ER-492, ¶ 71; 3-ER-495, ¶ 82. The fact that the district court correctly noted that O’Handley’s claims are “based on” other interrelated acts by Twitter, such as the imposition of strikes changes nothing. AOB 25. The district court refers to these acts as Twitter’s own expressive conduct protected by the First Amendment, not as examples of O’Handley’s claimed harms. 1-ER-025:11–15.

Aside from these problems, the dismissal on standing grounds was correct regardless of whether O’Handley’s claimed injury is conceived as the suspension of his account, the application of one or more strikes to his account, or even just Twitter’s labeling his “rampant” fraud tweet as disputed. In all cases, Twitter, and Twitter alone, is the only actor alleged to have done these things.

The district court also correctly distinguished both of O’Handley’s standing cases. In *Barnum Timber Co. v. Environmental Protection Agency*, 633 F.3d 804 (9th Cir. 2011), this Court found a causal link between the plaintiff’s alleged injury—a reduction in property value—and the EPA’s

decision to designate a creek adjacent to the plaintiff's property as an impaired water body. *Barnum*'s claimed injury involved no third parties. 633 F.3d at 900. Further, the complaint in *Barnum* contained detailed allegations, supported by expert declarations, explaining how the EPA's decision would negatively impact the property's value. 633 F.3d at 898–99. And in *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846 (9th Cir. 2005), the relationship between the defendants' conduct (a planned extension of an oil tanker dock) and the plaintiff's harm (negative environmental impacts due to a resulting increase in tanker traffic and risk of an oil spill) was fairly direct—nothing like the tenuous causal chain alleged by O'Handley. 402 F.3d at 860.

Because O'Handley has not demonstrated standing to press his claims against Secretary Weber, the district court's dismissal of O'Handley's federal claims should be affirmed.

II. O'HANDLEY CANNOT ESTABLISH STATE ACTION

Even if O'Handley had standing, the bulk of his federal claims fail because the complaint does not plausibly allege that Twitter, the entity responsible for applying strikes to and suspending his account (as the complaint repeatedly concedes), is a state actor on any theory.

O’Handley’s First Amendment and other constitutional rights are “protected only against infringement by governments.” *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1982) (quoting *Flagg Brothers v. Brooks*, 436 U.S. 149, 156 (1978)). This bedrock principle of constitutional law—known as the state action doctrine—requires any alleged deprivation of O’Handley’s rights to be “fairly attributable to the state” to be actionable under 42 U.S.C. § 1983. *Id.* at 937.

Courts follow a two-pronged test to determine whether a private party’s actions are “fairly attributable to the state.” *Lugar*, 457 U.S. at 937. Under the first prong, O’Handley must plausibly allege that Twitter’s actions stemmed from a “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.* The second prong requires O’Handley to plausibly allege that Twitter “may fairly [be considered] a state actor.” *Id.* Under this prong, state action must satisfy one of four tests: (1) public function, (2) joint action, (3) governmental nexus, and (4) government compulsion or coercion. *Id.* at 939; *Gorenc v. Salt River Project Agr. Imp. & Power Dist.*, 869 F.2d 503, 506–09 (9th Cir. 1989). Adherence to these tests “avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.” *Lugar*, 457 U.S. at 936. At the same time, it

“preserves an area of individual freedom by limiting the reach of federal law and federal judicial power,” *Lugar*, 457 U.S. at 936, and in this case safeguards Twitter’s own First Amendment rights. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

Because O’Handley fails to plausibly allege either prong of *Lugar*’s state action test, this Court should affirm the district court’s ruling.

A. Twitter’s Content-Moderation Policies Are Not Derived From a Right Created or a Rule of Conduct Imposed by the State

As a preliminary matter, O’Handley contends in error that only the second *Lugar* prong is at issue because “Twitter argued only that it was not a state actor.” AOB 16. O’Handley ignores that Secretary Weber disputed that the first *Lugar* prong was met (2-ER-136–137), and she continues to dispute it on appeal.

O’Handley fails to plausibly allege that Twitter’s editorial discretion flows from a right, privilege, or rule established by the state. *See Lugar*, 457 U.S. at 937; 3-ER-501, ¶ 107. Section 10.5 defines the mission of the OEC, in part, to “coordinate efforts between” the State and local governments to prevent interference with election security, Cal. Elec. Code § 10.5(b)(1), and “to monitor and counteract false or misleading information regarding the electoral process.” *Id.* § 10.5(b)(2). The statute does not grant Twitter any

“right or privilege” it does not already possess, *Lugar*, 457 U.S. at 937, nor does O’Handley identify any other statute granting such a right or privilege.

It should go without saying that Twitter’s authority to enforce its own policies exists independently of section 10.5; it flows instead from Twitter’s private agreement with its users that Twitter may “remove [c]ontent that violates [its] User Agreement” as a condition of use. 3-ER-321. Thus, courts have repeatedly held that Twitter’s enforcement of its own Civic Integrity Policy is not “state action” as a matter of law. *Halleck*, 139 S. Ct. at 1934 (“A private entity . . . who opens its property for speech by others is not transformed by that fact alone into a state actor.”); *see also Prager Univ. v. Google LLC*, 951 F.3d 991, 997 (9th Cir. 2020); *Howard v. Am. Online Inc.*, 208 F.3d 741, 754 (9th Cir. 2000); *NetChoice, LLC v. Atty. Gen., Fla.*, 34 F.4th 1196, 1203 (11th Cir. 2022) (“[social media companies’] so-called ‘content-moderation’ decisions constitute protected exercises of editorial judgment”).

O’Handley also did not (and could not) plausibly allege that Twitter’s actions against him were a product of “a rule of conduct imposed by the State or by a person for whom the State is responsible.” *Lugar*, 457 U.S. at 937. Before the district court, O’Handley pointed to the one-time, one-way communication from the OEC to Twitter flagging his November 2020 tweet

as containing election misinformation. 3-ER-494, ¶ 76. But this notification included no directive or “impos[ition]” of “rule[s] of conduct,” it simply alerted Twitter to a post that the OEC regarded as false or misleading.¹² *Id.* The OEC’s outreach about the tweet was nothing new to Twitter, which was already actively engaged in combatting election misinformation on its own platform. 3-ER-476–477; 484, ¶ 25 (alleging that the OEC “work[ed] . . . proactively with” “social media companies [who were] *taking responsibility on themselves* to do this work [already]”) (emphasis added).

O’Handley’s failure to plausibly allege facts satisfying *Lugar*’s first prong is dispositive. This Court should affirm the district court’s ruling.

B. Twitter Is Not a State Actor

Even if O’Handley had plausibly alleged state action under *Lugar*’s first prong, he has still failed to allege that Twitter is a state actor under *Lugar*’s second prong.

¹² O’Handley attempts to dispute his own allegations that the OEC shared information with Twitter about the “rampant” fraud tweet, and that the OEC’s email to Twitter contained no specific directive. He now argues that these were factual determinations made in error by the district court. AOB 21–22. But the complaint sets forth the text of the OEC’s message to Twitter, which, fairly read, provides general information in response to the “rampant” fraud tweet and makes no request that Twitter take any particular action. 3-ER-494, ¶ 76. The district court correctly characterized the complaint’s allegations without engaging in improper fact-finding. 1-ER-017.

