

22-15071

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**ROGAN O'HANDLEY,**

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court  
for the Northern District of California

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

**SUPPLEMENTAL EXCERPTS OF RECORD OF  
DEFENDANT-APPELLEE CALIFORNIA SECRETARY  
OF STATE DR. SHIRLEY N. WEBER**

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APPELLEE CALIFORNIA SECRETARY OF STATE DR. SHIRLEY N.  
WEBER

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IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

**ROGAN O'HANDLEY,**

Plaintiff,

**v.**

**ALEX PADILLA, in his personal capacity,  
 et al.,**

Defendants.

3:21-cv-07063-CRB

**STATE DEFENDANTS' NOTICE OF  
 MOTION AND MOTION TO DISMISS;  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT**

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

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**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE that on December 16, 2021, at 10:00 a.m., or as soon thereafter as may be heard before the Honorable Charles Breyer in Courtroom 6 of the United State. District Court for the Northern District of California, located at 450 Golden Gate Avenue in San Francisco, defendant Dr. Shirley Weber, in her official capacity as California Secretary of State, and defendants Jenna Dresner, Akilah Jones, Sam Mahood, Alex Padilla, and Paula Valle,<sup>1</sup> in their personal capacities (together, “State Defendants”), will and hereby do move this Court to dismiss without leave to amend the complaint of Rogan O’Handley (ECF No. 1) pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on the following grounds: (1) Plaintiff lacks standing to assert his claims against State Defendants; (2) plaintiff has failed to allege state action as required to state a section 1983 claim against State Defendants; (3) plaintiff has not stated a cognizable claim for a violation of his constitutional rights; (4) plaintiff has not stated a valid claim for conspiracy under section 1985; (5) Jenna Dresner, Akilah Jones, Sam Mahood, Alex Padilla, and Paula Valle are entitled to qualified immunity; and (6) plaintiff’s state constitutional claim as to Secretary Weber is barred by Eleventh Amendment sovereign immunity.

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Request for Judicial Notice filed herewith, the papers and pleadings on file in this action, and upon such other matters as may be presented at the time of the hearing.

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<sup>1</sup> Ms. Valle is named in the complaint as Paula Valle Castañon. Her professional name is Paula Valle, and she is referred to incorrectly in the complaint as “Ms. Castañon.”

1 Dated: October 5, 2021

Respectfully submitted,

2 ROB BONTA  
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5 /s/ Anna Ferrari

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8 *Akilah Jones, Sam Mahood, Alex Padilla,*  
9 *Paula Valle, and Dr. Shirley Weber*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION AND SUMMARY OF ARGUMENT**

3 In response to widespread concern that false and misleading information about elections is  
 4 proliferating on social media, the California Legislature established the Office of Election  
 5 Cybersecurity (OEC) within the Secretary of State's office and directed it to identify and mitigate  
 6 misinformation that could suppress voter turnout or disrupt the orderly administration of  
 7 elections. *See* Cal. Elec. Code § 10.5(b)(2), (c)(8). Plaintiff Rogan O'Handley alleges that the  
 8 OEC conspired with Twitter and others to suspend his Twitter account, and that the suspension  
 9 was part of larger effort to target and "censor" speech by political conservatives. In addition to  
 10 suing former Secretary of State Alex Padilla and four current and former OEC employees (Jenna  
 11 Dresner, Akilah Jones, Sam Mahood, and Paula Valle) in their individual capacities for damages  
 12 ("Individual Defendants"), plaintiff has named the current Secretary of State, Dr. Shirley Weber,  
 13 in her official capacity (collectively, "State Defendants"), in a bid to enjoin OEC's operations  
 14 going forward. As set forth below, the action should be dismissed.

15 **First**, plaintiff has no standing to proceed against the State Defendants absent any  
 16 allegations that their conduct is fairly traceable to plaintiff's harm. Twitter, a private actor,  
 17 suspended plaintiff's account because he repeatedly violated Twitter's content-moderation  
 18 policies. The complaint alleges no actual facts, just speculation, in support of plaintiff's  
 19 conspiracy theory. Thus, the Court lacks subject matter to entertain plaintiff's claims against the  
 20 State Defendants. **Second**, 42 U.S.C. § 1983 affords no remedy to plaintiff. It applies only where  
 21 an alleged infringement of civil rights can fairly be attributed to state actors. As the complaint  
 22 itself alleges, however, Twitter alone was responsible for suspending plaintiff's account pursuant  
 23 to its own policies and procedures. Relatedly, the paucity of allegations showing direct and  
 24 personal participation by the Individual Defendants in any deprivation defeats plaintiff's section  
 25 1983 claims against them. Twitter alone has the power to moderate content on its platform.  
 26 **Third**, the complaint states no cognizable constitutional claims against any of the State  
 27 Defendants. The federal and state free speech claims (first and second claims for relief) fail  
 28 because the act of reporting a social media post to Twitter as false or misleading is a form of

