

No. 22-15071

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROGAN O'HANDLEY,

Plaintiff-Appellant,

v.

TWITTER, INC., ET AL.,

Defendants-Appellees.

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

ANSWERING BRIEF OF DEFENDANT-APPELLEE TWITTER, INC.

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1, Twitter, Inc. discloses that it has no parent corporation, nor is there any publicly held corporation that owns 10% or more of its stock.

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INTRODUCTION

The U.S. Constitution protects the rights to free speech, equal protection, and due process against government infringement of individual liberty. These important protections against *government* overreach do not limit the actions of private companies like Twitter, Inc. To the contrary, the First Amendment protects the right of private companies to decide what content to publish or not publish on their own communications platforms.

In this case, however, plaintiff Rogan O’Handley attempts to transform the Constitution’s shield against government overreach into a sword to override those private rights, targeting defendant Twitter’s First-Amendment-protected editorial decisions to restrict or remove misleading and false election information from the Twitter platform. He cannot do so. The district court correctly held that O’Handley’s claims fail as a matter of law because Twitter is not a state actor and so is not subject to constitutional constraints. It also correctly held that Twitter’s own First Amendment rights preclude courts from countermanding Twitter’s editorial decisions, as O’Handley seeks to do here. Whatever rights O’Handley might have against the government do not entitle him to compel a private-sector company, like Twitter, to disseminate his messages.

Twitter has designed and adopted rules to minimize the reach of harmful and misleading content on its platform. One of those rules, the Civic Integrity Policy,

prohibits posting certain misleading information about elections. Twitter enforces this rule by labeling or removing Tweets and, in some instances, by temporarily or permanently suspending the accounts of persistent, repeat violators. Following the November 2020 election and continuing after the deadly insurrection at the Capitol on January 6, 2021, O’Handley Tweeted allegations regarding election fraud. Twitter determined that some of his Tweets violated its rules and, consistent with those rules, appended labels to the Tweets stating that their claim of election fraud was disputed. After O’Handley continued posting Tweets alleging election fraud that Twitter deemed to violate its Civic Integrity Policy, Twitter permanently suspended his account.

O’Handley argues that Twitter’s enforcement of its own rules violated his rights under the First Amendment and the Equal Protection and Due Process clauses of the U.S. Constitution; the Ku Klux Klan Act, 42 U.S.C. §1985; and the Free Speech clause of the California Constitution. He contends that a single communication from a California election official to Twitter, which allegedly flagged one of his Tweets as potentially violating Twitter’s Civic Integrity Policy, transformed all of Twitter’s subsequent content-moderation decisions regarding his account—including those taken months later—into state action. According to O’Handley, Twitter’s invitation to government officials (as well as the public) to help identify content that may violate Twitter’s private rules, along with Twitter’s

receipt and alleged reaction to the California official's communication, constituted an unlawful conspiracy to violate his constitutional rights.

None of that is right, as the district court correctly held. A private company is not transformed into a state actor, and thus constitutionally compelled to disseminate third-party speech that it considers harmful, merely because a government official suggests to that company that someone is potentially violating the company's own, independently formulated rules. Were that the law, huge swaths of private activity would be rendered unconstitutional simply because a private actor receives information from a government official and then acts, in part, based on that information. Disabling website operators like Twitter from receiving information from government officials regarding potentially harmful content would hamper their efforts to prevent the spread of misinformation and violence through their platforms, particularly when the need to do so is at its most acute: during elections, disease outbreaks, national security breaches, and other public emergencies.

O'Handley's claims independently fail because allowing them to proceed would infringe Twitter's own First Amendment rights. As the district court recognized, the First Amendment protects the right of privately operated online platforms to comment on content they disseminate and to decide not to publish content that they consider to be harmful. The First Amendment therefore bars lawsuits that seek to override such exercises of editorial discretion. Even if Twitter's

expressive labels and editorial decisions could be attributed to the state, Twitter's own First Amendment rights would prohibit imposing liability on Twitter—rather than on only the government—based on those labels or decisions.

O'Handley's claim under §1985, which prohibits conspiracies to interfere with civil rights, fails for the same reason as his constitutional claims, as the district court also correctly held: O'Handley has not plausibly alleged that Twitter conspired with any government official to violate his constitutional rights. This claim also fails because O'Handley nowhere alleges that Twitter was motivated by a racial or class-based animus, as is required to state a claim under §1985.

There is no reason for the Court to address O'Handley's remaining arguments—none of which were reached by the court below. The district court did not address whether the complaint plausibly alleges the other prerequisites of actionable federal constitutional claims. Nor did the district court address Twitter's immunity under Section 230 of the Communications Decency Act. And the district court did not reach the merits of O'Handley's California constitutional claim, instead properly declining to exercise supplemental jurisdiction over it after dismissing all federal claims.

This Court should affirm dismissal of all of O'Handley's claims against Twitter.

STATEMENT OF JURISDICTION

Twitter agrees that this Court has jurisdiction under 28 U.S.C. §1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS

An addendum sets forth all pertinent constitutional and statutory provisions.

COUNTERSTATEMENT OF ISSUES

1. Whether the district court correctly dismissed Plaintiff's federal constitutional claims against Twitter on the ground that he did not plausibly allege state action by Twitter.

2. Whether the district court correctly dismissed Plaintiff's §1985 claim on the ground that he failed to allege that Defendants conspired to deprive him of his rights, and whether Plaintiff failed to plausibly allege class-based animus as required for such a claim.

3. Whether the district court correctly held that Twitter's own First Amendment rights defeat Plaintiff's claims.

4. Whether this Court should decline to decide the merits of Plaintiff's state-law claim, over which the district court correctly declined to exercise supplemental jurisdiction.

COUNTERSTATEMENT OF THE CASE

A. The Twitter Platform And Its Content-Moderation Rules

Twitter operates a global communications platform that allows hundreds of millions of people to share views and follow current events. 3-ER-483 ¶17. It

believes that “the public conversation occurring on Twitter is never more important than during elections and other civic events,” and it is committed to “protect[ing] the integrity of those conversations from interference and manipulation.” 3-ER-379. To achieve this goal, Twitter has adopted and enforces policies called the Twitter Rules that govern what content can be posted on the Twitter platform. *Id.* 3-ER-312-15. Twitter makes these Rules publicly available on its website, *id.*, and all Twitter accountholders must agree to comply with them as a condition of using the platform, 3-ER-331-32.¹

One such Rule is Twitter’s Civic Integrity Policy. It prohibits posting false and misleading information about elections and other civic processes, including “false or misleading information intended to undermine public confidence in an election.” 3-ER-289-310. During the relevant period, the policy provided that Twitter may apply “labels” to Tweets that, in its judgment, “contain[] false or misleading information” about “civic processes” “in violation of this policy.” 3-ER-301-03. Such labels add context to Tweets deemed to violate the policy, flagging

¹ The district court correctly held it could consider the Twitter Terms of Service and Twitter Rules because they “are referenced in the Complaint and their authenticity is not questioned.” 1-ER-4 n.3; *see also* 1-ER-4 n.2; *Knievel v. ESPN*, 393 F.3d 1068, 1076-1077 (9th Cir. 2005) (considering content of website under “‘incorporation by reference’ doctrine”). O’Handley does not dispute that the district court properly considered these materials. Nor does he dispute that he agreed to the User Agreement, which includes the Terms of Service and Rules. *See* 3-ER-320.

that they may contain false or misleading information and identifying other sources of information that Twitter considers to be credible and authoritative. 3-ER-304-05.

On January 12, 2021, in the wake of the deadly insurrection at the Capitol and after Congress had officially certified the results of the election, Twitter announced it had updated its Civic Integrity Policy to “aggressively increase ... enforcement action” on “misleading and false information surrounding the 2020 US presidential election.” 3-ER-297.

As part of this January 2021 update, Twitter instituted a five-strike protocol for enforcing the Civic Integrity Policy. 3-ER-294. In addition to labeling violative Tweets, Twitter imposed progressive “account-level” measures for each new identified violation (or “strike”) from any particular account. Five or more strikes would result in permanent suspension. *Id.*; *see also* 3-ER-494 ¶79.

B. How Twitter Identifies Content That May Violate Its Policies

Twitter accountholders post hundreds of millions of Tweets daily. *See* 3-ER-483 ¶17. Because Twitter understands that misinformation and online abuse can spread quickly and are difficult to correct once disseminated, Twitter monitors the platform for violations of its rules through automated technology and human review, and also allows the public—including private citizens, “civil society partners,” and government actors—to help it identify this content by reporting suspected violations of its rules. 3-ER-290; 3-ER-292. Twitter has established various mechanisms for

receiving such reports, one of which it calls the Partner Support Portal (“Portal”). The Portal provides a priority pathway for persons and entities who Twitter believes have an interest or expertise in protecting and promoting civic processes—including local and state election officials—“to flag concerns directly to Twitter,” including “technical issues with your account and content on the platform that may violate [Twitter’s] policies,” 3-ER-473. According to the complaint, Twitter has granted access to the Portal to election officials from at least 38 states, including the California Secretary of State. 3-ER-485 ¶32; 3-ER-471.