Twitter’s independent right to moderate content on its platform in a manner not subject to constitutional constraint is well-established. In *Prager University*, the Ninth Circuit affirmed the dismissal of First Amendment claims against YouTube because “the state action doctrine precludes constitutional scrutiny of YouTube’s content moderation.” 951 F.3d at 999. That holding applies with equal force here. Nothing distinguishes YouTube from Twitter in this context, and there is wide agreement across courts that Twitter enjoys a First Amendment right to moderate content on its platform in a way that does not implicate the State of California. *See, e.g., Howard.*, 208 F.3d at 754; *NetChoice*, 34 F.4th at 1203.

Despite this well-accepted principle, O’Handley nevertheless insists that Twitter is a state actor. It is not. Courts use four tests to determine whether private action may be attributable to the state. O’Handley relies only on the joint action and nexus tests, and neither one applies.

1. The Complaint Does Not Plausibly Allege That the OEC and Twitter Are Joint Actors

As the district court held, O’Handley failed to plausibly allege that “the state has ‘so far insinuated itself into a position of interdependence with [Twitter] that it must be recognized as a joint participant in the challenged activity,” as required by the joint action test. *Tsao v. Desert Palace*, 698

F.3d 1128, 1140 (9th Cir. 2012) (quoting *Gorenc*, 869 F.2d at 507). Joint action “require[s] a substantial degree of cooperation” between Twitter and the state. *Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir. 2002); *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 753 (9th Cir. 2020) (finding the state must “significantly involve[] itself in the private parties’ actions and decisionmaking” in a “complex and deeply intertwined process” for there to be state action). Further, the joint action must be specific to O’Handley: He must plausibly allege that the OEC and Twitter’s actions are relevant to the “particular decision challenged,” *i.e.*, the suspension of his Twitter account. *Mathis v. Pac. Gas & Elec. Co.*, 75 F.3d 498, 503 n.4 (9th Cir. 1996).

Tsao v. Desert Palace demonstrates the high level of cooperation required for a finding of joint action. In *Desert Palace*, the Las Vegas Metro Police Department (LVMPD) trained private casino security guards, gave them access to LVMPD’s warrant records, and authorized the guards to issue citations “to appear in court for . . . misdemeanor trespassing.” 698 F.3d at 1140. The intent of this coordination was to relieve LVMPD “from responding to every claim of trespassing at the casino.” *Id.* The court concluded that LVMPD had “so far insinuated itself into a position of interdependence with [Desert Palace] that it must be recognized as a joint participant in the challenged activity.” *Id.* (citation omitted).

By contrast, O’Handley’s pleadings fall short of alleging “a substantial degree of cooperation,” *Franklin*, 312 F.3d at 445, or “interdependence,” *Desert Palace*, 698 F.3d at 1140, between Twitter and the OEC.

O’Handley’s central factual allegation to support joint action is that in a single, one-way communication, the OEC “flag[ged] concerns” about O’Handley’s “rampant” fraud tweet to Twitter. 3-ER-494, ¶ 76. The OEC made no request or demands of Twitter; it merely supplied information. *Id.* And unlike in *Desert Palace*, the OEC did not train Twitter, give Twitter access to state records, or delegate any authority to Twitter that it did not already possess. *See Desert Palace*, 698 F.3d at 1140. Generically reporting a tweet that the OEC viewed as containing false or misleading election information does not rise to the level of joint action. *See Lockhead v. Weinstein*, 24 F.App’x 805, 806 (9th Cir. 2001) (“[M]ere furnishing of information to police officers does not constitute joint action”).

O’Handley’s allegations regarding the “Partner Support Portal” change nothing; they indicate neither interdependence between the OEC and Twitter nor a “coordinated [effort] to facilitate censorship.” AOB 19. The complaint specifically alleges that *Twitter* developed a channel through which outside parties could report potential violations of Twitter’s Terms of Use. 3-ER-485, ¶ 28 (“Twitter asked [NASS’s Communications Director] to

let Secretaries of States’ offices know that it had created a separate dedicated way for election officials” to report violations); 3-ER-473. Elections officials from thirty-eight states and numerous localities had access to this portal to report “technical issues” and content “that may violate [*Twitter’s*] policies.” 3-ER-471 (emphasis added). But as Twitter’s Civic Integrity Policy makes clear, content-moderation decisions are made by Twitter alone, *see* 3-ER-290–92, -379, -380–81. And the complaint does not plausibly allege otherwise. 3-ER-485, ¶¶ 32–33.

General statements about the OEC’s and Twitter’s shared goal of combatting election disinformation also fail to establish joint action. 3-ER-484, ¶¶ 24–25; -491, ¶ 65. They merely demonstrate that the OEC, in furtherance of its own mission, sought to proactively notify “social media companies [that were] taking [similar] responsibility on themselves” to combat election misinformation. 3-ER-484, ¶ 25. A “shared . . . common goal” is insufficient to reach joint action; “state and private entities must share a specific goal to violate the plaintiff’s constitutional rights.” *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1455 (10th Cir. 1995); *Children’s Health Def. v. Facebook, Inc.*, 546 F. Supp. 3d 909, 928 (N.D. Cal. 2021) (“general statements by [Facebook and the government] about working to remove misinformation do[] not support the inference of”

joint action), *appeal docketed*, No. 21-16210 (9th Cir., argued May 17, 2022). “Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives.” *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982).

O’Handley also failed to allege cooperation between the OEC and Twitter that is specific to the “particular decision challenged”—the suspension of his Twitter account. *Mathis*, 75 F.3d at 503 n.4. Although O’Handley notes an unrelated interaction between the OEC’s Sam Mahood and Twitter’s Kevin Kane, 3-ER-486, ¶¶ 35–34, this exchange concerned a different Twitter user—not “the particular actions challenged” by O’Handley. *Mathis*, 75 F.3d at 503. The plain text of this exchange undermines O’Handley’s visions of state-orchestrated censorship: The OEC made a “request” to Twitter and “reported” information about misleading statements. 3-ER-486, ¶ 34. Notably absent is language that suggests a relationship between the OEC and Twitter premised upon a “complex and deeply intertwined process.” *Rawson*, 975 F.3d at 753. Further, O’Handley does not and cannot allege that the OEC’s one-time notification to Twitter had any bearing on Twitter’s decision—three months later—to suspend his account, the “particular decision [he] challenge[s]” today. *Mathis*, 75 F.3d at 503-04 n.4.

Similarly misplaced are O’Handley’s attempts to claim joint action by way of conspiracy. “A conspiracy between the State and a private party to violate constitutional rights may also satisfy the joint action test,” *Brunette v. Humane Soc’y of Ventura Cnty.*, 294 F.3d 1205, 1211 (9th Cir. 2002), but the conspiracy must have the intent of “effecting a particular deprivation of constitutional rights.” *Desert Palace*, 698 F.3d at 1140 (citation omitted); *see also Franklin*, 312 F.3d at 441 (defining a conspiracy as “an agreement or ‘meeting of the minds’ to violate constitutional rights”).