1 government speech outside the ambit of the First Amendment—and, in any event, could not have  
 2 caused plaintiff’s speech to be censored. The equal protection claim (third claim for relief),  
 3 premised upon the same alleged censorship, should be dismissed for the same reason. The  
 4 procedural due process claim (fourth claim for relief) fails because the State Defendants did not  
 5 “cause” Twitter to take any adverse action against plaintiff, and plaintiff has no protectable  
 6 property or liberty interest in maintaining his status as social media “influencer” or commentator.  
 7 And the claim that Elections Code section 10.5 is void for vagueness (fifth claim for relief) fails  
 8 as a matter of law because the statute does not proscribe or punish any private conduct. **Fourth**,  
 9 the claim that all defendants engaged in a civil conspiracy to deprive plaintiff of his rights to  
 10 equal protection under 42 U.S.C. § 1985(3) lacks merit. Plaintiff does not allege membership in a  
 11 protected class that would entitle him to claim the protections of this statute. But even if he  
 12 could, the complaint’s threadbare allegations of conspiracy lack the requisite specificity to  
 13 overcome dismissal. **Fifth**, the Individual Defendants are entitled to qualified immunity.  
 14 **Finally**, the Eleventh Amendment bars plaintiff’s claim under the California Constitution’s free  
 15 speech guarantee against Secretary Weber in her official capacity, as well as any claim that  
 16 plaintiff may wish to pursue against Secretary Weber for damages or other monetary relief.  
 17 Because these jurisdictional and other legal defects cannot be cured by amendment, the complaint  
 18 should be dismissed without leave to amend.

## 19 BACKGROUND

### 20 I. THE SECRETARY OF STATE’S RESPONSIBILITY TO ASSESS AND MITIGATE FALSE 21 AND MISLEADING ELECTION INFORMATION

22 In 2018, in response to growing concerns about election interference during and after the  
 23 2016 presidential race, the California Legislature established OEC within the Secretary of State’s  
 24 office to monitor and respond to potential interference with election security and integrity. 2018  
 25 Cal. Stat. c. 241, § 1. One of OEC’s primary, statutorily-prescribed missions is “[t]o monitor and  
 26 counteract false or misleading information regarding the electoral process that is published online  
 27 or on other platforms and that may suppress voter participation or cause confusion and disruption  
 28 of the orderly and secure administration of elections.” Cal. Elec. Code § 10.5(b)(2). In

1 furtherance of this mission, the statute directs OEC to undertake three functions: First, to “assess  
2 the false or misleading information regarding the electoral process described in paragraph (2) of  
3 subdivision (b),” *id.* § 10.5(c)(8), second, to “mitigate the false or misleading information,” *id.*,  
4 and third, to “educate voters, especially new and unregistered voters, with valid information from  
5 elections officials such as a county elections official or the Secretary of State.” *Id.*

## 6 **II. PLAINTIFF’S COMPLAINT**

7 Plaintiff Rogan O’Handley is a licensed California attorney who claims to have left the  
8 private practice of law to “better utilize his legal education in defense of liberty and constitutional  
9 ideals” as a political activist and “social media influencer.” Compl. ¶¶ 9, 70. At its height, over  
10 420,000 people allegedly followed plaintiff’s Twitter account, “DC\_Draino.” *Id.* ¶ 71.

11 Twitter’s civic integrity policy prohibits using Twitter’s services for the purpose of  
12 manipulating or interfering in elections or other civic processes.<sup>2</sup> (Request for Jud. Notice (RJN),  
13 Ex. A.) It imposes a strike-based system of “progressive penalties, culminating in removal,”  
14 against users who violate its terms. Compl. ¶ 79; *see also id.* ¶ 3. On November 12, 2020, in the  
15 aftermath of the 2020 presidential election, plaintiff authored the following post: “Audit every  
16 California ballot[.] Election fraud is rampant nationwide and we all know California is one of the  
17 culprits[.] Do it to protect the integrity of that state’s elections[.]” *Id.* ¶ 72. On November 17,  
18 2020, the complaint alleges, an unnamed “agent or staff member” of the Secretary of State’s  
19 office contacted Twitter about the post, stating that it “creates disinformation and distrust among  
20 the general public.” *Id.* ¶ 76. Twitter appended a label to the post stating “[t]his claim about  
21 election fraud is disputed” and applied a strike to plaintiff’s account. *Id.* ¶¶ 72, 77, 78.