Twitter reviews reports it receives through the Portal, individually determining that some reported Tweets violate its rules and that others do not. 3-ER-448-52. Accordingly, Twitter sometimes labels or removes the reported content or takes other enforcement action, and sometimes it does not. *Id.*

C. Twitter’s Content-Moderation Actions In Response To Repeated Tweets From O’Handley That It Found Violated Its Civic Integrity Policy

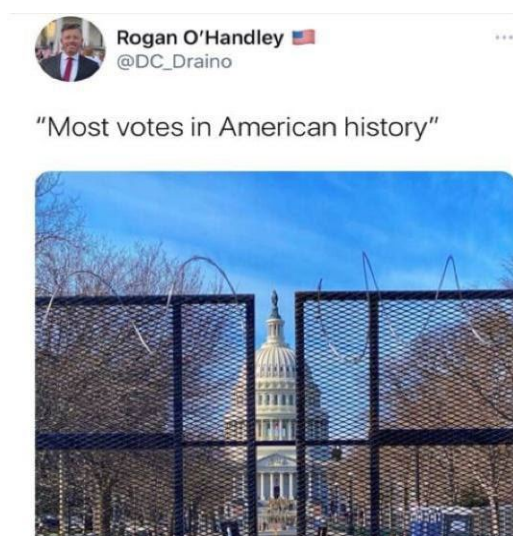
Plaintiff O’Handley is an attorney and political commentator. 3-ER-481 ¶9. His “combined social media following across all of his accounts currently reaches over 3 million people.” 3-ER-492 ¶70. One of those accounts was a Twitter account. Over the course of several months following the November 2020 federal election, he posted Tweets regarding the election that Twitter determined violated its Civic Integrity Policy. 3-ER-493-96 ¶¶72-86.

On November 12, 2020, shortly after the election, O’Handley Tweeted: “Audit every California ballot[.] Election fraud is rampant nationwide and we all know California is one of the culprits[.] Do it to protect the integrity of that state’s elections[.]” 3-ER-493 ¶72. Twitter labeled this Tweet, displaying text immediately below it stating: “This claim about election fraud is disputed.” 3-ER-493-94 ¶¶72, 77. The complaint alleges Twitter treated this Tweet as O’Handley’s first “strike.” 3-ER-494 ¶78.

The complaint identifies four other Tweets from O’Handley, all posted more than two months later—shortly after the January 6 insurrection, which had prompted Twitter to “aggressively increase ... enforcement action” on “misleading and false information surrounding the 2020 US presidential election.” 3-ER-297; *see also supra* 6-7. The first, posted on January 18, two days before the inauguration, stated: “When your country is stolen and you aren’t even allowed to talk about it, that’s not freedom[.] It’s fascism[.]” 3-ER-495 ¶84. On January 21, he Tweeted: “We are captives under a government we didn’t elect[.] It was forced upon us[.] That is by definition a dictatorship[.]” 3-ER-496 ¶85. And on January 22, he Tweeted: “How about a 9/11 commission-style report on what the hell just happened this past election?! When half our country stops believing in the integrity of our vote, that’s an *emergency* issue[.]” 3-ER-497 ¶86. Twitter allegedly applied the following label to each of these Tweets: “This claim of election fraud is

disputed, and this Tweet can't be replied to, Retweeted, or liked due to a risk of violence." 3-ER-495-98 ¶¶84-86. The complaint alleges that Twitter treated these Tweets as second, third, and fourth strikes against O'Handley's account, and that it locked his account for seven days following the fourth strike. 3-ER-495-97.

Finally, the complaint identifies this fifth Tweet, allegedly posted February 22:



3-ER-498 ¶87. The complaint alleges that, in response to this Tweet, Twitter permanently suspended O'Handley's account. 3-ER-499 ¶88. It further alleges that Twitter sent him a message stating the suspension was for "[v]iolating" the "Twitter Rules," specifically, "our rules about election integrity." *Id.*

D. O'Handley's Allegations Concerning California Election Officials

O'Handley's complaint attempts to connect all of Twitter's content-moderation decisions regarding his account to the California Office of Election

Cybersecurity (“OEC”). A sub-division within the California Secretary of State’s Office, OEC ““monitor[s] and counteract[s] false or misleading information regarding the electoral process that is published online or on other platforms.”” 3-ER-483 ¶20.

The complaint identifies a single communication from OEC to Twitter regarding O’Handley. Specifically, on November 17, 2020, nearly three months before Twitter permanently suspended O’Handley’s account, OEC allegedly sent Twitter through the Portal the following message regarding his November 2020 Tweet:

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

3-ER-493-94 ¶¶74-76. The complaint does not allege that Twitter replied to this message. Nor does it allege that OEC communicated with Twitter about O’Handley on any other occasion—much less about any of his other, months-later Tweets that allegedly led Twitter to impose his second through fifth strikes and ultimately suspend his account permanently.

E. Procedural History

O’Handley filed this lawsuit challenging Twitter’s decisions to enforce its rules, label his Tweets, and permanently suspend his account. 3-ER-478. The complaint named a litany of other defendants, including officials in the California Secretary of State’s office, SKDKnickerbocker (a political consulting firm), and the National Association of Secretaries of State. 3-ER-479-. Relying on the single communication that OEC sent Twitter almost three months before the permanent suspension, O’Handley asserted that Twitter’s labeling of his Tweets and suspension of his account was “joint action” with the California government and therefore subject to constitutional constraints. 3-ER-494 ¶¶81, 3-ER-500 ¶¶99, 109. On that basis, he claimed Twitter violated his First Amendment, Equal Protection, Due Process, and California free speech rights.

All defendants filed motions to dismiss, which the district court granted without leave to amend.

As to Twitter, the district court held that all of O’Handley’s federal constitutional claims fail as a matter of law because ““a private entity hosting speech on the Internet””—like Twitter here—“‘is not a state actor’ subject to constitutional constraints.” 1-ER-15 (quoting *Prager Univ. v. Google LLC*, 951 F.3d 991, 995 (9th Cir. 2020)). And O’Handley had failed to overcome that limitation, the court explained, because the complaint’s allegations “fall short of plausibly alleging joint

action” under either the “substantial cooperation” or conspiracy theories that he had attempted to advance. 1-ER-15.

Regarding O’Handley’s “substantial cooperation” theory of state action (which O’Handley has abandoned on appeal, *see infra* 23), the district court observed that “the central act in the [c]omplaint” is the single message OEC sent Twitter in November 2020. 1-ER-17. The court explained that “OEC’s message did not direct or even request that Twitter take any particular action in response to the tweet” and there was no “further communication between Twitter and the government about that tweet, or about any other O’Handley tweets.” *Id.* The court reasoned that such a “one-off, one-way communication” does not reflect the kind of “substantial cooperation” required to establish joint action. *Id.* The district court likewise concluded that Twitter’s alleged creation of a Portal that OEC and others used to report election misinformation on Twitter’s platform failed to establish joint state action. 1-ER-19-21. Relying on this Court’s decision in *Mathis v. Pacific Gas & Electric Co.*, 75 F.3d 498 (9th Cir. 1996), the district court reasoned that “general ‘consultation and information sharing’ in advance of the challenged decision” is not sufficient to plausibly allege joint state action because there is no allegation that “the government played any role in Twitter’s ‘internal ... decisions.’” 1-ER-19-20 (quoting *Mathis*, 75 F.3d at 504).

The district court also rejected O’Handley’s theory that Twitter became a joint state actor via conspiracy, concluding “there is no support for O’Handley’s assertion that Twitter was a willful participant in an agreement or meeting of the minds to violate constitutional rights.” 1-ER-21. As a matter of law, the court held that “a meeting of the minds to promptly address election misinformation” is not a “meeting of the minds to ‘violate constitutional rights.’” 1-ER-21-22 (quoting *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983)). And the court concluded the complaint failed to allege anything more. The court found no support for the complaint’s “single conclusory allegation that Twitter’s ‘real reasons for suspending Mr. O’Handley do not stem from a violation of Twitter’s terms of service, but from the content of his speech raising concerns about election administration and integrity, specifically concerns related to the work of then-California Secretary of State Alex Padilla.” 1-ER-22. The court explained that OEC’s “one message to Twitter [about O’Handley] did not state that Twitter should remove (or do anything with) O’Handley’s tweet because it criticized Padilla”; that “none of the other O’Handley tweets at issue in this case even referred to Padilla, California, or the OEC”; and that “Twitter routinely took the enforcement actions it did based on violations of its Civic Integrity Policy.” *Id.* Thus, the court concluded, “it is simply not plausible that Twitter shared a conspiratorial objective with the OEC.” 1-ER-23. The court therefore dismissed O’Handley’s federal constitutional claims against Twitter.

As for the §1985 claim, the district court concluded that because the complaint does not plausibly allege any conspiracy to deprive O’Handley of his rights, that claim too fails as a matter of law. 1-ER-23-24.

The district court also identified a separate, overarching defect in all of O’Handley’s federal law claims against Twitter: Because Twitter makes First-Amendment-protected “decisions about what content to include, exclude [and] moderate,” “Twitter has important First Amendment rights that would be jeopardized by a Court order telling Twitter what content-moderation policies to adopt and how to enforce those policies.” 1-ER-26. The court thus declined to issue any such order. 1-ER-28.

SUMMARY OF ARGUMENT

O’Handley’s federal constitutional claims against Twitter fail for lack of state action for two, independent reasons. *First*, O’Handley failed to plausibly allege that Twitter’s actions were “caused by” any state-created right or “rule of conduct,” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), rather than Twitter’s enforcement of its own rules regarding what content may appear on its platform. *Second*, as the district court correctly concluded, O’Handley failed to plausibly allege that Twitter’s content-moderation decisions with respect to his account are fairly attributable to the state. The sole theory of state action that O’Handley both asserted below and pursues on appeal is a joint-action “conspiracy” theory, which

requires a conspiracy between a private actor and the government to violate the plaintiff's constitutional rights. Because the Constitution generally does not constrain, and indeed protects, Twitter's decisions about what content may appear on its platform, a meeting of the minds to violate O'Handley's First Amendment rights would require an agreement that Twitter would label or remove his content not for its own reasons but specifically to further the government's alleged interest in censoring that content. But the complaint does not plausibly allege that Twitter acted to further OEC's alleged goals rather than its own independent interest in enforcing its rules. Given the lack of state action, this Court need not reach any other element of O'Handley's federal constitutional claims.