The only non-conclusory allegation that O’Handley makes to support his conspiracy theory is a statement attributed to the OEC that it “work[s] closely . . . with social media companies” to combat “misinformation.” 3-ER-484, ¶ 25. But as the district court correctly noted, a shared goal to combat election misinformation does not constitute a “meeting of the minds” to violate O’Handley’s constitutional rights. 1-ER-22:1; *see Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983); *Gallagher*, 49 F.3d at 1455. And the fact that Twitter offered a channel for state election officials and others to report violations of the Twitter Rules does not suggest otherwise: The OEC is not alleged to have any involvement in its development, and mere information sharing does not establish joint action. *See Mathis*, 75 F.3d at 503–04 (no joint action despite repeated information sharing between a private company

and the government); *Lockhead*, 24 F.App’x at 806; *Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 397 (6th Cir. 2016) (finding no joint action because nothing in the record “indicate[d] that [the state actor] gave information to [the private party] that he would not have given to anyone else”).

O’Handley incorrectly asserts that the district court misconstrued *Mathis*, 75 F.3d 498, and that *Carlin Communications, Inc. v. Mountain States Telephone & Telegraph Co.*, 872 F.2d 1291 (9th Cir. 1987) is the more applicable precedent. He claims that “the plaintiff [in *Mathis*] had not introduced any evidence that the task force was involved in the decision to bar [the plaintiff] from PG&E premises,” while attempting to distinguish his case by arguing that, unlike in *Mathis*, he properly “alleged facts to allow the plausible inference that the State exercised sufficient power over Twitter.” AOB 23. But O’Handley did not allege that the OEC involved itself in the decision to permanently suspend his account. 3-ER-499, ¶ 88. And as the district court found, a single communication from the OEC to Twitter does not support a plausible inference that the OEC then involved itself in multiple subsequent decisions by Twitter to label O’Handley’s tweets as disputed and ultimately suspend his account, thereby infringing upon his constitutional rights. 1-ER-17:4. Indeed, Twitter routinely referred to its

own decision-making process as distinct from OEC involvement. 3-ER-448–452; -499, ¶ 88. And under *Mathis*, O’Handley “needed to [allege] not merely that [Twitter] had a close relationship with [the OEC], but also that the relationship encompassed [Twitter’s content-moderation] decisions,” which he has failed utterly to do. 75 F.3d 498, 504; *Rawson*, 975 F.3d at 753; see 3-ER-494, ¶¶ 77–78; -499, ¶ 88.

O’Handley fares no better under *Carlin*. In that case, Mountain Bell terminated service to Carlin Communications due to “salacious telephone messages” sent over Mountain Bell’s network. 827 F.2d at 1293. Critically, a government attorney advised Mountain Bell to terminate Carlin’s service and indeed threatened to prosecute Mountain Bell “if it did not comply”; this threat supplied the “requisite ‘nexus’ between the state and the challenged action.” *Id.* at 1295. Applying *Carlin* necessitates affirmance of the district court: The OEC’s generic outreach to Twitter contained no comparable demand or threat of prosecution. 3-ER-494, ¶ 76. O’Handley thus fails to establish joint action under standards set forth in his own cited cases.

2. The Complaint Does Not Plausibly Allege a Close Nexus Between the OEC and Twitter

Under the nexus test, O’Handley must allege that “there is a sufficiently close nexus between the State and the challenged action of

[Twitter] so the action of the latter may be fairly treated as the state itself.”
Gorenc, 869 F.2d at 506 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). Courts consider an array of factors to determine whether a close nexus exists: “(1) the organization is mostly comprised of state institutions; (2) state officials dominate decision-making of the organization; (3) the organization’s funds are largely generated by the state institutions; and (4) the organization is acting in lieu of a traditional state actor.”
Villegas v. Gilroy Garlic Festival Ass’n, 541 F.3d 950, 955 (9th Cir. 2008) (paraphrasing the Supreme Court’s multi-factor nexus test introduced in *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n.*, 531 U.S. 288, 295–300 (2001)). The nexus test “is a matter of normative judgment,” in which “no one fact can function as a necessary condition across the board for finding state action”; courts look to the factors as a whole—availing and “countervailing”—to discern state action. *Brentwood Acad.*, 531 U.S. at 295. But O’Handley did not address any of these factors in his brief, and the only factor that his allegations might implicate, even in theory, is the second.¹³

¹³ O’Handley has not made plausible factual allegations to the first, third, or fourth factors. Twitter is a private company that derives its funds from private business transactions, and moderating content on privately owned and controlled media is not a traditional function of the state.

The complaint, however, alleges no facts showing that OEC officials dominate Twitter’s decision-making processes, much less facts supporting O’Handley’s sweeping conclusion that “there was a clear nexus between Defendant’s actions and the intent to chill Mr. O’Handley’s speech.” 3-ER-502, ¶ 118. *See Villegas*, 541 at 955. The OEC’s generic outreach to Twitter, taken as true—something that countless other third-parties, both public and private, have done—does not plausibly suggest the OEC “dominated” Twitter’s content-moderation decisions. 3-ER-494, ¶ 76.

Because O’Handley failed to plausibly allege either prong of *Lugar*’s state action test, this Court should affirm the district court’s order.

III. THE COMPLAINT FAILS TO STATE ANY FEDERAL CLAIM FOR RELIEF

The district court correctly dismissed O’Handley’s First Amendment, due process, equal protection, and conspiracy claims without reviewing their merits because Twitter is not a state actor. Even if this Court were to disagree about state action, their dismissal should still be affirmed because all four claims for relief also warrant dismissal on the separate grounds that they fail to state a claim upon which relief can be granted. The district court’s determination that the complaint does not state a claim that section 10.5 is void for vagueness should also be affirmed.

A. The First Amendment Claim Fails

O’Handley contends that the complaint states a First Amendment violation under two theories—first, that Twitter and the OEC “censored O’Handley’s tweets based on their content and the viewpoint they professed,” and second, that Twitter and the OEC retaliated against O’Handley based upon the content of his tweets. AOB 28–29. Even putting aside that both theories depend on the unsupportable premise that Twitter is a state actor, the claim fails as a matter of law because the OEC’s alleged acts pursuant to section 10.5 were themselves government speech unregulated by the First Amendment. Further, the complaint fails to state a claim of viewpoint discrimination or retaliation because it does not allege facts showing that the OEC impaired O’Handley’s speech rights or punished him for expressing his views.

1. The OEC’s Alleged Conduct Is Government Speech

The First Amendment limits the government’s ability to regulate private speech. It does not, however, “say that Congress and other government entities must abridge their own ability to speak freely.” *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017); *see also Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). The government speech doctrine recognizes that “[w]hen a government entity embarks on a course of action,

it necessarily takes a particular viewpoint and rejects others,” and that “imposing a requirement of viewpoint-neutrality on government speech would be paralyzing.” *Matal*, 137 S. Ct. at 1757. Otherwise, “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.” *Keller v. State Bar of Cal.*, 496 U.S. 1, 12–13 (1990).