22 Over the next three months, the complaint alleges, Twitter applied four additional strikes to  
23 plaintiff’s account for repeated violations of the platform’s rules entirely unrelated to plaintiff.  
24 Compl. ¶¶ 78, 84-88. The third strike, in January 2021, involved a seven-day suspension of  
25 plaintiff’s account. *Id.* ¶ 86. The fifth strike, in February 2021, resulted in the permanent

26 <sup>2</sup> Twitter, Civic integrity policy, *available at* [https://help.twitter.com/en/rules-and-](https://help.twitter.com/en/rules-and-policies/election-integrity-policy)  
27 [policies/election-integrity-policy](https://help.twitter.com/en/rules-and-policies/election-integrity-policy) (Oct. 2021) (last accessed Oct. 4, 2021) (RJN, Ex. A). Both this  
28 policy and Twitter’s enforcement of it are discussed at length in the complaint. Compl. ¶¶ 3, 77-  
79, 84-88. Thus, although no copy is appended to the complaint, it is integral to the complaint  
and appropriate for judicial notice on a motion to dismiss.

1 suspension of plaintiff's account. *Id.* ¶ 88. Aside from the November 17, 2020 report to Twitter,  
 2 the complaint does not allege any interactions between the Secretary of State's office and Twitter  
 3 respecting plaintiff.

4 On June 17, 2021, plaintiff filed the complaint in this action. The complaint names  
 5 Secretary Weber in her official capacity<sup>3</sup> and the five Individual Defendants in their personal  
 6 capacities. The complaint also names Twitter, the National Association of Secretaries of State  
 7 (NASS), and political consulting firm SKDKnickerbocker (SKDK) as defendants. The complaint  
 8 alleges broadly that all defendants acted in concert to "censor" plaintiff's political speech with the  
 9 intent to discriminate against his viewpoint in violation of 42 U.S.C § 1983 and the free speech  
 10 clause of the California Constitution. Compl. ¶¶ 101-148. It further alleges that all defendants  
 11 engaged in a civil conspiracy to interfere with plaintiff's First and Fourteenth Amendment rights  
 12 in violation of 42 U.S.C. § 1985. *Id.* ¶¶ 167-176. It alleges a separate section 1983 claim against  
 13 the State Defendants, Twitter, and SKDK that the suspension of his account deprived plaintiff of  
 14 his occupation and business goodwill, in violation of procedural due process. *Id.* ¶¶ 149-158.  
 15 Finally, it alleges a section 1983 claim against only the State Defendants that section 10.5 of the  
 16 California Elections Code is void for vagueness. *Id.* ¶¶ 159-166. As relief, the complaint  
 17 requests a declaration that section 10.5, as applied to plaintiff, violates his state and federal  
 18 constitutional rights, along with entry of a permanent injunction against Secretary Weber and  
 19 damages against the Individual Defendants. *Id.* at 31.

## 20 LEGAL STANDARD

21 Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss a claim for  
 22 lack of subject-matter jurisdiction. "A [Federal Rule of Civil Procedure] 12(b)(6) dismissal may  
 23 be based on either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged  
 24 under a cognizable legal theory.'" *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116,  
 25 1121 (9th Cir. 2008) (citation omitted). "To survive a motion to dismiss, a complaint must  
 26 contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its

27  
 28 <sup>3</sup> Secretary Weber was confirmed as Secretary of State on January 28, 2021, succeeding  
 current United States Senator Alex Padilla in this office.

face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). However, “[a] pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action’” cannot survive a motion to dismiss. *Id.* (citation omitted).

## ARGUMENT

### I. THE COMPLAINT FAILS TO ESTABLISH PLAINTIFF’S STANDING TO ASSERT CLAIMS AGAINST THE STATE DEFENDANTS

The State Defendants should be dismissed for lack of standing because plaintiff fails to allege facts sufficient to demonstrate that they took any action that is fairly traceable to the suspension of plaintiff’s Twitter account. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). The only alleged conduct specifically attributed to the Secretary of State’s office is that four of the Individual Defendants (Jenna Dresner, Akilah Jones, Sam Mahood, and Paula Valle) each received an email from SKDK, the Secretary’s voter outreach consultant, highlighting recent election-related news and social media postings, including plaintiff’s “[a]udit every California ballot” post. Compl. ¶ 74 & Ex. 6. The mere receipt of this email could have caused no plausible harm to plaintiff, and the complaint alleges no other specific conduct on the part of these four individuals pertaining to plaintiff. The causal nexus with respect to former Secretary of State Padilla is even more attenuated: The complaint’s only non-conclusory allegations concerning him assert that he was involved in awarding a voter outreach consulting contract to SKDK, Compl. ¶¶ 39-42, which fact, taken as true, still has nothing to do with plaintiff.

