

No. 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 Case No. 3:21-cv-07063-CRB; Hon. Charles R. Breyer

**APPELLANT'S REPLY BRIEF TO CALIFORNIA SECRETARY OF
STATE SHIRLEY WEBER**

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INTRODUCTION

In an abusive violation of free speech and other constitutional rights, the California Secretary of State’s Office of Election Integrity (“State” or “OEC”), partnered with social media companies to censor disfavored speech. For a year, Twitter and the State (“Appellees”) worked to streamline and perfect their speech censorship processes, finally settling on a dedicated portal by which OEC officials received preferential treatment from Twitter for their censorship requests.

In its Answering Brief (“AB”), the State asserts that using the portal to “flag” O’Handley’s speech was not actually a request for Twitter to *do* anything, that despite coordinating speech censorship with social media companies for a year, the Court should view the State’s actions towards O’Handley in isolation, and that the State’s request to shut down a private actor’s speech somehow implicates the State’s own First Amendment rights. The State’s arguments are meritless.

The right to speak out against the government is fundamental to our constitutional order. The State flouted this venerable right when it entered a “partnership” with Twitter to censor dissenting viewpoints based on their content. Allowing the district court’s ruling to stand would threaten the rights of all private speakers to challenge their government. This Court should reverse the district court’s ruling and remand this case for further proceedings.

I. O’HANDLEY HAS STANDING TO PURSUE HIS CLAIMS AGAINST SECRETARY WEBER BECAUSE OF THE STATE’S CENSORSHIP REQUEST TO TWITTER

O’Handley plausibly alleges multiple injuries with a direct causal link to the State. To cause an injury in fact, a defendant need not be the injury’s “sole source” or “proximate cause” if the link between the conduct and the harm asserted is “not tenuous or abstract.” *Barnum Timber Co. v. EPA*, 633 F.3d 894, 901 (9th Cir. 2011); *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 845, 860 (9th Cir. 2005). A “causation chain does not fail simply because it has several ‘links,’ provided those links are not hypothetical or tenuous and remain plausible.” *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (citation omitted).

The State errs in suggesting that the Complaint failed to allege the State was not directing Twitter to take a particular action in response to O’Handley’s tweet. O’Handley alleged that Appellees used the term “flag” to mean a “request to censor speech,” a reasonable inference drawn from Appellees’ past use of the phrase. 3-ER-486, ¶34. When the State “flagged” O’Handley’s tweet through Appellees’ censorship portal, there was no doubt what the State was asking Twitter to do. 3-ER-385, ¶28. Indeed, the very purpose of the portal was to censor “flagged” speech. While the State claims ignorance about the portal’s purpose to this Court, it repeatedly touted its efficient censorship processes to other audiences. 3-ER-484, ¶¶24–25.

The State further misconstrues the Complaint’s allegations to frame O’Handley’s multiple injuries arising out of his November 12 tweet as some new revelation. AB at 23. But the record is clear that when Twitter takes action against tweets allegedly containing election misinformation, it limits the audience to whom the tweet is distributed in various ways. 2-ER-88:11–15; 3-ER-494, ¶¶75–80.

While O’Handley did not specify every action Twitter took against his November 12 tweet, Twitter cleared up any ambiguity on this point with its judicially noticed materials. 3-ER-304–05 (providing that Twitter will “[r]educ[e] the visibility” of the tweet and disable users’ “ability to reply, Retweet, or like the Tweet”). In any event, this is a minor factual clarification that can be accomplished by allowing O’Handley to amend his Complaint, and it certainly does not warrant dismissal of O’Handley’s claims with prejudice. *Eminence Capital, LLC v. Aspeon*, 316 F.3d 1048, 1052 (9th Cir. 2002) (“Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment.”).

There was plainly a link between the OEC’s request and Twitter’s retaliatory actions against O’Handley. 3-ER-485, ¶29. The OEC flagged O’Handley’s November 12 tweet for censorship through the dedicated reporting channel, and Twitter responded obediently by taking action against the tweet, as it did with 98 percent of social-media posts that the OEC reported as “misinformation.”

3-ER- 490, ¶64. The State should not be allowed to participate in the business of censorship and then feign lack of involvement when it is successful. When the power of a state is brought to bear against speech, the constitution demands that it make a *full* account in court to anyone it injured. *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988) (describing the First Amendment protection of “core political speech” to be “at its zenith”); *Terminiello v. City of Chicago*, 337 U.S. 1, 4–5 (1949) (concluding that free speech is protected “against censorship”).