As the district court correctly held, the “central allegation” in the complaint is that an unnamed “agent or staff member” of the Secretary of State’s Office “flagged” the “rampant” fraud tweet in an email to Twitter. 1-ER-080; 3-ER-494, ¶ 76. This is government speech falling outside of the First Amendment’s ambit. As the constitutional officer charged with regulating free and fair elections, the Secretary “will have a viewpoint” on what constitutes false or misleading election information, “and there is no constitutional reason why it should not be able to convey that message with clarity,” whether that message is directed to a private social media company or the general public. *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1014 (9th Cir. 2000) (citing *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring)). Section 10.5 specifically directs the OEC to “monitor and counteract false or misleading information regarding the electoral process,” Cal Elec. Code § 10.5(b)(2), and “educate voters . . .

with valid information from elections officials,” *id.* § 10.5(c)(8). Thus, O’Handley cannot fairly contend that the OEC’s activities to identify and respond to election misinformation are anything other than government speech.

O’Handley argues the Secretary engaged in content and viewpoint “discrimination” merely because the OEC reported it as false and misleading. AOB 29 – 30; and see 3-ER-500, ¶ 99 (alleging “Twitter’s real reason for suspending” O’Handley’s account arises from “the content of his speech raising concerns about election administration and integrity”). Not so. It does not offend the First Amendment for the OEC to identify false or misleading election information and then issue an explanation of why it is false or misleading. That is precisely the sort of “content-based choice” that can be made “when the State is the speaker.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); *Downs*, 228 F.3d at 1112 (when the government “opens up its own mouth,” “its control of its own speech is not subject to the constraints of constitutional safeguards”). That the OEC, as a government speaker, expressed disagreement with O’Handley’s tweet does not mean the OEC engaged in prohibited “viewpoint discrimination.” *See Am. Family Ass’n, Inc. v. City & Cnty. of S.F.*, 277 F.3d 1114, 1124 (9th Cir. 2002) (“Although Plaintiffs correctly cite

dozens of cases for the principle that the government cannot prescribe matters of opinion or belief, all of these authorities involve conduct beyond mere criticism of speech by a governmental authority.”).

Because the facts alleged in the complaint reflect that the OEC engaged in government speech to identify and respond to election misinformation, O’Handley’s free speech claim is not subject to review under the First Amendment.

2. The Complaint Does Not Allege Facts Establishing That the OEC Restricted O’Handley’s Speech

O’Handley also cannot state a First Amendment claim based on a theory of content or viewpoint discrimination because the complaint does not allege facts showing that the OEC abridged his speech at all.

By its own terms, Elections Code section 10.5 does not burden O’Handley’s First Amendment rights. As the district court correctly observed, 1-ER-34:9–10, it sets forth the mission and purpose of the OEC to “monitor and counteract false or misleading information regarding the electoral process.” Cal Elec. Code § 10.5(b)(2); *see also id.* § 10.5(c)(8) (the OEC shall “mitigate the false or misleading information, and educate voters, especially new and unregistered voters, with valid information from elections officials . . .”). Its directives in no way limit the ability of private

individuals to express their views about elections or anything else. Nor does it prescribe any penalty against private speakers that would deter them speaking.

O’Handley disagrees, arguing that, irrespective of section 10.5’s plain text, the OEC’s generic outreach to Twitter ultimately caused his tweet to be “censored.” AOB 29. But the notion that the OEC “censored” or interfered with O’Handley’s speech finds no plausible support in the complaint. *See Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) (holding that the First Amendment consequences of a public official’s requests that a third party not disseminate plaintiff’s message turn on “the distinction between attempts to convince and attempts to coerce”). The OEC has no oversight responsibility over Twitter. Its message to Twitter did not require, or even ask, that Twitter take any particular action with respect to O’Handley’s tweet, much less try to “coerce” Twitter, such as by suggesting it would penalize Twitter for inaction. Thus, it cannot be plausibly inferred from the complaint that the OEC’s actions—as distinct from Twitter’s—abridged O’Handley’s speech.

In this way, the OEC’s outreach to Twitter is analogous to the county supervisors’ resolution in *American Family*, 277 F.3d 1114. In that case, this Court affirmed the dismissal of a viewpoint discrimination claim based

on a resolution urging “local television stations not to broadcast advertising campaigns aimed at ‘converting’” one’s sexual orientation. *Id.* at 1120.

Like the resolution in *American Family*, the OEC’s alleged message, at most, expressed substantive disagreement with the “rampant” fraud tweet and explained why it misleads. But because the complaint does not allege that the OEC “imposed or even threatened any prohibitions or sanctions for [O’Handley’s] viewpoint,” it does not state a colorable claim of viewpoint discrimination. *Id.* at 1125; *see also id.* at 1124 (“We agree with the host of other circuits that recognize that public officials may criticize practices that they would have no constitutional ability to regulate, so long as there is no actual or threatened imposition of government power or sanction.”).

Because the complaint does not allege that the OEC engaged in any official action that restricted what O’Handley may say about election administration, or that it threatened Twitter for failing to take action against O’Handley, there has been no actionable government restriction on his speech. As such, O’Handley cannot state a First Amendment claim for content or viewpoint discrimination.

3. The Complaint Does Not Plead a Retaliation Claim Against a Government Speaker

O’Handley contends that the OEC “targeted him for reprisal based on his speech” as retaliation for exercising his political views. AOB 30. To proceed, O’Handley must plead facts demonstrating that “(1) he engaged in constitutionally protected activity; (2) as a result, he was subjected to adverse action by the defendant that would chill a person of ordinary firmness from continuing to engage in the protected activity; and (3) there was a substantial causal relationship between the constitutionally protected activity and the adverse action.” *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010); *Mulligan v. Nichols*, 835 F.3d 983, 988 (9th Cir. 2016).

The very marketplace of ideas that the First Amendment endeavors to protect “is undermined if public officials are prevented from responding to speech of citizens with speech of their own.” *Mulligan*, 835 F.3d at 989 (citing *Bond v. Floyd*, 385 U.S. 116, 136 (1966)). Accordingly, allegations that speech by a government official constitutes First Amendment retaliation “warrant a cautious approach” *Mulligan*, 835 F.3d at 989.

The complaint fails to allege any action on the part of the OEC that would surpass this high bar. To offend the First Amendment, an adverse action by a public employee must be more than a “minor indignity”—it must

“have the effect of punishing someone for his or her speech.” *Blair*, 608 F.3d at 544. But notifying Twitter of election misinformation contained in a single tweet, far from punishing O’Handley for his views, merely expresses the OEC’s own views regarding the false or misleading character of the tweet. “It would be the height of irony, indeed, if mere speech, in response to speech, could constitute a First Amendment violation.” *See Nunez v. City of L.A.*, 147 F.3d 867, 875 (9th Cir. 1998). And the complaint alleges no adverse action against O’Handley resulting from the OEC’s outreach in November 2020, as distinct from Twitter’s unrelated content-moderation decisions in 2021.

Even the later effects of Twitter’s eventual suspension of his account—which the complaint correctly attributes to Twitter, not the OEC—are insufficiently adverse to amount to retaliation. *See Mulligan*, 835 F.3d at 989 (holding the loss of plaintiff’s job, among other “undoubtedly damaging” reputational harms that followed the police’s publication of an unflattering press release about plaintiff’s arrest “is not actionable under § 1983 unless it is accompanied by some more tangible interests”).