The complaint also alleges that in November 2020, an unidentified “agent or staff member” of the Secretary of State’s Office called out one of plaintiff’s posts as misleading, and that Twitter labeled it as such. Compl. ¶¶ 77-78. Even if the complaint identified who was responsible for the “flag,” that would still be insufficient to establish standing; reporting the post to Twitter, by itself, could not cause any alleged injury to plaintiff, as Twitter alone had the power to determine to label the post as disputed and apply a strike to plaintiff’s account. RJN, Ex. A, at 3-4, 6-8; *Allen v. Wright*, 468 U.S. 737, 759 (1984) (where “[t]he links in the chain of causation between the challenged Government conduct and the asserted injury” are a series of “independent decisions” by unrelated actors, they “are far too weak for the chain as a whole to sustain [plaintiff’s]

standing”). Indeed, by admitting that all suspensions and strikes against plaintiff were imposed by Twitter, a private entity, the complaint effectively demonstrates the absence of any causal connection between the actions of any State Defendants and the alleged harm to plaintiff. Compl. ¶¶ 77-79, 84-88, 99, 152; *see also* § II, *supra*.

## II. SECTION 1983 AFFORDS NO RELIEF TO PLAINTIFF

“The ultimate issue in determining whether a person is subject to suit under [42 U.S.C.] § 1983” is whether “the alleged infringement of federal rights is fairly attributable to the [government].” *Pasadena Republican Club v. W. Just. Ctr.*, 985 F.3d 1161, 1167 (9th Cir. 2021), *petition for cert. docketed*. “[S]tate action may be found if, though only if there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’” *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001). “[N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient.” *Id.* There are four tests to assist the Court in determining whether there is state action: (1) public function, (2) joint action, (3) governmental compulsion or coercion, and (4) governmental nexus. *Pasadena Republican Club*, 985 F.3d at 1167. Ultimately, “the inquiry is always whether the defendant has exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” *Id.* (citation omitted).

To determine whether there is state action, the court must first “identify the specific conduct of which the plaintiff complains.” *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020). The complaint here deals nearly exclusively with actions undertaken by *private* actors, not by the State Defendants. Indeed, only one action in the complaint is alleged to have been carried out by a government actor: An unidentified “agent or staff member” of the Secretary of State’s Office contacted Twitter about plaintiff’s “[a]udit every California ballot” post in November 2020. Compl. ¶ 76. The remaining actions of which plaintiff complains—labeling his post as disputed, awarding him a strike for the post, appending similar labels to three subsequent posts, awarding further strikes, and ultimately suspending his account, *id.* ¶¶ 77-78, 84-88—are attributed to Twitter, a private entity. Moves by Twitter to enforce its own civic



1 integrity policy are not “state action” as a matter of law, and the Ninth Circuit has long held “that  
 2 a private entity hosting speech on the internet is not a state actor.” *Prager Univ. v. Google LLC*,  
 3 951 F.3d 991, 997 (9th Cir. 2020); *see also Howard v. Am. Online Inc.*, 208 F.3d 741, 754 (9th  
 4 Cir. 2000). More generally, “[f]ederal courts have uniformly rejected attempts to treat . . . social  
 5 media companies as state actors under Section 1983.” *Rutenburg v. Twitter, Inc.*, No. 4:21-cv-  
 6 00548-YGR, 2021 WL 1338958, at \*2 (N.D. Cal. Apr. 9, 2021) (compiling cases). Thus,  
 7 Twitter’s actions cannot give rise to liability under section 1983 in this case.