The district court also correctly dismissed O'Handley's §1985 claim for the same reason that his state-action theory fails: He has not plausibly alleged that Twitter conspired with the government to violate his rights. This Court can alternatively affirm dismissal of this claim on the ground that O'Handley did not allege another essential element: that Twitter's actions with respect to his Tweets and account were motivated by "some racial, or ... class-based" animus. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-268 (1993).

The district court also correctly held that Twitter's labeling and restriction of O'Handley's content are protected by the First Amendment. Twitter's own First

Amendment rights are yet another reason that those editorial decisions do not give rise to liability against Twitter.

Finally, the Court should affirm the district court's non-prejudicial dismissal of O'Handley's California constitutional claim, and do so without deciding the merits of that claim. That claim is not properly before the Court because the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over it.

STANDARD OF REVIEW

This Court reviews de novo the district court's dismissal for failure to state a claim and may affirm on any ground supported by the record. *Jones v. Allison*, 9 F.4th 1136, 1139 (9th Cir. 2021). A district court's decision to decline supplemental jurisdiction is reviewed for abuse of discretion. *Lima v. United States Dep't of Educ.*, 947 F.3d 1122, 1125 (9th Cir. 2020).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED O'HANDLEY'S CONSTITUTIONAL CLAIMS BECAUSE TWITTER IS A PRIVATE ACTOR

The district court correctly held that O'Handley's First Amendment, Due Process, and Equal Protection claims all suffer from the same fundamental and incurable defect: The complaint fails to plausibly allege state action.

As O'Handley recognizes, Twitter is a private entity and private entities are almost never subject to constitutional constraints. O'Handley's claims therefore

“face[] a formidable threshold hurdle.” *Prager*, 951 F.3d at 996. While “a private entity can qualify as a state actor in a few limited circumstances,” *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019), the state action doctrine is intentionally narrow in order to “preserve[] an area of individual freedom by limiting the reach of federal law and federal judicial power,” *Lugar*, 457 U.S. at 936.

These concerns are at their apex here because O’Handley’s claims implicate Twitter’s own First Amendment rights to exercise editorial control and judgment over content disseminated through its platform. *See infra* 42-46. As the Supreme Court recently explained, expanding the state-action doctrine would be “especially problematic in the speech context, because it could eviscerate certain private entities’ rights to exercise editorial control over speech and speakers on their properties or platforms.” *Halleck*, 139 S. Ct. at 1932. The Supreme Court therefore confirmed that when a private actor “provides a forum for speech,” it “is not ordinarily constrained by the [Constitution].” *Id.* at 1930; *see also id.* (“[M]erely hosting speech by others ... does not alone transform private entities into state actors subject to First Amendment constraints.”); *Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 737 (1996) (plurality op.) (“A court’s decision that a private party ... is a ‘censor,’ could itself interfere with that private ‘censor’s’ freedom to speak as an editor.”) And this Court likewise recently held that “a private entity

hosting speech on the Internet”—there, the YouTube video platform—“is not a state actor” subject to constitutional constraints. *Prager*, 951 F.3d at 997. A legion of other cases has similarly rejected constitutional challenges to the content-moderation decisions of private online service providers. *See, e.g., Howard v. AOL*, 208 F.3d 741, 754 (9th Cir. 2000); *Green v. America Online (AOL)*, 318 F.3d 465, 472 (3d Cir. 2003); *Kim v. Apple, Inc.*, 2014 WL 3056136, at *2 (D.D.C. July 7, 2014), *aff’d*, 582 F. App’x 3 (D.C. Cir. 2014).

In the face of these precedents, O’Handley erroneously contends that Twitter’s content-moderation decisions regarding his Tweets and account qualify as a rare instance of state action by a private actor. The Supreme Court has established a demanding, two-part test to determine whether private conduct can be deemed state action. *Lugar*, 457 U.S. at 937. *First*, “the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.” *Id.* *Second*, even where the first prong is satisfied, “the party charged with the deprivation must be a person who may fairly be said to be a state actor.” *Id.*

The complaint’s federal constitutional claims against Twitter fail to satisfy either part of this test.

A. O’Handley Fails To Allege Twitter Moderated His Tweets Pursuant To A Federally Created Right Or Rule

O’Handley’s federal constitutional claims against Twitter fail at the outset because he cannot satisfy *Lugar*’s first prong. This prong, “the state policy requirement[,] ensures that the alleged deprivation is fairly attributable to a state policy.” *Collins v. Womancare*, 878 F.2d 1145, 1151 (9th Cir. 1989). It demands that “the claimed constitutional deprivation”—here, Twitter’s labeling and removal of O’Handley’s Tweets and suspension of his account—have “result[ed] from the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible.” *Belgau v. Inslee*, 975 F.3d 940, 946 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2020).

Twitter did not “exercise ... [a] right or privilege created by the State” in removing O’Handley’s Tweets and suspending his account. *Id.* at 946. In *Lugar*, the Supreme Court held that a private defendant’s use of a prejudgment attachment procedure created by state statute satisfied the first prong. 457 U.S. at 940-941. The Court concluded that a challenge to a “procedural scheme created by [a] statute obviously is the product of state action.” *Id.*; *see also Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012) (private actor given “authority, normally reserved to the state, to issue a citation to appear in court”). Here, Twitter did not avail itself of any government-created procedure or privilege in taking action on

O’Handley’s account. Nor did it need to. Twitter reserves the right to moderate content on its platform in its User Agreement, including based on violations of its rules. 3-ER-321. Indeed, Twitter has a contractual right to remove any content or permanently suspend any account “at its sole discretion at any time.” 3-ER-323. Thus, the “source of the alleged constitutional harm is not a state statute or policy but th[is] particular private agreement.” *Belgau*, 975 F.3d at 947.

Nor did O’Handley’s alleged injury result from “a rule of conduct imposed by the state or by a person for whom the state is responsible.” *Id.* at 946. This Court has held that a rule of conduct was state-imposed where an employer’s requirement that employees provide social security numbers was derivative of government regulations requiring employers to collect that information. *See Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999). By contrast, the complaint concedes that Twitter invoked its own private rules—not any government regulation—in suspending O’Handley’s account. *See* 3-ER-499 ¶88 (“Your account, DC_Draino, has been suspended for ... [v]iolating our rules about election integrity.”). No allegation suggests otherwise. The complaint alleges that OEC “flag[ged]” that one of O’Handley’s Tweets might violate Twitter’s rules. 3-ER-493 ¶74, 3-ER-494 ¶¶75-76. But that message did not reference any government regulation or rule or otherwise “direct or even request that Twitter take any particular action in response to the Tweet,” and the complaint does not allege any “further

communication between Twitter and the government about that tweet, or about any other O’Handley tweets.” 1-ER-17 (district court opinion). The complaint thus fails to plausibly allege that Twitter’s challenged editorial decisions “can[] be traced to a ... rule of conduct imposed by” the government rather than Twitter’s private rules. *Ohno v. Yasuma*, 723 F.3d 984, 994 (9th Cir. 2013).

O’Handley’s arguments to the contrary are unavailing. He argued below “that the deprivation at issue here was made ‘with knowledge of and pursuant to state statute,’ specifically, Cal. Elec. Code §10.5.” 2-ER-201. But that statute merely creates a government office to “monitor and counteract false or misleading information regarding the electoral process.” Cal. Elec. Code §10.5(b)(2). It directs that office to “[a]ssess the false or misleading information ..., mitigate the false or misleading information, and educate voters, especially new and unregistered voters, with valid information from elections officials.” *Id.* §10.5(c)(8). It does not delegate state functions to private actors like Twitter or mandate that Twitter enforce any state-created rule about “false or misleading” election information. Indeed, it does not regulate Twitter at all. Twitter’s actions thus were not performed “pursuant to” that statute.

O’Handley’s suggestion (Br.16) that Twitter’s briefing below did not address *Lugar*’s first prong is baseless. Twitter did present this argument. *See* 3-ER-362 (the Portal “does not deputize or co-opt Twitter into enforcing any governmental law

or regulation” and reports by government officials do not “imbue Twitter’s content-moderation decisions with governmental authority”); 2-ER-111 n.1 (“The Complaint fails to plausibly allege that Twitter was wielding or acting pursuant to any governmental authority.”). Contrary to O’Handley’s suggestion (Br.16), the district court did not hold that Twitter failed to address *Lugar*’s first prong. It simply addressed Twitter’s arguments with respect to the second prong because that was the focus of the district court’s own analysis. 1-ER-15. And despite focusing on the second prong, the district court also addressed the first, concluding “[t]he State did not delegate to Twitter any ‘authority, normally reserved to the state.’” 1-ER-18. In all events, this Court can resolve this case on the first prong even if the district court did not. *See Padilla v. Terhune*, 309 F.3d 614, 618 (9th Cir. 2002) (appellate court may affirm “on any ground supported by the record, even if it differs from the reasoning of the district court”).

B. The District Court Correctly Held That O’Handley Failed To Plausibly Allege State Action Based On Joint Action

O’Handley’s federal constitutional claims against Twitter fail for the independent reason that, as the district court held, Twitter cannot “fairly be said to be a state actor.” *Lugar*, 457 U.S. at 937. O’Handley has argued that Twitter is a state actor under a “joint action” theory. Such joint action can be established through “a substantial degree of cooperative action” or a conspiracy between a private actor and the government specifically to violate the plaintiff’s constitutional rights. *Taylor*

v. List, 880 F.2d 1040 (9th Cir. 1989). O’Handley argued both theories below, and the district court rejected both. 1-ER-14-23. On appeal, however, he has abandoned the substantial cooperation theory. *See* Br.15-25 (expressly discussing only the conspiracy and nexus tests); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) (“[I]ssues which are not specifically and distinctly argued and raised in a party’s opening brief are waived.”).²

O’Handley’s conspiracy theory is meritless. As the district court correctly held, there is “no support for O’Handley’s assertion that Twitter was a willful participant in ‘an agreement or meeting of the minds to violate constitutional rights.’” 1-ER-21-22. Twitter’s decision to remove O’Handley’s account for violating its rules months after receiving a message expressing the government’s view that one of his Tweets contained harmful election misinformation does not establish any such agreement.