Because the complaint fails to allege an adverse action by the OEC that reflects an intent to punish O’Handley for the content of his speech, the First Amendment claim should be dismissed.

B. The Equal Protection Claim Fails

Even if O’Handley had adequately alleged standing and state action (and he did not), his equal protection claim would still fail as a matter of law. To state an equal protection violation, O’Handley must plead facts demonstrating intentional discrimination against him based upon membership in a protected class. *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). The complaint fails to plead facts that would establish that O’Handley belongs to a protected class, or that the OEC intended to discriminate against him based on any protected status.

O’Handley speculates that the OEC “focused their speech censorship efforts on conservative requests for transparency in election processes rather than the same calls from self-identified political liberals.” 3-ER-495, ¶ 83. But the complaint does not identify any other conservatives whose speech the OEC supposedly targeted that would situate O’Handley within a broader class. Likewise, it identifies no “self-identified political liberals” who posted election misinformation that the OEC declined to flag. 3-ER-495, ¶ 83. This is insufficient to state an equal protection claim on the theory that conservative individuals were “treated differently from other persons.” AOB 32 (quoting *United States v. Lopez-Flores*, 63 F.3d 1468, 1472 (9th Cir. 1995); see *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir.

2005) (holding that “[a]n equal protection claim will not lie by ‘conflating all persons not injured into a preferred class receiving better treatment’ than the plaintiff”) (quoting *Joyce v. Mavromatis*, 783 F.2d 56, 56 (6th Cir. 1986)); *Lindsay v. Bowen*, 750 F.3d 1061, 1065 (9th Cir. 2014) (holding that the plaintiff’s equal protection claim in part fails because “[w]hile claiming that similarly situated [individuals] were treated differently than she was, [plaintiff cannot] identify a single person who” in fact was treated differently).

Even if O’Handley’s complaint successfully alleged disparate treatment, it fails to plead facts showing discriminatory intent. *See Wayte v. United States*, 470 U.S. 598, 608 (1985). In this regard, the only non-speculative allegation in the complaint would establish that the OEC regarded the tweet as containing false or misleading information about election administration that could sow “distrust among the general public.” 3-ER-495, ¶ 76. Given that section 10.5 expressly directs the OEC to “monitor and counteract” such statements, Cal. Elec. Code. § 10.5(b)(2), the mere suggestion that the OEC employed its statutory responsibilities as a pretext to discriminate against conservatives, without any supporting facts, is insufficient to state a claim. *See Lindsay*, 750 F.3d at 1064–65 (holding that the plaintiff’s equal protection claim in part fails because “she offers no

proof, beyond conclusory allegations of discrimination, that the [governmental actor] had any . . . ulterior motive; *Iqbal*, 556 U.S. at 682 (“As between [an] ‘obvious alternative explanation’ for the [complained activity] and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.”) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 (2007)).

Because O’Handley failed to plead facts that show disparate treatment or discriminatory intent, this Court should affirm the dismissal of his equal protection claim.

C. The Due Process Claim Fails

As discussed above (*supra* at 25–40), the district court properly dismissed O’Handley’s due process claim because the complained “actions are not attributable to the State.” 1-ER-033. The complaint also fails to state a substantive or procedural due process claim upon which relief could be granted.

To state a procedural due process claim, O’Handley must plead facts showing (1) a constitutionally protected liberty or property interest; (2) a deprivation of that interest by the government; and (3) the lack of adequate process. *Shanks v. Dressel*, 540 F.3d 1082, 1090–91 (9th Cir. 2008). The complaint fails to allege facts that would demonstrate an interest “within the

Fourteenth Amendment’s protection of liberty and property” such that “due process requirements apply in the first place.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). To support his procedural due process claim, O’Handley identifies two interests that supposedly require a “pre-deprivation hearing”: (1) A liberty interest to pursue a profession as a social media influencer, and (2) a property interest in “business goodwill” as defined under California Business and Professions Code section 14100. AOB 35–37.

Neither alleged interest merits procedural due process protection. O’Handley offers no authority for the novel proposition that there is a liberty interest in continued access to accounts on a private social media platform. AOB 36. His claim rests on an implicit assumption that one’s status as an alleged social media influencer is akin to employment. 3-ER-481, ¶ 9; -505, ¶ 152. Even taking this as true, a property interest in continued employment exists only where established “by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Roth*, 408 U.S. at 577. O’Handley identifies no state law or other independent source giving rise to a property interest in his social media accounts. And any such “rule[] or understanding[]” would run counter to

Twitter’s Terms of Service, which expressly provide for the suspension of accounts of users who violate the Twitter Rules. 3-ER-336.

O’Handley’s asserted property interest in business goodwill from his social media accounts also fails because Business and Professions Code section 14100 applies to businesses, not individuals. *See In re Marriage of McTiernan & Dubrow*, 133 Cal. App. 4th 1090, 1098–99 (2005) (“No California case has held that a natural person, apart and distinct from a ‘business,’ can create or generate goodwill.”). O’Handley has alleged no facts to support a claim that his Twitter account amounts to a legally cognizable business that could generate goodwill, and he thus fails to articulate a plausible protected property interest. Further, Twitter, a private actor, has a well-established First Amendment right to moderate content on its platform, and to take action against users who violate its policies, up to and including suspending their accounts. To hold that O’Handley had a due process right to be heard before Twitter suspended his account would eviscerate Twitter’s editorial discretion.

O’Handley’s due process claim, as pled, invokes procedural due process rights, not substantive ones. *See* 3-ER-506, ¶¶ 154–155. For the first time on appeal, O’Handley argues this claim as one of substantive due process, claiming that OEC “had no valid basis for their interference with

O’Handley’s Twitter account,” and that such interference amounted to a violation of O’Handley’s substantive right to pursue his “chosen profession” of working as a “social media influencer.” AOB 34–35.

This argument fails as matter of law because the right to pursue one’s chosen profession is not considered a fundamental right. *Marilley v. Bonham*, 844 F.3d 841, 854 (9th Cir. 2016) (en banc). Rather, the right is “economic in nature,” and any alleged burden upon it is subject to rational basis review. *Slidewaters LLC v. Wash. State Dep’t of Lab. & Indus.*, 4 F.4th 747, 758 (9th Cir. 2021), *cert. denied sub nom, Slidewaters LLC v. Wash. Dep’t of Lab. & Indus.*, 142 S. Ct. 779 (2022). To survive rational basis review, “[t]he question is whether Defendants’ actions are rationally related to [a legitimate state] interest.” *Id.* “Under this deferential standard, [a plaintiff] must show that the state’s actions are ‘clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.’” *Id.* (quoting *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012)).

The OEC’s alleged conduct would readily withstand rational basis review because the State has a legitimate interest in mitigating the influence of false or misleading information about the electoral process. Both section 10.5 itself, and the OEC’s alleged acts in contacting Twitter about

O’Handley’s “rampant” fraud tweet, rationally relate to the State’s interest in preventing voter confusion, voter suppression, and interference with orderly and secure elections. The State of California “has a compelling interest in preserving the integrity of its election process,” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (citing *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214 (1989)), and the State is given wide latitude to pursue this interest via appropriate legislation. Because O’Handley’s alleged deprivation of an economic right only merits rational basis review, his substantive due process claim fails as a matter of law.