8 None of the four tests establish that Twitter’s actions constitute state action. First, as the  
 9 Supreme Court has itself recognized, hosting speech is not a public or government function.  
 10 *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019); *see also Prager Univ.*, 951  
 11 F.3d at 997. Nor are there allegations that the State has “*significantly involve[d]* itself in the  
 12 private parties’ actions and decisionmaking at issue,” as required for the joint action test.  
 13 *Rawson*, 975 F.3d at 753. The complaint does not allege that any state employee or officer did  
 14 anything other than report the November 12, 2020 post to Twitter through channels that Twitter  
 15 itself established. Compl. ¶ 28. There are no non-conclusory allegations that any other  
 16 defendants participated in Twitter’s decision to append a “disputed” label to the post, let alone its  
 17 decisions to award a strike, add disclaimers to several subsequent posts, or suspend plaintiff’s  
 18 account. Compl. ¶¶ 74-88. The allegation that an unnamed government official notified Twitter  
 19 about a single post, which *Twitter* then determined violated its policies, does not establish a  
 20 “complex and deeply intertwined” decision-making process that could qualify as joint action.  
 21 *Rawson*, 975 F.3d at 753. This single allegation is similarly insufficient to show a nexus or  
 22 symbolic relationship between Twitter and the State, as required for the third test. There is no  
 23 allegation of financial integration or other entanglement between the two entities, nor is there any  
 24 allegation of joint operation or government involvement in how Twitter established or  
 25 administers its content-moderation policies. *Cf. Pasadena Republican Club*, 985 F.3d at 1161  
 26 (concluding there is no nexus on similar facts). Finally, plaintiff has not alleged any facts giving  
 27 rise to compulsion, as necessary for the fourth test. The case law is clear that action “taken by  
 28 private entities with the mere approval or acquiescence of the State is not state action.” *Caviness*

1 *v. Horizon Cmty. Learning Ctr.*, 590 F.3d 806, 817 (9th Cir. 2010) (citation omitted). Rather, the  
 2 action must have been compelled or ordered by the State. *Heineke v. Santa Clara Univ.*, 965 F.3d  
 3 1009, 1014 (9th Cir. 2020). The complaint only alleges that the State requested Twitter to review  
 4 a particular post that it believed contained “disinformation.” Compl. ¶ 76. There is no allegation  
 5 the State ordered, threatened, or otherwise compelled Twitter to do *anything*.

6 In addition to requiring state action, which the Complaint here fails to satisfy, section 1983  
 7 requires allegations that a state official sued in their individual capacity must have had “some  
 8 kind of direct personal participation” in the purported deprivation of his constitutional rights.  
 9 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). As explained above (*see* § I, *supra*), no such  
 10 facts are alleged with respect to Senator Padilla. And with respect to the four remaining  
 11 Individual Defendants, the only act attributed to them that had anything to do with plaintiff is  
 12 their receipt of a single email from SKDK cataloging several election misinformation posts on  
 13 social media, including the “[a]udit every California ballot” post. Compl. ¶ 74, Ex. 6; *and see*  
 14 § I, *supra*. Taken as true, the mere receipt of an email falls well below the level of “direct  
 15 personal participation” that could give rise to liability under section 1983. Further, plaintiff  
 16 cannot cure this deficiency by alleging in conclusory fashion that the passive receipt of this email  
 17 somehow “set in motion a series of acts” that the Individual Defendants “knew or reasonably  
 18 should have known would cause Twitter” to suspend plaintiff’s account. Compl. ¶ 152; *see Moss*  
 19 *v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009) (affirming dismissal of *Bivens* claim where  
 20 factual content of complaint may establish the “mere possibility” of a claim but “does not allow us  
 21 to reasonably infer” that stated conclusions are plausible). Because no state action is alleged, and  
 22 a section 1983 claim lacking allegations of direct, personal participation necessarily fails, the  
 23 Individual Defendants should be dismissed.

### 24 **III. THE COMPLAINT PLEADS NO COGNIZABLE CLAIMS FOR RELIEF AGAINST THE** 25 **STATE DEFENDANTS**

#### 26 **A. The Complaint Does Not State a Violation of the First Amendment or the** 27 **California Constitution’s Free Speech Clause**

28 The first and second claims, which allege violations of freedom of speech, fail as a matter  
 of law because the only conduct alleged in the complaint is *government* speech, *i.e.*, the actions of

1 an unidentified “agent or staff member” of the Secretary of State’s office in reporting one of  
 2 plaintiff’s posts to Twitter as false or misleading in November 2020. Because the federal and  
 3 state constitutions do not apply all to government speech, these claims must be dismissed.

4 The First Amendment limits the government’s ability to regulate private speech. It does  
 5 not, however, “say that Congress and other government entities must abridge their own ability to  
 6 speak freely.” *Id.* Put simply, the First Amendment “does not regulate government speech.”  
 7 *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). This limitation serves an important  
 8 purpose: “imposing a requirement of viewpoint-neutrality on government speech would be  
 9 paralyzing.” *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017). The First Amendment “does not  
 10 require government to maintain viewpoint neutrality when its officers and employees speak about  
 11 that venture.” *Id.* And the same is true under the California Constitution’s free speech clause;  
 12 article I, section 2 of the state Constitution does not extend to government speech. *Delano Farms*  
 13 *Co. v. Cal. Table Grape Comm’n*, 4 Cal. 5th 1204, 1210 (2018).