1. The Complaint Does Not Plausibly Allege A Meeting Of The Minds To Violate O’Handley’s Constitutional Rights

A conspiracy theory of joint action requires showing that the private actor and the government shared a “goal of violating a plaintiff’s constitutional rights.” *Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir. 2002). That is a high bar. As discussed

² Regardless, any invocation of that theory on this appeal would also fail on the merits. As the district court correctly held, the one-off, one-way communication that O’Handley alleges OEC made to Twitter regarding his account “does not reflect ‘substantial cooperation.’” 1-ER-17.

above, “the state-action doctrine ... protects a robust sphere of individual liberty,” particularly where, as here, a private actor’s own First Amendment rights are involved. *Halleck*, 139 S. Ct. at 1934. Showing that the private defendant and the state shared *some* objective is not enough. *See Fonda*, 707 F.2d at 439. Nor is it enough to show that a government actor urged a private actor to act in a particular way and the private actor acted consistently with that urging. *See Zhou v. Breed*, 2022 WL 135815, at *1 (9th Cir. Jan. 14, 2022) (“The mere fact that ... public officials criticized a billboard or called for its removal, without coercion or threat of government sanction, does not make that billboard’s subsequent removal by a private party state action.” (citing *American Fam. Ass’n v. City & Cnty. of San Francisco*, 277 F.3d 1114, 1225 (9th Cir. 2002); *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999))). As this Court has held, so long as a private party acts based on its own “legitimate, independent motivation to further its own ends”—as opposed to acting only to further the government’s ends—there is no state action. *United States v. Rosenow*, 33 F.4th 529, 543 (9th Cir. 2022); *see also United States v. Cleveland*, 38 F.3d 1092, 1094 (9th Cir. 1994) (same); *Blum v. Yaretsky*, 457 U.S. 991, 1008 (1982).

Instead, to establish a conspiracy, a plaintiff must establish a “meeting of the minds” between the private and state actors to “knowingly attempt to accomplish an alleged wrongful purpose.” *Fonda*, 707 F.2d at 439. Here, where the alleged

constitutional violation is a First Amendment violation, the alleged agreement has a wrongful purpose only if the private defendant agreed to censor speech on behalf of the government. Thus, if Twitter had “legitimate, independent motivation” to remove content, *Rosenow*, 33 F.4th at 543, then it did not agree to further any unconstitutional objective. *See also Cleaveland*, 38 F.3d at 1094.³ To the contrary, it was exercising its own First Amendment right to decide what content may appear on its platform. *See infra* 42-46.

As the district court held, there is “no support for O’Handley’s assertion that Twitter was a willful participant in ‘an agreement or meeting of the minds to violate constitutional rights.’” 1-ER-21-22. The complaint does not plausibly allege that Twitter removed O’Handley’s account to further the government’s ends. In particular, it does not allege any government involvement in Twitter’s editorial actions with respect to O’Handley’s Tweets beyond a single, one-way

³ *Rosenow* and *Cleaveland* involved Fourth Amendment claims, but the test they articulate is applicable here. First, the same overarching state-action test applies to Fourth Amendment claims: whether “private action [is] ‘treat[able] as that of the [government entity] itself.’” *Ballinger v. City of Oakland*, 24 F.4th 1287, 1300 (9th Cir. 2022) (quoting *Blum*, 457 U.S. at 1004), *cert. denied*, 142 S. C. 2777 (2022); *Rosenow*, 33 F.4th at 541 (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974), which involved a Fourteenth Amendment claim, for proposition that state action requires “a ‘sufficiently close nexus’ between the government and the private entity’s challenged conduct”). Second, this Circuit’s state-action test in the Fourth Amendment context and the conspiracy test for state action both turn on “the private party’s intent” to achieve the government’s ends. *Rosenow*, 33 F.4th at 543; *see also Cleaveland*, 38 F.3d at 1094 (same); *Fonda*, 707 F.2d at 439 (conspiracy requires “meeting of the minds”).

communication from OEC to Twitter “flag[ging] concerns” about one of his Tweets. That communication was allegedly sent via the Portal that Twitter had created to receive, and enable quick review of, reports from various sources—including but not limited to some government officials—regarding content that might violate Twitter’s own policies on election misinformation. 3-ER-494 ¶76. That alleged communication did not even request that Twitter take any particular action on (let alone remove) the Tweet. *Id.* And Twitter did not permanently suspend O’Handley’s account until several months later—after finding during those months that four of his subsequent Tweets violated its rules. 3-ER-495-99 ¶¶84-88.

O’Handley provides no explanation for how the government’s merely drawing a Tweet to Twitter’s attention can plausibly establish that Twitter labeled some of his Tweets and months later suspended his account out of a desire to further a state agency’s alleged censorship goals. *See Rosenow*, 33 F.4th at 543; *Cleveland*, 38 F.3d at 1094. It does not. Courts have repeatedly rejected claims that exchanges of information between private and governmental entities before the challenged decision create joint action. *See, e.g., Mathis*, 75 F.3d at 504; *Lockhead v. Weinstein*, 24 F. App’x 805, 806 (9th Cir. 2001); *see also Moldowan v. City of Warren*, 578 F.3d 351, 399 (6th Cir. 2009); *Ginsberg v. Healey Car & Truck Leasing, Inc.*, 189 F.3d 268, 272 (2d Cir. 1999). As the district court correctly held,

the complaint's allegation of information-sharing therefore fails as a matter of law to establish joint action. 1-ER-17.

Moreover, numerous allegations in the complaint preclude O'Handley's joint-action theory because they confirm Twitter's "independent, legitimate motivation" for suspending O'Handley's account. *Rosenow*, 33 F.4th at 543; *Cleveland*, 38 F.3d at 1094. As the complaint alleges, long before any alleged communication from the government, and long before taking any action against O'Handley, Twitter adopted the Civic Integrity Policy, which prohibits "false or misleading information intended to undermine public confidence in an election or other civic process." 3-ER-494 ¶79. In the wake of the deadly insurrection at the Capitol and shortly before Twitter allegedly applied second, third, and fourth strikes to O'Handley's Tweets, Twitter publicly announced that it had updated that policy to "aggressively increase ... enforcement action" on "misleading and false information surrounding the 2020 US presidential election." 3-ER-297. And as the complaint also alleges, when labeling O'Handley's Tweets and eventually suspending his account, Twitter informed him that it had concluded that his Tweets violated its own rules. 3-ER-495-99 ¶¶84-87 (referring to each label as a "strike" under Twitter's Civic Integrity Policy); 3-ER-500 ¶88 ("Your account, DC_Draino has been suspended for violating the Twitter Rules. Specifically, for: Violating our rules about election integrity.").

Nor are the allegations regarding Twitter’s Partner Support Portal sufficient to establish a “meeting of the minds” between Twitter and OEC to violate O’Handley’s constitutional rights. 1-ER-21. Despite having scoured public records, 3-ER-484-85 ¶¶24, 28-31, 3-ER-494 ¶77, O’Handley failed to muster any allegations indicating that Twitter created or used the Portal with an objective to censor speech on behalf of the government. Instead, as Twitter explained to the National Association of Secretaries of State in a communication that O’Handley attached to the complaint, Twitter created the Portal so that certain individuals could help Twitter implement *Twitter’s* rules regarding what content can and cannot appear on its platform. 3-ER-473 (describing the Portal as a way to “flag concerns directly to Twitter,” including “technical issues ... and content on the platform that ... may violate [Twitter’s] policies”). That purpose is further reflected in an OEC tracking spreadsheet that O’Handley also attached to his complaint, 3-ER-494 ¶77, which shows that when Twitter responded to Portal reports, it consistently explained its decision to take or not take any enforcement action by referencing its own review of its own rules. *See* 3-ER-450 (“After our review, we’ve locked the account *for breaking our rules regarding civic integrity.*” (emphasis added)); 3-ER-451 (“We’re writing to let you know that after a review, we *didn’t find a violation of our civic integrity policy* in the content you reported.” (emphasis added)). At most, the complaint alleges that Twitter facilitated reports from the government concerning

content that might violate Twitter's *own rules* against election misinformation. That is far from enough to establish a conspiracy to violate constitutional rights.

2. O'Handley's Counterarguments Cannot Save His Conspiracy Theory

O'Handley presses several arguments on appeal, all of which fail.

First, O'Handley is wrong that he needed to allege only a "meeting of the minds to promptly address election misinformation" to establish a conspiracy to violate his First Amendment rights. Br.23-24. As discussed, *see supra* 24-26, a conspiracy theory of joint action requires more than a shared policy goal like "promptly address[ing] election misinformation." It requires that the private and governmental actors have agreed upon and shared the specific "goal of violating a plaintiff's constitutional rights." *Franklin*, 312 F.3d at 445. Because Twitter is a private actor, its desire to promptly address what it views as election misinformation on its platform violates no one's constitutional rights. Instead, the sort of constitutional violation O'Handley posits can occur only when the *government* censors speech based on content or viewpoint. Thus, to establish that the object of any purported conspiracy was to violate his constitutional rights, O'Handley would have had to plead at least that Twitter shared the goal of censoring speech *for the government* specifically *because* the government wanted that speech censored. That Twitter's actions may have produced a result that OEC also preferred, or that Twitter and OEC may both have had a goal of promptly addressing election misinformation,

is not enough. *See, e.g., Rosenow*, 33 F.4th at 545 (“[A] private party’s otherwise legitimate, independent motivation is not rendered invalid just because law enforcement assistance may further its interests.”); *Cruz v. Donnelly*, 727 F.2d 79, 81 (3d Cir. 1984) (per curiam) (no actionable conspiracy when complaint’s allegations “depict[ed] only a police investigation that happen[ed] to follow the course suggested by comments from a complainant”).