To support his contention that due process analysis protects “the right to pursue one’s chosen profession,” O’Handley cites *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 238–39 (1957), and *Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999). AOB 34–35. Neither helps him here. As the Supreme Court explained in *Gabbert*, “*Schwartz* held that former membership in the Communist Party and an arrest record relating to union activities could not be the basis for *completely excluding* a person from [a profession].” *Gabbert*, 526 U.S. at 292 (emphasis added). Unlike the plaintiff in *Schwartz*, O’Handley has hardly been excluded from a career as a social media influencer. O’Handley alleges (and thereby admits) that he still maintain a robust presence on other social media platforms, even after

Twitter suspended his account. By his own reckoning, he still has more than two and a half million followers on other platforms. *See* 3-ER-484, ¶ 9.

Because O’Handley fails to allege interests that merit due process protections under the Fourteenth Amendment, this Court should affirm the dismissal below.

D. The Void-for-Vagueness Claim Fails

1. Elections Code 10.5 Does Not Regulate Private Conduct

As the district court correctly held, O’Handley’s claim that Elections Code section 10.5 is void for vagueness fails because he cannot show that the statute regulates any private conduct. Section 10.5 “does not restrict what anyone can say. It is therefore ‘not amenable to a vagueness challenge.’” ER-084 (quoting *Beckles v. United States*, 137 S. Ct. 886, 895 (2017)).

A statute is facially vague when it “fails to provide a person of ordinary intelligence fair notice of what is *prohibited*, or is so standardless that it authorizes or encourages seriously discriminatory *enforcement*.” *United States v. Williams*, 553 U.S. 285, 304 (2008) (emphasis added). But section 10.5 cannot run afoul of the vagueness doctrine because it neither prohibits private conduct nor gives the OEC any “enforcement” powers with respect

to private conduct. Rather, section 10.5 “simply sets out the mission of the OEC” (ER-084), which includes, as relevant here, “assess[ing] . . . false or misleading information regarding the electoral process” and “mitigate[ing] . . . false or misleading information.” Cal. Elec. Code, § 10.5(c)(8); *see Beckles*, 137 S. Ct. at 895 (internal quotations and citations omitted) (holding that the U.S. Sentencing Guidelines were not vague because the guidelines did not “bind or regulate the primary conduct of the public”). Statutes that “merely guide” discretionary authority are “not amenable to a vagueness challenge.” *Beckles*, 137 S. Ct. at 894.

When a statute “is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater deal of specificity than in other contexts.” *Lane v. Salazar*, 911 F.3d 942, 950 (9th Cir. 2018). But this principle applies only where the challenged statute *regulates* or *prohibits* some form of private conduct, which section 10.5 does not.¹⁴

¹⁴ O’Handley’s brief quotes *Lane* to support his First Amendment theory of requisite heightened specificity. *Lane* quotes from *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010), which quotes from *Farrell v. Burke*, 449 F.3d 470 (2d Cir. 2006), which quotes from *Smith v. Goguen*, 415 U.S. 566 (1974). Each of these cases involved a *prohibition* or *regulation* of private conduct and are thus inapposite. *See Lane*, 911 F.3d at 945 (statute prohibiting “[t]hreatening another with bodily harm”); *VIP of Berlin*, 593 F.3d at 182 (ordinance prohibiting “adult oriented store[s]” within 250 feet of a residential area); *Farrell*, 449 F.3d at 476 (“special

O’Handley cites no case law suggesting that a statute like section 10.5, which only serves to define the OEC’s mandate, had the effect of prohibiting or regulating private conduct.

O’Handley’s as-applied challenge to section 10.5, relying on the flawed premise that the “OEC *applied* the term [‘false’] to censor [his] speech,” fares no better. AOB 39. In an as-applied challenge, the court must consider, “*in the circumstances of this case*,” if the statute “(1) does not define the conduct it prohibits with sufficient definiteness and (2) does not establish minimal guidelines to govern law enforcement.” *United States v. Wyatt*, 408 F.3d 1257, 1260 (9th Cir. 2005) (emphasis in original) (internal citation omitted) (considering a statute that criminalized the “use[] of a hazardous or injurious device on Federal land”); *United States v. Rodriguez*, 360 F.3d 949, 953 (9th Cir. 2004) (considering the vagueness of a statute that “prohibits any robbery or extortion that . . . ‘obstructs, delays, or affects commerce’”).

condition of parole . . . prohibit[ing] the possession of ‘pornographic material’”); *Smith*, 415 U.S. at 569 (statute imposing criminal liability on anyone who “publicly . . . treat[ed] contemptuously the flag of the United States”).

O’Handley argues in conclusory fashion that the OEC interpreted section 10.5 as license to “actually censor speech it found . . . to be ‘false or misleading.’” AOB 38. But he does not—and cannot—plausibly allege that the OEC, and not Twitter, took such action against him. The complaint concedes that OEC did nothing more than alert Twitter to a single tweet, and that Twitter took all further action. 3-ER-494, ¶ 76. “*Twitter* . . . appended commentary assert[ing] that Mr. O’Handley’s claim about election fraud was disputed;” “*Twitter* . . . added a ‘strike’ to Mr. O’Handley’s account;” “*Twitter* permanently suspended Mr. O’Handley’s account.” 3-ER-494, ¶¶ 77–78; 499, ¶ 88 (emphasis added). The complaint is bereft of factual allegations that the OEC took any part in these decisions. To the contrary, each time Twitter allegedly moderated O’Handley’s content, it cited violations of its own internal policies—not section 10.5—as the basis for its decisions. 3-ER-448–452; -499, ¶ 88.

2. The Meaning of “False or Misleading” Is Clear

Because O’Handley did not and cannot plausibly allege that OEC “censored” him, this Court need not consider whether “false and misleading” are impermissibly vague terms. AOB 39. Regardless, O’Handley’s arguments are unavailing.

As the district court correctly held (1-ER-034), there is nothing unclear about its use of the terms “false or misleading.” The Ninth Circuit has held more than once that statutes using the terms “false” or “misleading” are not impermissibly vague. *See, e.g., First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1274–75 (9th Cir. 2017) (ordinance prohibiting “false or misleading advertising by limited services pregnancy centers”); *United States v. Matanky*, 482 F.2d 1319, 1321–22 (9th Cir. 1973) (statute “proscribing false statements in an application for payment under the Social Security Act”).

Rather than analyze section 10.5’s full text, O’Handley argues that his “rampant” fraud tweet cannot be evaluated under section 10.5’s standard because it “contains no factual assertions that could be determined false.” AOB 40. But his statement about “rampant” election fraud need not “associate[itself] with a specific number” to be a purported statement of fact. AOB 40. Defining “rampant” in O’Handley’s terms, the statement “[e]lection fraud is [growing] nationwide” is a statement of fact much like the statement, “The Celtics ‘prevail[ed]’ in the NBA Finals.” AOB 40; 3-ER-480, ¶ 3. Both statements can be falsified, even though neither cites a number of fraudulent votes cast or games won. Further, O’Handley’s tweet contained other purportedly factual statements constituting misinformation. 3-ER-493, ¶ 72. For example, “[a]udit every California ballot” implies that

California does not audit ballots (it does), and “we all know California is one of the culprits” implies that California is responsible for the claimed increase in voter fraud (it is not). *Id.* Both statements are falsifiable.