These injuries—the flagging of O’Handley’s tweet, the limitation on its dispersal, the limitation of other users’ ability to interact with it, the strike, and O’Handley’s ultimate de-platforming—are apparent in the record. 2-ER-88:11–15; 3-ER-501–03. They are traceable directly to the State’s decision to target O’Handley’s tweet for censorship. 3-ER-495, ¶¶75–76. They were further described in O’Handley’s response in opposition to the State’s motion to dismiss. 2-ER-230:10–18; 2-ER-231:6–13; 2-ER-232:12–13; 2-ER-234:4–6, 17–19; 2-ER-235:18–19; 2-ER-241:3–6, 19–21; 2-ER-242:6–8.¹

¹ Even if these matters had not previously been briefed, the Court can look at the existence of these injuries in the Complaint and judicially noticed materials because it they are pure legal issues that are evident from the face of the pleading itself. *Nunies v. HIE Holdings, Inc.*, 908 F.3d 428, 433 (9th Cir. 2018); *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir. 2012); *Bolker v. C.I.R.*, 760 F.2d 1039, 1042 (9th Cir. 1985).

O’Handley has plausibly alleged multiple injuries caused by the OEC’s improper decision to target his political speech for censorship, and the district court’s decision to dismiss his Complaint for lack of standing should be reversed.

II. THE COMPLAINT PLAUSIBLY ALLEGED THAT TWITTER’S ACTIONS MAY BE FAIRLY TREATED AS THOSE OF THE STATE

The parties agree that the two-pronged test, set forth in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982), applies to determine whether Twitter’s actions may be fairly treated as those of the State. The test is simple: “First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible.” *Id.* “Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.” *Id.*

O’Handley’s Complaint satisfies both prongs of the *Lugar* test.

A. O’Handley’s Allegations Satisfy *Lugar*’s First Prong.²

Lugar’s first prong asks whether the constitutional deprivation is “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.* A “procedural scheme created by the state is the product of state action.” *Id.* at 941.

² O’Handley maintains that Appellees waived their argument that this prong was not satisfied. AB at 16.

The state enacted such a procedural scheme through Elections Code § 10.5, which created the OEC. 3-ER-479, ¶1; 3-ER-483, ¶19. In implementing this statute, the OEC explained, “[w]e work closely and proactively with social media companies to keep misinformation from spreading [and to] take down sources of information as needed.” 3-ER-484, ¶25. Then-Secretary of State Alex Padilla described this systematic relationship between the OEC and social media companies—like Twitter—as a “partnership.” 3-ER-491, ¶65.

The Complaint plausibly alleges that the OEC interpreted its statutory authority to empower it to target speech for censorship, 3-ER-483–84, ¶¶21–25; that OEC and Twitter worked together to quickly censor whatever speech the OEC deemed offensive, 3-ER-484–85, ¶¶26–31; that Twitter created a channel for communication to streamline OEC’s censorship efforts, 3-ER-484–85, ¶¶26–31; that Appellees utilized this portal frequently to fulfill OEC’s censorship requests, 3-ER- 485–91, ¶¶32–65; and, that O’Handley was specifically targeted as part of the OEC’s efforts to censor disfavored speech, 3-ER-491–500, ¶¶66–99. The State created this procedural scheme—by statute and through acts of the Secretary of State’s office—and Twitter willingly participated in this scheme. This easily satisfies *Lugar*’s first prong.

The State seeks to hide under private forum cases where there is no allegation of joint action between the state and the private party. AB at 28. But

O’Handley is not arguing that a private social-media company enforcing its own policy is a state actor. He is arguing that when Twitter and a government entity, like the State, act in concert, conspire together, and work closely together, Twitter ceases to be a private actor on those facts. *Lugar*, 457 U.S. at 941.