Indeed, accepting O’Handley’s position that any private party’s efforts to pursue a goal that it shares with a government actor renders the private party a state actor would subject huge swaths of private conduct to all manner of limitations that the Constitution imposes on *only* the government. Such a rule would also severely impair the ability of government actors to perform the core government functions of “promot[ing] a program” or “espous[ing] policy.” *Shurtleff v. City of Bos.*, 142 S. Ct. 1583, 1587 (2022). And any rule that disables Twitter from labeling or removing content or speakers it deems offensive merely because those actions may also coincide with a policy goal of a government official or agency would infringe on Twitter’s First Amendment right to exercise “editorial control and judgment” over what content does and does not appear on its platform. *See infra* 42-46.

Second, equally unavailing is O’Handley’s argument that the district court “weighed evidence” and “refuse[d], improperly, to make every permissible inference in O’Handley’s favor.” Br.20. Surviving a motion to dismiss requires

pleading facts that, when “viewed in the light most favorable to Plaintiffs,” are sufficient to “establish” a claim for relief. *Moss v. U.S. Secret Service*, 572 F.3d 962, 967-968 (9th Cir. 2009). That is precisely the standard the district court applied.

Contrary to what O’Handley contends, for example, the district court did not fail to credit as true his allegation that Facebook and Twitter “promptly removed” 98% of the 300 posts OEC flagged. Br.17. Rather, the district court concluded that, assuming that percentage is true, Twitter’s conduct still did not rise to the level of state action. That conclusion was correct; the percentage of OEC-flagged Tweets Twitter allegedly removed is not dispositive because the complaint does not plausibly allege Twitter removed them to further the government’s alleged censorious objective, rather than to enforce Twitter’s own platform rules. 1-ER-18; *see also supra* 27-29. And as discussed above, *supra* 29, an OEC spreadsheet attached to the complaint that purportedly tracked the outcome of the reports OEC made to Twitter and other social media companies shows that in responding to Portal reports, Twitter consistently described its decisions to take or not take any content-moderation action by referencing its own review and application of its own rules.⁴

⁴ Because the district court’s discussion of the 98% figure’s accuracy was irrelevant to its conclusion, O’Handley’s criticism of that discussion is academic. But in any event, the district court was correct to note that “[t]he 98% number is of somewhat limited value, as it represents *both* Facebook and Twitter posts,” and because it is contradicted by the OEC spreadsheet that O’Handley attached to his own complaint,

O’Handley likewise mischaracterizes when he claims the district court paid insufficient heed to his allegations that Twitter “bumped to the head of the queue” Tweets flagged through its Portal, including the one Tweet from O’Handley that Twitter removed the day after OEC reported it. Br.18; *see also id.* at 19. The district court considered, and credited, these allegations and rightly concluded that O’Handley failed to plausibly allege state action even if they are true. As the court explained, “the government can work with a private entity without converting the private entity’s decisions into government decisions.” 1-ER-19. Given that “‘consultation and information sharing’ in advance of the challenged decision [a]re not enough for joint action,” *id.* (citing *Mathis*, 75 F.3d at 504), it would make little sense for a private actor’s *use* of that information—such as by using it to prioritize certain content for review—to be sufficient to create state action. In any event, Twitter’s decision to prioritize review of reports from certain sources over others is itself protected by its own First Amendment right “to listen” to and credit whatever ideas and viewpoints it finds most persuasive, *see, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972), as well as a core part of Twitter’s exercise of its First-Amendment-protected editorial judgment, *see infra* at 42-46.

which “shows that Twitter took no action on OEC-reported content in about one-third of the instances of alleged misinformation listed,” 1-ER-20 (emphasis added).

O’Handley’s remaining criticisms of the district court’s analysis (Br.21-22) fare no better. He argues that the court erred in concluding that (1) OEC’s message to Twitter “was nothing more than ‘one party supplying information to another party,’” (2) Twitter, not OEC, decided whether to label or remove flagged Tweets, and (3) “Twitter made content decisions based on its own applications of its own Rules.” Br.21-22. He claims that each conclusion is “contradicted” by allegations of OEC’s general cooperation with Twitter, 3-ER-484 ¶¶25; 3-ER-490-91 ¶¶64-65, and OEC’s message to Twitter regarding one of his Tweets, ¶¶76-77. But there is no contradiction, nor any improper “findings of fact.” Br.21. As the district court recognized, the complaint alleges only that OEC and Twitter “collaborated to counteract election misinformation generally.” 1-ER-24; *see also* 1-ER-18-21. And despite O’Handley’s insistence to the contrary, the report about one of his Tweets, *as alleged*, did not demand a particular action or threaten Twitter for failure to comply; it merely conveyed OEC’s view that the Tweet contained election misinformation. There are no allegations, for example, that OEC “‘exert[ed] control over how [Twitter] used the information [it] obtained,’” 1-ER-18, or “‘played any role in Twitter’s ‘internal ... decisions,’” 1-ER-19-20 (quoting *Deeths v. Lucile Slater Packard Children’s Hospital at Stanford*, 2013 WL 6185175, at *10 (E.D. Cal. Nov. 26, 2013); *Mathis*, 75 F.3d at 504). *See, e.g., Howerton v. Gabica*, 708 F.2d 380, 384-385 (9th Cir. 1983) (joint action where police “actively intervened”

at every step of a repossession); *Deeths*, 2013 WL 6185175, at *10 (no joint action where social workers “asked” private doctor for “professional opinion” because that did not “show [doctor’s] control over how the social workers used the information they obtained to reach a decision”).

Accepting all the allegations in the complaint as true, the district court correctly concluded that they were insufficient, as a matter of law, to establish that Twitter was acting in service of the government rather than enforcing its own private rules. 1-ER-17, 19. That Twitter’s actions happened to follow a course favored by OEC is insufficient to demonstrate joint action under either a conspiracy or substantial cooperation theory. *See Cruz*, 727 F.2d at 81 (no actionable conspiracy when complaint’s allegations “depict[ed] only a police investigation that happen[ed] to follow the course suggested by comments from a complainant”); *supra* 24-30.

Third, O’Handley’s effort to assert two theories of state action that he did not raise before the district court—a nexus theory and a coercion theory—must be rejected. *See* Br.16, 23. As an initial matter, by failing to raise either theory below, O’Handley has waived his right to assert them now. *See Connecticut Gen. Life Ins.*, 321 F.3d at 882. And in any event, both fail.

The nexus theory that O’Handley now invokes requires “pervasive entwinement of public institutions and public officials” in the private actor’s “composition and workings,” *Brentwood Academy v. Tennessee Secondary School*

Athletic Ass’n, 531 U.S. 288, 298 (2001), but O’Handley has not alleged anything of that sort. As the district court correctly held, O’Handley failed to allege even “substantial cooperation” between OEC and Twitter, 1-ER-15; *a fortiori*, he has not plausibly alleged the “pervasive entwinement” that the nexus theory requires.

The complaint also falls far short of plausibly alleging coercion. Relying on *Carlin Communications, Inc. v. Mountain States Telephone & Telegraph Co.*, 827 F.2d 1291 (9th Cir. 1987), O’Handley argues that state action exists when the government “direct[s] a specific entity to take a specific (allegedly unconstitutional) action against a specific person.” Br.23. But that is not what *Carlin* says. “Direc[tion]” alone is far from enough to plausibly allege coercion. In *Carlin*, this Court held that a public telephone utility’s decision to terminate an adult entity’s message service was state action because a prosecutor had threatened to bring criminal charges against the utility under a law prohibiting distribution of sexually explicit material to minors. 827 F.2d at 1293, 1295. Under *Carlin*, state action thus exists when the government applies such coercive pressure on a private entity to take a specific action that the state cannot claim that the action occurred as a result of private choice.

O’Handley alleges nothing like that. OEC’s communication to Twitter does not come close to resembling the kind of coercive pressure required to transform Twitter into a state actor. Unlike in *Carlin*, Twitter did not suspend O’Handley’s

account under threat of criminal prosecution. And the complaint does not allege that OEC had the power to take any other adverse regulatory action against Twitter, or that it implicitly or explicitly intimated that it would wield any such authority. As such, and for the reasons discussed above, *supra* 24-29, the complaint fails to plausibly allege that Twitter’s decision was not a private choice. *Carlin* is inapplicable here.

* * *

This Court should affirm the district court’s dismissal of all of O’Handley’s federal constitutional claims because the complaint’s allegations that Twitter received information from the government before deciding whether to remove content from its platform for violating its own rules do not plausibly establish that Twitter conspired with the government to carry out the government’s censorship goals.

II. THE DISTRICT COURT CORRECTLY DISMISSED O’HANDLEY’S §1985 CLAIM

O’Handley’s §1985 claim fails on the merits for multiple reasons, including for the same reason his constitutional claims fail: He has not plausibly alleged that Twitter conspired with state officials to violate his constitutional rights.

The Supreme Court has made clear that §1985 is not a “general federal tort law.” *Bray*, 506 U.S. at 268. Rather, to state a claim for relief under §1985(3), a plaintiff must show: (1) a conspiracy; (2) an act in furtherance of the conspiracy; (3)

an intent to deprive any person of the equal protection of, or equal privileges and immunities under the law; and (4) a resulting injury to a legal right or privilege. *See Great Am. Fed. Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979). Because the Act's "original purpose ... was to enforce the rights of African Americans and their supporters," *Holgate v. Baldwin*, 425 F.3d 671, 676 (9th Cir. 2005), a plaintiff must also show, among other things, (5) that "some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action," *Bray*, 506 U.S. at 267-268. O'Handley's claim failed to satisfy this multi-part test for two reasons.