O’Handley also disputes the district court’s reading of *First Resort*, claiming that section 10.5 must include “further clues on which O’Handley could have relied to determine what speech the OEC would censor as false or misleading.” AOB 38. This would only make sense if section 10.5 restricted what O’Handley could say or otherwise regulated his conduct, which it does not. Regardless, O’Handley misreads the case. In *First Resort*, the court held that “otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity,” and that the specific language in question must be viewed in the context of the statute as a whole. 860 F.3d at 1274–75. Here, section 10.5(b)(2) explains that the purpose of “counteract[ing] false or misleading information” is to mitigate or counteract misinformation that “may suppress voter participation or cause confusion and disruption of the orderly and secure administration of elections.” Cal. Elec. Code § 10.5(b)(2). A statement implying that “rampant” election fraud throws the results of the 2020 election into doubt—provided without evidence or context—could certainly confuse voters. It could also cause disillusioned voters to sit out

future elections or encourage frustrated voters to attempt to disrupt election administration. 3-ER-480, ¶ 3.

The court should affirm the dismissal of O’Handley’s vagueness claim.

E. The Complaint Fails to Allege a Conspiracy Within the Meaning of Section 1985(3)

O’Handley fails to identify any error in the district court’s dismissal of his conspiracy claim under 42 U.S.C. §1985(3).

To state a cause of action under section 1985(3), O’Handley must allege (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of this conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. *United Bhd. of Carpenters and Joiners of Am. v. Scott*, 463 U.S. 825, 828–29 (1983). Because section 1985 protects against violations of equal protection of the law, O’Handley must also allege facts that would establish “[5] some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action,” *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971), 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, 275 (1993) (quoting *Scott*, 463 U.S. at 833).

The district court correctly dismissed the section 1985(3) claim for failure to plausibly allege facts that would establish a conspiracy. 1-ER-023–24; 1-ER-033. O’Handley agrees that the analysis for determining whether a plaintiff has alleged the existence of a conspiracy for section 1985 purposes is the same as stating a claim for conspiracy with a state actor under section 1983. AOB 42; *Cassettari v. Nevada Cnty., Cal.*, 824 F.2d 735, 739 (9th Cir. 1987). Thus, for the reasons explained above, *see supra* at 35–36, O’Handley’s conspiracy allegations fall short.

The conspiracy claim also fails to allege that O’Handley belongs to any class that section 1985 has been construed to protect. In order to state a claim under section 1985(3) in this Circuit, O’Handley must allege facts establishing membership in a class that “require[s] and warrant[s] special federal assistance in protecting their civil rights.” *Maynard v. City of San Jose*, 37 F.3d 1396, 1403 (9th Cir. 1994) (quoting *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536–37 (9th Cir. 1992) (internal quotations omitted). “More specifically, [this Circuit] requires either that the courts 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 purported class to which O’Handley belongs is so indefinite as to prevent identification, much less meet the standard articulated in *Schultz*. O’Handley defines the class to which he belongs by reference to his individual disagreement with the California Secretary of State’s views. 3-ER-480, ¶ 3 (alleging the OEC targeted O’Handley for “the expression of his opinion that California . . . should audit its elections to protect against voter fraud”); 3-ER-493, ¶ 74 (alleging the OEC targeted O’Handley for “questioning Padilla’s administration of and fitness for his political office”); 3-ER-496, ¶ 84 (alleging the OEC “focused their speech censorship efforts on conservative requests for transparency in election processes”). But disagreeing with an elected official is neither a suspect classification nor a status that the Legislature has “singled out for special federal protection.” *McCalden v. Cal. Library Ass’n*, 955 F.2d 1214, 1223 (9th Cir. 1990), superseded by statute on other grounds as stated in *Harmston v. City and Cnty. of S.F.*, 627 F.3d 1273, 1280 (9th Cir. 2010). And a purported class defined only by a plaintiff’s “political and philosophical opposition” and “outspoken criticism” of defendants is too “vague and amorphous” to be “objectively identified by an observer,” much less protected under section

1985(3). *Rodgers v. Tolson*, 582 F.2d 315, 317–18 (4th Cir. 1978). It is not even clear from the complaint whether anyone else belongs to this purported class besides O’Handley.

Although O’Handley contends that his political beliefs confer protected status under section 1985(3), his cited cases do not help his cause. AOB 42–43. First, none of the cases he cites recognizing a section 1985(3) class based on political associations or views were decided by this Circuit. Second, their holdings have been called substantially into question by *Scott* and its progeny, which cautioned that broadly recognizing classes based on political affiliation would provide “a remedy for every concerted effort by one political group to nullify the influence or do injury to a competing group by use of otherwise unlawful means.” 463 U.S. at 836. This result “would go far toward making the federal courts, by virtue of § 1985(3), the monitors of campaign tactics in both state and federal elections, a role that the courts should not be quick to assume.” *Id.*; *see also Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155, 161 (4th Cir. 1985) (*Scott* offers “little support for the contention that § 1985(3) includes in its scope of protection the victims of purely political conspiracies”); *accord Farber v. City of Paterson*, 440 F.3d 131, 142 (3d Cir. 2006) (“While we do not hold that

discrimination motivated by a mutable characteristic can never be invidious, political affiliation surely does not qualify”).

Even if O’Handley’s personal political views situated him within a protected class, the complaint is bereft of facts plausibly suggesting that an “invidiously discriminatory animus” motivated the OEC. The complaint alleges no facts suggesting that the OEC’s decision to report his tweet was motivated by his political views—as distinct from the fact that he posted demonstrably false and misleading election information that was likely to cause confusion and distrust. It is not enough for O’Handley to rest on the bare conclusion that “Defendants focused their speech censorship efforts on conservative requests.” 3-ER-495, ¶ 84. In the plain absence of facts showing that his membership in the supposed “class” actually motivated the alleged conduct, his claim fails as a matter of law. *See Scott v. Rosenberg*, 702 F.2d 1263, 1270 (9th Cir. 1983) (affirming dismissal of section 1985(3) claim where complaint failed to allege facts to support conclusion that FCC enforcement action against pastor for unlawful solicitation of funds during a broadcast was motivated by anti-religious animus). For all of these reasons, the dismissal of the section 1985(3) conspiracy claim should be affirmed.

IV. THE DISTRICT COURT CORRECTLY DECLINED TO REVIEW THE LIBERTY OF SPEECH CLAIM

The district court did not abuse its discretion in declining to exercise supplemental jurisdiction over O’Handley’s claim under article I, section 2, of the California Constitution, without prejudice to his ability to press his claim in state court. 1-ER-024. As an initial matter, the Eleventh Amendment bars O’Handley from suing Secretary Weber in federal court over an alleged violation of the California Constitution. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98–102 (1984). Although O’Handley sued former Secretary Padilla and four other employees of the Secretary of State’s Office in their personal capacities, he did not appeal the dismissal of those defendants. AOB 12 n.2. That leaves only Secretary Weber in her official capacity, who categorically cannot be sued in federal court for violating the Liberty of Speech Clause. That should be the end of the analysis.