B. O’Handley Plausibly Alleged that Twitter Was a State Actor Here.

Lugar’s second prong requires that “the party charged with the deprivation must be a person who may fairly be said to be a state actor.” *Lugar*, 457 U.S. at 937. *Lugar* set forth four tests (or factors) to determine whether a private party is a state actor. *Id.* The *Lugar* Court recognized that these tests may not be different in operation, but rather “simply different ways of characterizing the necessarily fact-bound inquiry.” *Id.* at 939. The fact-bound inquiry into whether Twitter functioned as a state actor can be approached from any angle, regardless of the legal label assigned to the inquiry. *Id.* at 937–39. The Court is not precluded from using any analysis tool at its disposal when looking at the facts. *Id.* The overarching question the Court must answer is whether private behavior “may fairly be treated as that of the state itself.” *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*, 531 U.S. 288, 295 (2001). Here, it can. O’Handley’s Complaint alleged state action under the “joint action” and “close nexus” tests. *Id.* at 939; Appellant’s Opening Brief (“OB”) at 17.

1. O’Handley plausibly alleged joint action between the OEC and Twitter.

O’Handley plausibly alleged a long-term, celebrated relationship between the OEC and Twitter to act jointly regarding censorship. 3-ER-485–91, ¶¶32–65; 3-ER-500–01, ¶¶99–100; 3-ER-507–08, ¶¶167–76. The joint-action test can be satisfied by a plausible allegation of a “system of cooperation and interdependence” between Twitter and the OEC. *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012). Separately, this test can be satisfied by the existence of a conspiracy. *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 840 (9th Cir. 1999) (citing *Lugar*, 457 U.S. at 941). In his Opening Brief, O’Handley argued that the joint-action test is satisfied under both rubrics.

The State argues that O’Handley has alleged only “a single, one-way communication,” in which the OEC “merely supplied information...[g]enerically reporting a tweet that the OEC viewed as containing false or misleading election information.” AB at 32. This argument grossly misconstrues O’Handley’s Complaint. For nearly a year prior to O’Handley’s November 12 tweet, Appellees coordinated censorship efforts through email and the creation of the separate dedicated portal to prioritize State censorship requests. By the time O’Handley’s speech came into Appellees’ sights, everyone knew their role in the “partnership’s” censorship efforts without it having to be explained each time the OEC submitted a request for censorship to Twitter via the portal. They had repeatedly practiced it,

and Twitter censored speech at the State’s request 98 percent of the time. To suggest this was “a single, one-way communication” denies O’Handley the reasonable inference drawn from Appellees’ extensive coordination and cooperation.

To use the OEC’s own words, its “priority [was] working *closely* with social media companies to be proactive so when there’s a source of misinformation, *we* [could] contain it” and “take down sources of misinformation as needed.” 3-ER-484, ¶¶24–25. The OEC, overseen by the California Secretary of State, declared that it had a close relationship with social media companies that results in the takedown of sources. *Id.* The OEC’s admission that it worked *closely* with companies like Twitter to de-platform sources of “misinformation,” standing alone, should be sufficient for O’Handley’s claim to survive the pleading stage.

This allegation alone clears the “substantial degree of cooperation” test set forth in *Franklin v. Fox*, by a wide degree. In *Franklin*, the Court was persuaded that a convict’s daughter, who visited him in a jailhouse and elicited a confession, was not a state actor because there was *no evidence* that she had “made repeated requests” or “solicited [the government’s] input” about how she should go about meeting with her father in jail. 312 F.3d 423 (9th Cir. 2002). This was at the summary judgment stage, where the plaintiff was able to muster *no evidence* of joint action between his daughter and the government, and *no evidence* that the

government even knew she was going to seek a confession. *Id.* Here, by contrast, the State admitted that it worked “closely” with companies like Twitter.

But the Complaint goes on, alleging that the OEC’s goal in partnering with Twitter was to “aggressively suppress speech they deemed to be ‘misleading,’ under the guise of fostering ‘election integrity.’” 3-ER-479, ¶1. This is a plausible allegation of a shared goal to suppress speech, backed up by the OEC’s own explanation that it worked with social media companies to “take down sources,” 3-ER-484, ¶¶24–25. The statements described in the Complaint are more than general statements about a shared goal of combatting misinformation. They are affirmations of a “partnership,” 3-ER-491, ¶65, cooperation, 3-ER-486, ¶¶34–35, preference for government actors, 3-ER-485, ¶29, and a close and proactive working relationship with the stated goal of censoring speech, 3-ER-484, ¶¶24–25. In sum, the Complaint alleges a “complex and deeply intertwined process,” involving more than “mere approval or acquiescence,” and including “significant encouragement” from the OEC to Twitter. *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 753 (9th Cir. 2020) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