First, as the district court correctly concluded, the complaint fails to plausibly plead conspiracy to deprive O'Handley (or anyone) of his constitutional rights. *See supra* 24-34. He can no more establish a conspiracy under §1985(3) than he can establish one for his joint-action theory of state action. Therefore, O'Handley's claim fails to satisfy the first and third elements.

Second, the complaint fails to satisfy the fifth element because it does not plausibly allege that Twitter was motivated by "some racial, or ... class-based" animus. *Bray*, 506 U.S. at 267-268. The statutory term "class" "connotes something more than a group of individuals who share a desire to engage in conduct that the §1985(3) defendant disfavors." *Id.* at 269. Rather, to allege "class-based ... animus" under §1985, the Ninth Circuit requires that courts or Congress have

“designated the class in question a suspect or quasi-suspect classification requiring more exacting scrutiny or that Congress has indicated through legislation that the class required special protection.” *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985) (per curiam).

The complaint does not even clearly identify any “class” at which animus was allegedly directed—let alone demonstrate that any such class is one courts or Congress have identified as requiring special protection. O’Handley simply asserts on appeal that Twitter discriminated against him based on his “conservative political views,” Br.42, making no attempt to define those views or explain why Twitter’s actions evinced animus against them.

To the extent O’Handley means to suggest that Twitter was motivated by “political” animus against “conservative[s],” Br.42, that is not enough. The Supreme Court has indicated that “political, non-racial conspiracies” are likely not actionable under §1985. *United Bhd. of Carpenters & Joiners of Am. v. Scott*, 463 U.S. 825, 834-836 (1983). O’Handley cites *Life Insurance Co. of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979) to argue that discrimination on the basis of political viewpoint creates an actionable conspiracy. Br.41. But *Reichardt* did not hold that discrimination based on plaintiffs’ status as “political opponents” or “supporters of a [different] political candidate” meets the statute’s “class based” animus requirement. 491 F.2d at 505. Instead, it noted that as of that time, courts

adjudicating claims under §1985 “ha[d] not limited its protection to racial or otherwise suspect classifications.” *Id.*

O’Handley notably ignores that, after *Reichardt*, the Supreme Court specifically cast doubt on whether §1985(3) extends to “wholly non-racial, but politically motivated conspiracies.” *Carpenters*, 463 U.S. at 836. As the Court explained there, stretching that provision to cover political conspiracies would have far-reaching consequences, arguably providing a remedy for any claim that a political party interfered with another’s freedom of speech, even if it merely “encourag[ed] the heckling of its rival’s speakers” or “disrupt[ed] ... the rival’s meetings.” *Id.* And any such construction would turn federal courts into “monitors of campaign tactics in both state and federal elections”—a “role that [they] should not be quick to assume.” *Id.* *Carpenters* is thus a “powerful indication that, when squarely confronted with the question, the [Supreme] Court would not include such conspiracies within the scope of the provision.” *Grimes v. Smith*, 776 F.2d 1359, 1366 (7th Cir. 1985). O’Handley does not attempt to explain why this Court should hold that political conspiracies are actionable under §1985(3), despite admonitions from the Supreme Court that they are not.

None of the other cases O’Handley cites, Br.42-43, helps him. None is binding on this Court, and more fundamentally, each either pre-dates *Carpenters*, see *Keating v. Carey*, 706 F.2d 377, 386-388 (2d Cir. 1983), *Means v. Wilson*, 522

F.2d 833, 836-837 (8th Cir. 1975), or fails to reconcile its interpretation of §1985(3) with the Supreme Court’s reasoning in that case. O’Handley relies, for example, on *McLean v. International Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir. 1987), but that decision did not squarely hold that political conspiracies are actionable. It merely noted, citing a lone pre-*Carpenter* decision, that the Fifth Circuit had once recognized political conspiracies as actionable under §1985(3).

O’Handley’s reliance in *Conklin v. Lovely*, 834 F.2d 543, 549 (6th Cir. 1987) is likewise unavailing. There, the Sixth Circuit explicitly acknowledged that “*Carpenters* raises doubts” as to whether political conspiracies are actionable under §1985(3) and that “other circuits post-*Carpenters* have restricted Section 1985(3) to conspiracies directed towards racial classes.” *Id.* That court’s holding that the alleged political conspiracies were actionable under §1985(3) thus reflected only the mandatory application of “controlling” pre-*Carpenters* circuit precedent that “may not [be] overrule[d] [absent] an inconsistent decision of the United States Supreme Court.” *Id.* O’Handley identifies no case suggesting this Court is likewise constrained. Indeed, because “it is the obligation of the subordinate jurisdictions to divine the direction of the [Supreme] Court,” *Grimes*, 778 F.2d at 1366, this Court should follow the considered reasoning in *Carpenters* to hold that political conspiracies are not actionable under §1985(3).

III. TWITTER’S OWN FIRST AMENDMENT RIGHTS INDEPENDENTLY FORECLOSE ALL OF O’HANDLEY’S CLAIMS AGAINST TWITTER

None of O’Handley’s claims can overcome Twitter’s own First Amendment rights. As the district court recognized, Twitter engages in protected expression when it adopts and implements its own editorial policies by labeling, restricting, or removing speech on its platform. 1-ER-25-28. Twitter’s First Amendment rights to engage in such expression defeat any interest O’Handley has in using Twitter to promulgate his messages. Likewise, any court order punishing Twitter for an exercise of its editorial judgment or compelling it to promulgate speech that it does not wish to disseminate—as O’Handley’s claims seek to do—would violate Twitter’s own First Amendment rights. *See* 1-ER-28. Thus, even if O’Handley had plausibly pleaded state action as to Twitter, the First Amendment would still bar him from pursuing claims against Twitter (although not against the government defendants).

A. The District Court Correctly Held That Twitter’s Labels And Other Editorial Decisions Are Protected Expression

The district court correctly held that the First Amendment protects Twitter’s decisions about what content to “include, exclude, moderate, filter, label, restrict or promote.” 1-ER-26. The Supreme Court has long held that the First Amendment protects the right of private-sector communications platforms to exercise editorial judgments regarding what content they will or will not disseminate. And numerous

courts have applied this principle to the editorial decision-making of online platforms such as Twitter.

The Supreme Court first held that the exercise of “editorial control and judgment” is protected by the First Amendment in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). That case involved a Florida statute requiring any newspaper that published an opinion critical of a political candidate to give the candidate equal space to reply. *Id.* Defenders of that statute argued it was necessary because of consolidation within the newspaper industry, an alleged “homogeneity of editorial opinion, commentary, and interpretative analysis,” and “abuses of bias and manipulative reportage.” *Id.* at 250. The Supreme Court rejected those arguments and held that the statute “fail[ed] to clear the barriers of the First Amendment because of its intrusion into the function of editors.” *Id.* at 258. It explained that “[t]he choice of material to go into a newspaper ... and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment” protected by the First Amendment. *Id.*

The Supreme Court has subsequently held that this right to refrain from hosting other people’s messages is not “restricted to the [traditional] press.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 574 (1995). Thus, the Court has held that a private utility cannot be forced to include third-party speech in its billing envelopes, *Pacific Gas & Electric Co. v. Public Utilities*

Commission of California, 475 U.S. 1, 20-21 (1986) (plurality op.); that cable companies' exercise of editorial discretion over stations and programs is entitled to First Amendment protection, *see Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998); *Denver Area*, 518 U.S. at 747 (plurality op.); and that a private parade organizer cannot be forced to include a group whose message it disapproves, *Hurley*, 515 U.S. at 574-576. In *Hurley*, the Court observed that "the presentation of an edited compilation of speech generated by other persons ... fall[s] squarely within the core of First Amendment security" and that the "selection of contingents to make a parade is entitled to similar protection." 515 U.S. at 570.

The district court here (1-ER-25-28) rightly concluded that when Twitter adopts and enforces editorial policies concerning whether or how to disseminate certain content or to host certain speakers, the First Amendment protects those decisions as an "exercise of editorial control and judgment." *Miami Herald*, 418 at 256. Policies such as the Civic Integrity Policy set out Twitter's views on what role it wants to play in society and in the public exchange of ideas. They also communicate Twitter's views on the types of speech that are (or are not) appropriate or productive to share with its community of accountholders.

Twitter's actions implementing such policies are expressive too. They are the means by which Twitter strives to ensure that its contributions to the public debate

do not include speech or speakers that it deems harmful, inappropriate, or otherwise unfit for disseminating on its platform. This is exactly like a newspaper's editors deciding the paper will not publish certain articles, editorials, or advertisements. *Miami Herald*, 418 at 258. And it is just like a parade organizer's decision not to include certain participants that seek to express a message that conflicts with the organizer's own, or a bookstore's selection of books or magazines it will not offer for sale. See *Hurley*, 515 U.S. 557; *Smith v. People of California*, 361 U.S. 147, 152 (1959). Twitter's decisions to label some of O'Handley's Tweets is likewise straightforwardly protected by the First Amendment. The labels are plainly Twitter's own speech and operate both to limit the dissemination of speech that Twitter deems objectionable or detrimental to the discourse it seeks to promote and to direct readers to other content it deems more valuable.