14 The relevant conduct at issue here—an unidentified “agent or staff member” reporting one  
 15 of plaintiff’s posts to Twitter because, in the Secretary of State’s view, it contained inaccurate and  
 16 misleading information, Compl. ¶ 76—constitutes government speech. Multiple cases have  
 17 recognized that the State may allow agencies to promulgate information to the public as needed to  
 18 further governmental interests. *E.g., Johannis v. Livestock Mktng. Ass’n*, 544 U.S. 550, 559  
 19 (2005). And the State would certainly be free to communicate its views, for instance, via its own  
 20 Twitter account or website. Plaintiffs can hardly argue otherwise. Notifying Twitter about a false  
 21 or misleading post is simply that: communicating the State’s own view on a topic. The message  
 22 sent to Twitter conveyed the State’s opinion and perspective that the “[a]udit every California  
 23 ballot” post was disputed and contained misleading information that could sow “distrust among  
 24 the general public.” Compl. ¶ 76. It did not purport to *require* Twitter to do *anything*, nor could  
 25 it have. Nor did it suggest in any way that Twitter would somehow face sanctions for doing or  
 26 not doing anything. *See* Compl. ¶ 76. All further action was voluntarily undertaken by Twitter.  
 27 There is no other way to fairly read the complaint without engaging in rank speculation.  
 28

**B. The Complaint Does Not State a Violation of the Equal Protection Clause**

The Equal Protection Clause forbids the government from “deny[ing] to any person within its jurisdiction the equal protection of the laws.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Plaintiff’s equal protection claim should be dismissed because he fails to allege membership in an identifiable group that was subjected to different (worse) treatment by the State Defendants, or that they acted with an intentionally discriminatory purpose. *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).

The complaint broadly alleges the existence of a “propaganda campaign” to suppress speech that OEC “disfavored” or “disagreed with.” Compl. ¶¶ 2, 4, 66; *see also id.* ¶¶ 14, 22, 26, 36 (similar). However, this allegation is both highly conclusory and too indefinite to identify any particular “targeted” group. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005) (holding that “[a]n equal protection claim will not lie by conflating all persons not injured into a preferred class receiving better treatment than the plaintiff.”) The complaint alleges that, although plaintiff “was far from the only speaker on Twitter suggesting the need for an audit or the existence of voter fraud,” Compl. ¶ 83, defendants “focused their speech censorship efforts on conservative requests for transparency in election processes rather than the same calls from self-identified political liberals.” *Id.* Yet the complaint points to no similarly-situated “self-identified political liberal” who published similar information, but got more favorable treatment by the Secretary of State’s Office. Accordingly, plaintiff fails to allege facts sufficient to support its sweeping conclusion that a discernible class of speakers was targeted systematically.

Plaintiff also cannot proceed under a “class-of-one” theory. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (proceeding to analyze equal protection claim under a “class-of-one” theory where plaintiff fails to allege membership in a protected class). The Ninth Circuit has held that the “class-of-one” doctrine does not apply to forms of state action that “by their nature involve discretionary decisionmaking.” *Towery v. Brewer*, 672 F.3d 650, 660 (9th Cir. 2012). “[T]reating like individuals differently is an accepted consequence of the discretion granted,” and “allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.” *Id.* at 660. Accordingly, an

1 equal protection claim cannot lie under a class-of-one theory absent a broader pattern of  
 2 “generally exercising the discretion in a particular manner while treating one individual  
 3 differently and detrimentally.” *Id.* at 660-61. Determining whether social media posts relating to  
 4 elections are misleading, and whether they should be reported as such to Twitter or other  
 5 platforms, is an inherently discretionary function, *see* § IV, *infra*, and plaintiff alleges no pattern  
 6 with respect to the exercise of this discretion, aside from broad speculation.

7 Ultimately, plaintiff’s equal protection claim is derivative of, and adds nothing to, his failed  
 8 First Amendment claim. Because plaintiff does not allege membership in a protected class, and  
 9 speech is the only fundamental right alleged to be burdened in the context of this claim, his equal  
 10 protection claim “rise[ ]s and fall[s] with the First Amendment claims,” *OSU Student All. v. Ray*,  
 11 699 F.3d 1053, 1067 (9th Cir. 2012), and should be dismissed for the same reasons.