Beyond that, however, it is well-settled that dismissal of a claim arising under state law following the dismissal of federal claims before trial is “clearly within [the district court’s] discretion” under 28 U.S.C. § 1367(c)(3). *Voigt v. Savell*, 70 F.3d 1552, 1565 (9th Cir. 1995) (citing *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1309 (9th Cir. 1992),

cert. denied, 507 U.S. 1004 (1993)); *see also United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). Dismissal was also proper because the claim raises novel issues of state constitutional law. 28 U.S.C. § 1367(c)(1).

Notably, O’Handley does not question the district court’s discretion to dismiss this claim on either ground. Instead, he contends that the complaint stated a plausible claim for relief under the Liberty of Speech Clause. AOB 44–45. Again, the Eleventh Amendment squarely bars this claim against Secretary Weber. But even if that were not the case, O’Handley’s views of the merits of the claim have no bearing on whether the district court correctly declined to exercise jurisdiction.¹⁵

O’Handley is also wrong about the merits because the absence of state action is fatal to this claim. *Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 26 Cal. 4th 1013, 1031 (2001) (plurality op.) (holding free speech rights under the California Constitution only protect against government action). The Liberty of Speech Clause also does not apply to

¹⁵ Even if this Court were to reverse on one or more of O’Handley’s federal claims, there would be no need for further action with respect to the supplemental state-law claim because the Eleventh Amendment bars it. Even if not, the proper course would be to remand this claim for the district court either to consider in the first instance, or, in its discretion, to (again) decline to exercise supplemental jurisdiction. *See Fang v. United States*, 140 F.3d 1238, 1244 (9th Cir. 1998); *Hunsaker v. Contra Costa Cnty.*, 149 F.3d 1041, 1044 (9th Cir. 1998).

government speech, and the only conduct alleged against Secretary Weber— alerting Twitter to a tweet that the Secretary viewed as false and misleading—is government speech. *Delano Farms Co. v. Cal. Table Grape Comm’n*, 4 Cal. 5th 1204, 1210 (2018); *and see supra* at 40–43.

Citing *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1979), O’Handley contends that California Constitution recognizes a right to his continued access to Twitter even if the First Amendment does not. More than 40 years ago, *Pruneyard* construed the California Constitution to allow speech in public areas of a privately owned shopping mall. *Id.* at 908–09. But *Pruneyard* cannot revive O’Handley’s defunct state action theory. *Pruneyard* concerned physical property that “serve[s] as the functional equivalent of the traditional town center business district, where historically the public’s free speech activity is exercised.” *Albertson’s, Inc. v. Young*, 107 Cal. App. 4th 106, 114–15 (Cal. Ct. App. 2003). Unlike the public areas of the mall in *Pruneyard*, Twitter is not a blank canvas for public expression; it expressly conditions use of the services on compliance with its internal content-moderation rules. Further, no case has extended *Pruneyard*’s holding to the Internet, which would introduce “potentially sweeping consequences” in California’s free speech jurisprudence. *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d 1099, 1116–17 (N.D. Cal.

2017). The state courts should undertake to answer this question in the first instance.

CONCLUSION

For the reasons stated above, this Court should affirm the district court's dismissal of O'Handley's claims for lack of standing, because Twitter is not a state actor, and for failure to state a claim, and find that the district court did not abuse discretion in declining to exercise supplemental jurisdiction over the state constitutional claim.

Dated: July 25, 2022

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 22-15071

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22-15071

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROGAN O’HANDLEY,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: July 25, 2022

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22-15071

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**ADDENDUM TO ANSWERING BRIEF OF DEFENDANT-APPELLEE
CALIFORNIA SECRETARY OF STATE DR. SHIRLEY N. WEBER**

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§ 2. Liberty of speech or of the press; responsibility for abuse; right
to refuse to disclose source of information by member of news media

Currentness

Sec. 2. (a) 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.

(b) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

Nor shall a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

As used in this subdivision, "unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

Credits

(Added Nov. 5, 1974. Amended June 3, 1980.)

West's Ann. Cal. Const. Art. 1, § 2, CA CONST Art. 1, § 2

Current with urgency legislation through Ch. 46 of 2022 Reg.Sess. Some statute sections may be more current, see credits for details.

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§ 10.5. Office of Elections Cybersecurity; creation; missions and..., CA ELEC § 10.5

West's Annotated California Codes
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§ 10.5. Office of Elections Cybersecurity; creation; missions and responsibilities

Effective: January 1, 2019

Currentness

- (a) There is established within the Secretary of State the Office of Elections Cybersecurity.
- (b) The primary missions of the Office of Elections Cybersecurity are both of the following:
- (1) To coordinate efforts between the Secretary of State and local elections officials to reduce the likelihood and severity of cyber incidents that could interfere with the security or integrity of elections in the state.
 - (2) To monitor and counteract false or misleading information regarding the electoral process that is published online or on other platforms and that may suppress voter participation or cause confusion and disruption of the orderly and secure administration of elections.
- (c) The Office of Elections Cybersecurity shall do all of the following:
- (1) Coordinate with federal, state, and local agencies the sharing of information on threats to election cybersecurity, risk assessment, and threat mitigation in a timely manner and in a manner that protects sensitive information.
 - (2) In consultation with federal, state, and local agencies and private organizations, develop best practices for protecting against threats to election cybersecurity.
 - (3) In consultation with state and local agencies, develop and include best practices for cyber incident responses in emergency preparedness plans for elections.
 - (4) Identify resources, such as protective security tools, training, and other resources available to state and county elections officials.
 - (5) Advise the Secretary of State on issues related to election cybersecurity, and make recommendations for changes to state laws, regulations, and policies to further protect election infrastructure.

§ 10.5. Office of Elections Cybersecurity; creation; missions and..., CA ELEC § 10.5

(6) Serve as a liaison between the Secretary of State, other state agencies, federal agencies, and local elections officials on election cybersecurity issues.

(7) Coordinate efforts within the Secretary of State to protect the security of Internet-connected elections-related resources, including all of the following:

(i) The state's online voter registration system established pursuant to Section 2196.

(ii) The statewide voter registration database developed in compliance with the requirements of the federal Help America Vote Act of 2002 (52 U.S.C. Sec. 20901 et seq.).

(iii) The Secretary of State's election night results Internet Web site.

(iv) The online campaign and lobbying filing and disclosure system developed by the Secretary of State pursuant to Chapter 4.6 (commencing with Section 84600) of Title 9 of the Government Code.

(v) Other parts of the Secretary of State's Internet Web site.

(8) Assess the false or misleading information regarding the electoral process described in paragraph (2) of subdivision (b), mitigate the false or misleading information, and educate voters, especially new and unregistered voters, with valid information from elections officials such as a county elections official or the Secretary of State.

Credits

(Added by Stats.2018, c. 241 (A.B.3075), § 1, eff. Jan. 1, 2019.)

West's Ann. Cal. Elec. Code § 10.5, CA ELEC § 10.5

Current with urgency legislation through Ch. 46 of 2022 Reg.Sess. Some statute sections may be more current, see credits for details.