The district court here is far from alone in concluding that online platforms' content-moderation decisions are protected by the First Amendment. The Eleventh Circuit recently held that “[w]hen platforms choose to remove users or posts, deprioritize content in viewers’ feeds or search results, or sanction breaches of their community standards, they engage in First-Amendment-protected activity.” *NetChoice, LLC v. Attorney Gen., Fla.*, 34 F.4th 1196, 1213 (11th Cir. 2022). That court recognized that social media platforms, including Twitter in particular, “invest significant time and resources into editing and organizing—the best word, we think,

is *curating*—users’ posts into collections of content that they then disseminate to others.” *Id.* at 1204-1205. And like the decision on appeal here, that opinion concluded that Twitter’s and other social media-platforms’ content-moderation decisions “about what speech to permit, disseminate, prohibit, and deprioritize—decisions based on platforms’ own particular values and views—fit comfortably within the Supreme Court’s editorial-judgment precedents.” *Id.* at 1214. On this basis, the Eleventh Circuit upheld a preliminary injunction preventing enforcement of provisions of a state law that sought to restrict platforms’ content-moderation decisions by, among other things, prohibiting platforms from deplatforming a candidate for office and requiring them to “apply censorship, deplatforming, and shadow banning standards in a consistent manner.” *Id.* at 1206.

Numerous district courts have similarly held that the First Amendment safeguards the decisions of online platforms about what content to moderate, filter, promote, or restrict. *See, e.g., Isaac v. Twitter, Inc.*, 557 F. Supp. 3d 1251, 1261-1262 (S.D. Fla. 2021); *La’Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017); *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1008 (E.D. Cal. 2017); *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 443 (S.D.N.Y. 2014).

B. Twitter’s First Amendment Rights Independently Defeat O’Handley’s Claims

The fact that the editorial decisions and actions of Twitter that O’Handley’s suit challenges are protected by Twitter’s own First Amendment rights forecloses all

of his claims against Twitter. This is so even if O’Handley were able to establish state action. Although establishing state action might permit O’Handley to state a claim against government defendants, that alone would not be enough to overcome Twitter’s First Amendment rights and thereby avoid dismissal of his claims against Twitter.

This Court has long recognized that “[e]ven if state action [is] present” in a private publisher’s editorial decisions, the private entity “still [has] the freedom to exercise subjective editorial discretion” over the speech it disseminates. *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 135 (9th Cir. 1971). *Times Mirror* rejected a putative First Amendment claim by an advertiser against the publisher of the *Los Angeles Times*. The suit alleged that Times Mirror was a “state actor” and sought to compel it to publish the advertiser’s proffered ads without censoring or changing their content. *See id.* While the Court held that Times Mirror was not a state actor, the Court further held that dismissal would have been required even if Times Mirror had qualified as a state actor. *Id.*

The Court in *Times Mirror* relied on a Third Circuit decision concerning a student-run law review at a state-sponsored university, *Avins v. Rutgers, State University of New Jersey*, 385 F.2d 151 (3d Cir. 1967). There, the Third Circuit stated that “the acceptance or rejection of articles submitted for publication in a law school law review necessarily involves the exercise of editorial judgment and this is

in no w[ay] lessened by the fact that the law review is supported, at least in part by the State.” *Id.* at 153-154. In neither *Times Mirror* nor *Avins* could the alleged presence of state action trump the publisher’s right to exercise editorial judgment over what third-party speech to disseminate through its platform. That is because “[t]he right to freedom of speech does not open every avenue to one who desires to use a particular outlet for expression.” *Id.* at 153.

This Court followed the same approach in *Carlin*. There, the Court held that a state prosecutor’s threatened application of an Arizona statute to a telephone-service-provider violated the plaintiff’s First Amendment rights by coercing the telephone-service-provider to stop hosting the plaintiff’s sexually-oriented comical content. 827 F.2d at 1296-1297. Notwithstanding that conclusion, this Court vacated an injunction preventing the private provider from censoring the plaintiff’s content. Thus, even though “unconstitutional state action” infected the termination decision, that was not a basis for awarding relief against the telephone services provider; “[i]t only follow[ed] that the *state* may never *induce* [the telephone service provider] to do” the same going forward. *Id.* (emphasis in original).

The same principles would support dismissal of O’Handley’s claims against Twitter even if he had plausibly alleged state action (which he has not). That result would not leave O’Handley without any potential claims for any constitutional injury he might have suffered. Just as the plaintiff in *Carlin* was able to seek and

obtain relief against the state defendants who had coerced the private service-provider to censor its speech, O’Handley could still attempt to state a claim against the state defendants here. But he cannot go farther and have a court override, or impose damages on Twitter on account of, Twitter’s First-Amendment-protected editorial judgments to label or suppress his Tweets or to permanently suspend his account.

C. O’Handley’s Arguments That Twitter Lacks First Amendment Rights Are Meritless

First, O’Handley is wrong to argue (Br.48) that, if the Court finds that Twitter engaged in state action, his own constitutional rights necessarily override Twitter’s. Where subjecting a private entity’s actions to constitutional limitations under the state action doctrine implicates that entity’s own constitutional rights, judicial relief can be available against such entities only if the plaintiff’s rights are weightier than those of the private entity.

O’Handley erroneously argues (Br.48) that *Marsh v. State of Alabama*, 326 U.S. 501 (1946) supports his notion that his rights would automatically trump Twitter’s if Twitter were deemed a state actor. In fact, *Marsh* confirms the opposite. The Court there held that a state could not criminally prosecute the plaintiff for his speech on a corporation’s private property where the state had authorized the corporation to functionally operate the town. *Id.* at 509. At the same time, however, the Court recognized the corporation’s own property rights, and the state’s interest

in protecting those rights. *Id.* Although the Court ultimately concluded that the plaintiff's First Amendment rights prevailed, the very passage O'Handley quotes explicitly weighed the respective rights of the plaintiff and the corporation, ultimately explaining that First Amendment rights occupy "a preferred position" over the corporation's property rights. *See id.* And even there, the Court merely declined to enforce the state trespass law against the plaintiff; it did not recognize any claim by the plaintiff against the private company.

Likewise, in *Denver Area*, the plurality concluded that even if a statute authorizing certain private cable providers to exclude sexually explicit content from their stations imbued such exclusions with state action, the cable providers' own First Amendment-protected right to exercise editorial discretion had to be balanced against, and defeated, the First Amendment rights of cable programmers and viewers. *See* 518 U.S. at 747; *see also Hammerhead*, 707 F.2d at 39 n.6 (recognizing that finding that private entity had engaged in state action implicating the plaintiff's rights would require assessment of "the competing First Amendment considerations of [the private entity's] own right to speak").

Here, O'Handley has not and cannot allege any reason why his interests would outweigh Twitter's. While he has no constitutional right to speak on Twitter's privately operated platform specifically, Twitter has a constitutional right to exercise editorial control over what content appears on that platform. Twitter's First

Amendment rights thus predominate and preclude O’Handley’s constitutional claims.

Second, O’Handley is wrong to assert (Br.50, 52) that his claims against Twitter do not implicate Twitter’s First Amendment rights. He argues that forcing Twitter to disseminate his speech “would not interfere with Twitter’s own speech in any way” because “Twitter is merely a host for the speech *of others*.” *Id.* (emphasis added). As an initial matter, the labels Twitter appended to O’Handley’s Tweets were not third-party speech. Imposing liability on Twitter for labeling O’Handley’s Tweets would self-evidently infringe Twitter’s First Amendment rights. O’Handley’s only response on this point—that he somehow has withdrawn his challenge to Twitter’s labeling activity (Br.50-51)—is unavailing, including because, by his own account, Twitter’s labeling of his Tweets was inextricably intertwined with the “strikes” that led to Twitter’s permanent suspension of his account, which he unabashedly still seeks to countermand.

Regardless, O’Handley’s assertion that the First Amendment does not apply to Twitter’s decisions regarding what third-party speech to publish (Br.51-54) is directly contrary to the Supreme Court’s teaching in seminal cases, including *Hurley*, *Miami Herald*, *Pacific Gas*. As discussed (*supra* 42-43), those cases all held that private entities could not, consistent with the First Amendment, be forced to disseminate the speech of others. O’Handley’s attempts to distinguish them all fail.

Twitter’s moderation of third-party content conveys a message about Twitter’s values and the platform and community it hopes to foster. A platform that adopts and enforces policies against false and misleading election information and hateful and violent content fosters very different discourse among its users than one that allows such content. “Because a social-media platform itself ‘spe[aks]’ by curating and delivering compilations of others’ speech[,] ... requir[ing] the platform to disseminate speech with which it disagrees interferes with its own message and thereby implicates its First Amendment rights.” *NetChoice*, 34 F.4th at 1217.

Nor does it matter that Twitter is supposedly less “spatially limited” in the material it can publish than a print newspaper. Br.53. Constitutional protections for publishers and editors are not conditioned on limited space. *Miami Herald* made that clear, holding that “[e]ven if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.” 418 U.S. at 258. Moreover, the Supreme Court has held that there is “no basis for qualifying the level of First Amendment scrutiny that should be applied” to the internet. *Reno v. ACLU*, 521 U.S. 844, 870 (1997); *see also Brown v. Entertainment Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (“[T]he basic principles of freedom of

speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.”).

There is likewise no merit to O’Handley’s assertion (Br.52) that his claims are not aimed at forcing Twitter to convey a particular message. As was true in *Miami Herald*, *Hurley*, and *Pacific Gas*, those claims seek both to hold Twitter liable for, and to countermand, Twitter’s decisions not to convey his specific messages about alleged election fraud—messages that Twitter has decided, in its exercise of editorial discretion, have no place on its platform.

Third, the cases on which O’Handley relies to suggest that Twitter’s content-moderation activity is conduct rather than protected expression (Br.48-50) are inapposite. Both of those cases, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) and *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (“FAIR”), 547 U.S. 47 (2006), involved property owners who, unlike Twitter, were not themselves engaged in expressive activity.