### 12 **C. The Complaint Does Not Allege a Plausible Due Process Violation**

13 The complaint alleges that the State Defendants violated procedural due process by  
 14 “set[ting] in motion a series of acts” to “cause Twitter to inflict the constitutional injury of  
 15 depriving Plaintiff of his occupation and taking the business goodwill he has garnered through his  
 16 Twitter account.” Compl. ¶ 152. These allegations fail to state a cognizable claim because:  
 17 (1) the Complaint does not plausibly allege that the State Defendants “caused” Twitter to do  
 18 anything—at most, it alleges that Twitter enforced its own content moderation policies; and  
 19 (2) there is no legitimate property interest in one’s occupation as a “Twitter influencer,” Compl. ¶  
 20 150, or in having access to one’s social media accounts or followers on a particular private  
 21 platform. Even accepting as true the complaint’s contention that one’s status as a “social media  
 22 influencer” amounts to a vocation, Compl. ¶¶ 4, 152, there is no protected property interest in  
 23 one’s private employment, *Branham v. Thomas M. Cooley L. Sch.*, 689 F.3d 558, 564-65 (6th Cir.  
 24 2012), and Twitter’s suspending his account would not preclude him from spreading his  
 25 “influence[ ]” on other platforms. Further, the complaint acknowledges, as it must, that any alleged  
 26 suspension of plaintiff’s Twitter account was undertaken by Twitter, not the State Defendants.  
 27 Compl. ¶¶ 3, 77-79, 84-88, 99, 152; *see also* § II, *supra*. Any loss of purported

1 “business goodwill,” Compl. ¶ 152, was not caused by the State Defendants, and the due process  
2 claim should be dismissed.

3 **D. Elections Code Section 10.5 Is Not Void for Vagueness**

4 The complaint’s fourth claim for relief alleges that Elections Code section 10.5 does not  
5 comport with due process because plaintiff “should not have been punished for behavior he could  
6 not have known allegedly violated the law.” Compl. ¶ 161. A statute can be void for vagueness  
7 if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited.” *United*  
8 *States v. Williams*, 553 U.S. 285, 304 (2008); *Grayned v. City of Rockford*, 408 U.S. 104, 110  
9 (1972). Section 10.5 authorizes the California Secretary of State to “monitor and counteract false  
10 or misleading information regarding the electoral process that is published online and that may  
11 suppress voter participation or cause confusion and disruption of the orderly and secure  
12 administration of elections.” Cal. Elec. Code § 10.5(b)(2). It does not purport to regulate or  
13 prohibit any private speech or conduct, and imposes no penalties for persons who publish false or  
14 misleading information regarding the electoral process. *Id.* § 10.5. Because section 10.5  
15 proscribes no speech or conduct, there is no need to provide fair notice of any proscription.  
16 Accordingly, the complaint fails to state a void-for-vagueness claim.

17 **E. The Complaint Does Not State a Violation of Section 1985**

18 The sixth claim for relief, for civil conspiracy under 42 U.S.C. § 1985(3), is not cognizable.  
19 To plead such a claim, plaintiff must allege a deprivation of a legally-protected right motivated by  
20 “some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the  
21 conspirators’ action.” *Griffith v. Breckenridge*, 403 U.S. 88, 102 (1971). Section 1985(3)  
22 extends “beyond race” only if “the courts have designated the class in question a suspect or quasi-  
23 suspect classification requiring more exacting scrutiny” or if “Congress has indicated through  
24 legislation that the class required special protection.” *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529,  
25 1536 (9th Cir. 1992) (internal quotation marks and citation omitted). Plaintiff satisfies neither:  
26 Courts have not recognized “social media influencers” as a suspect or quasi-suspect classification,  
27 and Congress has not passed legislation indicating that this group requires special protection. *Cf.*  
28 *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 269 (1993) (holding that “opposition to

1 abortion” does not identify a “class” protected by § 1985(3)); *Orin v. Barclay*, 272 F.3d 1207,  
 2 1217 n.4 (2001) (same); *Sever*, 978 F.2d at 1538 (“Obviously, ‘individuals who wish to petition  
 3 the government’ have not been judicially designated a suspect or quasi-suspect group.”).