PruneYard involved a privately owned shopping center that was not a forum for speech and whose owner did not seek to use the center as a platform for anyone’s speech, much less to exercise editorial judgments over any such discourse. The owner banned all expressive activity on its property and had no expressed objection to the content of plaintiffs’ speech. *See* 447 U.S. at 77-78; *Hurley*, 515 U.S. at 580. “[T]he only First Amendment interest that the mall owner asserted was the right ‘not

to be forced by the State to use [its] property as the forum for the speech of others.” *NetChoice*, 34 F.4th at 1215 (quoting *PruneYard*, 447 U.S. at 85). That is why the Supreme Court held in *PruneYard* that the case involved no “intrusion into the function of editors,” 447 U.S. at 88, and later explained that “[t]he principle of speaker’s autonomy was simply not threatened in that case,” *Hurley*, 515 U.S. at 580. Twitter, on the other hand, is a communications platform with a panoply of rules about what content accountholders may post, and agreement to those rules is a condition for access.

FAIR is likewise inapposite. It concerned a federal law requiring law schools to open their recruiting process to military recruiters. *FAIR*, 547 U.S. at 56. The schools argued that requiring them to host recruiters and post notices on their behalf violated the First Amendment, in part because the schools objected to the military’s “Don’t Ask, Don’t Tell” policy regarding gay servicemembers. *Id.* at 51. The Court held that the law did not infringe upon the school’s First Amendment rights because “the schools [were] not speaking when they host[ed] interviews and recruiting receptions” and their hosting activity was not “inherently expressive.” *Id.* at 64, 66; *see also id.* at 64 (“[A] law school’s recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper.”).

As the Eleventh Circuit recently explained in discussing the rights of online platforms such as Twitter to moderate third-party content, “*FAIR* isn’t controlling

here because social-media platforms warrant First Amendment protection on both of the grounds that the Court held that law-school recruiting services didn't." *NetChoice*, 34 F.4th at 1216. First, Twitter, "unlike law-school recruiting services, [is] in the business of disseminating curated collections of speech." *Id.* "A social-media platform that 'exercises editorial discretion in the selection and presentation of' the content that it disseminates to its users 'engages in speech activity.'" *Id.* (quoting *Arkansas Educ. Television Comm'n*, 523 U.S. at 674). Second, Twitter is "engaged in inherently expressive conduct of the sort that the Court found lacking in *FAIR*." *Id.* at 1217. "Unlike the law schools in *FAIR*, social-media platforms' content-moderation decisions communicate messages when they remove ... users or content." *Id.* Here, Twitter's decision to permanently suspend O'Handley's account was preceded by repeated public explanations that Twitter believed that his claims of election fraud were disputed, as well as private explanations (just to O'Handley) that his Tweets violated Twitter's rules. *See, e.g.*, 3-ER-496 ¶85. But even absent explanations, given the context, "a reasonable observer witnessing a platform remove a user or item of content would infer, at a minimum, a message of disapproval." *NetChoice*, 34 F.4th at 1217. Likewise, a platform's decision not to

remove a user or item of content conveys a decision to “promote various values and viewpoints.” *Id.* at 1205.⁵

Fourth, O’Handley’s suggestion that Twitter could “publicly dissociate” itself from his rule-violating Tweets by “appending commentary” to them (Br.50) does not cure the First Amendment problem posed by his claims. As an initial matter, Twitter *did* dissociate by labeling his Tweets and O’Handley objected to those actions too as violating his First Amendment rights before belatedly trying to recast his claims. *See supra* 6-7. Regardless, Twitter has a right to refuse entirely to spread messages it believes are harmful or does not want to be affiliated with. The alternative option of disseminating the speech but noting that it may be false or misleading is another way Twitter might choose (and initially did choose) to shape the discourse that it curates and aims to foster, but it is not compelled to limit itself to that approach. Requiring Twitter to express itself by posting a response to content (as opposed to choosing not to disseminate it) would amount to more compelled speech, not less. *See Pacific Gas*, 475 U.S. at 15-16 (“[A]ppellant may be forced

⁵ The district court decision on which O’Handley relies (Br.49-50), *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022 (N.D. Cal. 2007), is also inapposite. The defendant there asserted a First Amendment defense to an anti-discrimination claim under the California Unruh Act. *Id.* at 1028. The court rejected that defense because it concluded that the defendant’s website was a “commercial enterprise” rather than an “Internet ‘publication,’” and that the website had no expressive component. *Id.* at 1059-1060. Twitter, in contrast, *is* an internet publication engaged in inherently expressive activity.

either to appear to agree with TURN's views or to respond. ... That kind of forced response is antithetical to the free discussion that the First amendment seeks to foster.”).

Fifth, the Supreme Court's decision in *Turner* undermines, rather than helps (Br.54-56), O'Handley's argument. *Turner* recognized cable-system operators' independent First Amendment rights to control the third-party content that they carried. *See* 512 U.S. at 636. Even though “[n]o reasonable person would have thought that the cable operator there endorsed every message conveyed by every speaker on every one of the channels it carried,” the Court still “stated categorically that the operator's editorial discretion was protected.” *NetChoice*, 34 F.4th at 1218-1219. And although the Court, applying intermediate scrutiny, found those interests to be overcome by a competing public interest, two features were present there that are absent here. The Court determined there was “little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator,” explaining that it was a “common practice for broadcasters to disclaim any identity of viewpoint between the management and the speakers who use the broadcast facility.” *Turner*, 512 U.S. at 655. Here, by contrast, the public does hold Twitter responsible for its content-moderation rules and practices and views them as expressive choices. Indeed, O'Handley's own criticisms of Twitter for supposedly having an overall political bias against

conservative-leaning content generally, *see* 3-ER-494, 497, belies any claim to the contrary.

In addition, the cable-system operators in *Turner* had been granted a monopolistic franchise that permitted them to wholly “silence the voice of competing speakers.” *Turner*, 512 U.S. at 656. Nothing similar can be alleged here. Twitter, like a daily newspaper and unlike a cable-system operator, “does not possess the power to obstruct readers’ access to other competing publications.” *Id.*; *see also NetChoice*, 34 F.4th at 1220 (“[T]he *Turner* Court cabined that approach to ‘broadcast’ media because of its ‘unique physical limitations’—chiefly, the scarcity of broadcast frequencies.”). To be sure, “the size and success” of Twitter’s platform “makes it an enviable vehicle for the dissemination of ... views.” *Hurley*, 515 U.S. at 577-578. “[B]ut that fact, without more, would fall far short of supporting a claim that” Twitter “enjoy[s] an abiding monopoly of access to” speakers and readers because there are still other outlets through which they can communicate. *Id.*

Sixth, and finally, there is no basis for O’Handley’s suggestion that this Court should vacate the district court’s holding that Twitter’s editorial judgments are protected by the First Amendment. He is wrong in contending (Br.56 n.6) that Twitter’s First Amendment rights are at play only if he has otherwise stated a claim. Twitter’s First Amendment rights bear on the threshold question of whether Twitter is a state actor. *See supra* 17-18. And even if Twitter were a state actor, the First

Amendment would still be a defense to all of O’Handley’s claims. *See supra* 46-48. Moreover, the district court was entitled to reach any of the merits issues properly presented in the case. The doctrine of constitutional avoidance applies only “where a dispositive nonconstitutional ground is available” on which to decide the case. *City of L.A. v. County of Kern*, 581 F.3d 841, 846 (9th Cir. 2009). That is not the case here because O’Handley’s state-action theory itself involves interpreting the constitution. *See Roberts v. AT&T Mobility LLC*, 877 F.3d 833, 837 (9th Cir. 2017) (“[T]he presence of state action” is “[a] threshold requirement of any constitutional claim.”).

IV. THE COURT SHOULD NOT REACH O’HANDLEY’S OTHER ARGUMENTS

O’Handley urges the Court not just to vacate the district court’s dismissal of his claims but also to reverse by resolving issues that the district court did not reach, namely, whether he has plausibly alleged the nuts-and-bolts elements of his federal and state constitutional claims against Twitter and whether Section 230 bars his claims. Br.28-37, 44-48, 56-58. The district court did not reach these issues because it held that O’Handley failed to plausibly allege state action. Unless this Court disagrees with that conclusion, there is no reason to address O’Handley’s other arguments. And should this Court disagree with the decision below, it should allow the district court to address these arguments in the first instance on remand. *See American President Lines, Ltd. v. International Longshore & Warehouse Union*,

Alaska Longshore Div., Unit 60, 721 F.3d 1147, 1157 (9th Cir. 2013) (“It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.”).

The factors this Court considers in deciding whether to resolve an issue not passed on below—whether “the proper resolution is beyond any doubt” and whether “injustice might otherwise result”—weigh against review. *Dodd v. Hood River Cnty.*, 59 F.3d 852, 863 (9th Cir. 1995). It is not beyond any doubt that Twitter’s other asserted grounds for dismissal should be rejected. If anything, it is beyond any doubt that O’Handley fails to state any plausible claim. Nor would any injustice to O’Handley result from a remand. At most there would be some delay, but delay would be more likely to be unjust to Twitter than to O’Handley because it is more likely than not that O’Handley would ultimately not prevail on these claims.

This Court should not reach the merits of O’Handley’s state-law claim for the additional reason that it was dismissed for lack of jurisdiction. The district court declined to exercise supplemental jurisdiction over that claim after dismissing O’Handley’s federal claims. “Because no federal claims remain[ed], the district court did not abuse its discretion” in doing so. *Lima*, 947 F.3d at 1128. The Court should likewise reject O’Handley’s invitation (Br.48 n.4) to certify this question to the California Supreme Court. After electing to file this lawsuit in federal court and

declining to seek certification below, he should not be permitted to postpone dismissal with a last-minute request for certification.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: July 25, 2022

Respectfully submitted,

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ADDENDUM

**ADDENDUM
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U.S. Const. amend. I

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1985

Conspiracy To Interfere With Civil Rights

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, 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; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; ; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Cal. Elec. Code §10.5

Office of Elections Cybersecurity

(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.

(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.

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2022 I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. Counsel in this case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

Date: July 25, 2022

s/ Patrick J. Carome

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