4 Even if plaintiff could invoke section 1985(3), the claim would still fail as a matter of law  
 5 because the conspiracy allegations are threadbare. To establish a section 1985(3) violation, a  
 6 plaintiff must demonstrate (1) a conspiracy; (2) an act in furtherance of the conspiracy; (3) an  
 7 intent to deprive any person of the equal protection of, or equal privileges and immunities under,  
 8 the law; and (4) a resulting injury to a legal right or privilege. *See Great Am. Fed. Savings &*  
 9 *Loan Ass’n v. Novotny*, 442 U.S. 366, 373 (1979) (quoting *Griffin*, 403 U.S. at 102). To  
 10 demonstrate the existence of a conspiracy, the plaintiff must allege facts showing an agreement or  
 11 “meeting of the minds” between or among the defendants. *Ward v. Equal Emp. Opportunity*  
 12 *Comm’n*, 719 F.2d 311, 314 (9th Cir.1983). A claim under section 1985 fails where it merely  
 13 alleges conspiracy “without factual specificity.” *Karim-Panahi v. L.A. Police Dep’t*, 839 F.2d  
 14 621, 626 (9th Cir. 1988). Here, although each of plaintiff’s claims is premised on a theory of  
 15 concerted action among multiple defendants, the complaint contains only a formulaic recitation of  
 16 the elements of civil conspiracy without any concrete factual allegations plausibly suggesting that  
 17 there was any conspiracy. Even the most specific factual allegations—that SKDK sent an email  
 18 to OEC staff, that someone in the Secretary of State’s Office reported one of plaintiff’s posts to  
 19 Twitter, that Twitter took various actions to “strike” and suspend plaintiff’s account—are at best  
 20 unilateral actions carried out by separate individuals or entities, acting alone, at different points in  
 21 time. Taken together, they still fail to establish a meeting of the minds across defendants.  
 22 Similarly, the complaint fails to plead any overt act taken in furtherance of the alleged conspiracy.  
 23 *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 929-30 (9th Cir. 2004). Accordingly, the civil  
 24 conspiracy claim must be dismissed.



1 **IV. QUALIFIED IMMUNITY BARS ALL CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS**

2 Even if the complaint pled any viable section 1983 or 1985 claim against the State  
 3 Defendants, the five Individual Defendants are entitled to qualified immunity.<sup>4</sup> To overcome  
 4 qualified immunity, a plaintiff must present plausible factual allegations showing “(1) that the  
 5 official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’  
 6 at the time of the challenged conduct.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (citation  
 7 omitted). This exacting standard gives government officials “breathing room” to make  
 8 “reasonable but mistaken judgments” by “‘protect[ing] all but the plainly incompetent or those  
 9 who knowingly violate the law.’” *City & Cnty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 (2015)  
 10 (quoting *al-Kidd*, 563 U.S. at 744). For the purposes of qualified immunity, a right is “clearly  
 11 established” only if the law is so clear that, under the particular circumstances the official faced,  
 12 “every ‘reasonable official would understand that what [he or she] is doing’ is unlawful.” *D.C. v.*  
 13 *Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *al-Kidd*, 563 U.S. at 741) (emphasis added).

14 Therefore, well before this Court could impose monetary liability on the Individual  
 15 Defendants, plaintiff must identify factually comparable precedent that would have put them on  
 16 clear notice that their actions under these particular factual circumstances were unarguably  
 17 unconstitutional. Plaintiff cannot do so. There is no controlling precedent that would have  
 18 informed the State Defendants in November 2020 that identifying social media posts containing  
 19 false or misleading election information to the private platform on which they are posted violates  
 20 a clearly established constitutional right to a point that is “beyond debate.” *See Halleck*, 139 S.  
 21 Ct. at 1930 (comparing public access channel to other private property owners, whom “[t]he  
 22 Constitution does not disable . . . from exercising editorial discretion over speech and speakers on  
 23 their property”). Indeed, as demonstrated above, plaintiff’s constitutional claims fail for  
 24 numerous reasons.

25  
 26 <sup>4</sup> Qualified immunity protects only those government officials performing a discretionary  
 27 function. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The role of OEC in identifying and  
 28 mitigating false and misleading election information under section 10.5(c)(8) of the Elections  
 Code is an inherently discretionary function.



**V. THE ELEVENTH AMENDMENT BARS PLAINTIFF’S CLAIM UNDER THE CALIFORNIA CONSTITUTION AND ANY CLAIM FOR DAMAGES AGAINST SECRETARY WEBER**

Sovereign immunity bars plaintiff’s state-law free speech claim (second claim for relief) against Secretary Weber, who is sued in her official capacity only. Although there is a limited exception to state sovereign immunity for claims seeking injunctive relief against state officials under federal law, *Ex parte Young*, 209 U.S. 123 (1908), it does not extend to claims brought under state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-102 (1984). The complaint is ambiguous as to whether it seeks to recover damages against Secretary Weber. Compare Compl. 31, § iii (seeking damages against unspecified defendants) with *id.* 32, § v (seeking damages from “persons sued in their personal capacities”). To the extent that it does, sovereign immunity would pose an absolute bar. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989). Separate and apart from that, state officials in their official capacity are not “persons” subject to suit under 42 U.S.C. § 1983. *Hafer v. Malo*, 502 U.S. 21, 30 (1991). Thus, Secretary Weber should be excluded from plaintiff’s second claim for relief, and any claims for damages against Secretary Weber should be dismissed.

**CONCLUSION**

For the foregoing reasons, the complaint should be dismissed without leave to amend.

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