The State’s reliance on *Gallagher v. Neil Young Freedom Concert* is misplaced. AB at 33. In *Gallagher*, if there was any evidence that the concert organizers had shared a common goal with the government of “performing pat-

down searches on concert patrons,” that would have been enough survive *summary judgment* on the issue of state action. 49 F.3d 1442, 1455 (10th Cir. 1995). At the summary judgment stage, the Tenth Circuit would not have required conclusive proof that the concert organizers knew or intended this as a constitutional violation. *Id.* Instead, proof of a common goal would have been established by a record showing “influence” by government actors and some kind of “role” in the private party’s decision. *Id.* O’Handley alleges that the OEC had both an outsized influence and a key role in Twitter’s broad censorship efforts, 3-ER-485–91, ¶¶32–65; 3-ER-500–01 ¶¶99–100; 3-ER-507–08, ¶¶167–176, allegations that make *Gallagher* distinguishable.

To require proof of specific intent by Twitter to violate the constitution at the motion-to-dismiss stage would render the joint-action test void. Plausible allegations of a common goal and joint action to suppress speech, which was in turn a constitutional violation, are sufficient. The factfinder can “draw the reasonable inference” from O’Handley’s allegations that the State is liable for the misconduct of attempting to censor political speech, and that Twitter was a knowing partner in that constitutional violation. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

As is obvious by now, O’Handley does not, as the State asserts, challenge only “the suspension of his Twitter account.” AB at 34. Instead, he challenges the

State’s targeting of his speech, and every action that flowed from it, including, but not limited to the suspension of his Twitter account. *See* Section I. These plausible allegations of joint action establish that state action can be fairly attributed to Twitter, resulting in the deprivation of O’Handley’s constitutional rights. *See* OB at 17–25, 41–44.

2. O’Handley plausibly alleged a close nexus between the OEC and Twitter.

By alleging a “partnership” and close working relationship between the OEC and Twitter, O’Handley plausibly alleged such a “close nexus” between the State and Twitter’s decision to target O’Handley’s speech for suppression that it may fairly be treated as that of the State. 3-ER-484, ¶¶24–25; 3-ER-472–79.

The “close nexus” test asks simply 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 Academy*, 531 U.S. at 295. It “is a matter of normative judgment,” in which “no one fact can function as a necessary condition across the board for finding state action.” *Id.*

The OEC prioritized “working *closely* with social media companies to be proactive so when there’s a source of misinformation, *we* can contain it” and “take down sources of misinformation as needed.” 3-ER-484, ¶¶24–25. Surely working “*closely*” is close enough to be considered a “close nexus.” Yet OEC did more than

simply work closely, it also provided significant encouragement, through its public statements and otherwise, to Twitter to target, censor and suppress speech.

3-ER-484–91, ¶¶32–65; 3-ER-500–01, ¶¶99–100; 3-ER-507–08, ¶¶167–76.

Twitter knowingly participated in OEC’s stated goals. *Id.* The OEC’s censorship requests were “bumped to the head of the queue” and had a 98 percent takedown success rate. 3-ER-472–73; 490, ¶64.

These allegations demonstrate at least “significant encouragement” and a dominant role in decision-making. *Rawson*, 975 F.3d at 753. This creates the plausible inference of a “close nexus.” Accordingly, the district court’s decision that O’Handley failed to plausibly allege that Twitter was a state actor must be reversed.

III. O’HANDLEY STATED PLAUSIBLE FEDERAL CLAIMS

In addition to state action, O’Handley has alleged the other elements of his federal claims.

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

Appellees violated O’Handley’s First Amendment rights. The State’s arguments otherwise are not persuasive.

1. The State engaged in regulation, not speech.

The State contends that the portal communication from a Secretary of State employee to Twitter flagging O’Handley’s November 12 tweet is protected under

the government speech doctrine, but that email is not government speech. While the government speech doctrine recognizes that the State must be allowed to express a point of view, the State may not invoke the doctrine to “regulate [the] speech [of others].” *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017); *see also Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1595–96 (2022) (“The ultimate question is whether the government is . . . expressing its own views or . . . engaged in the regulation of private speech.” (cleaned up)). Because the line between expression and regulation can be blurry, the government-speech doctrine is narrowly construed to preclude the government from “silenc[ing] . . . the expression of disfavored viewpoints.” *Matal*, 137 S. Ct. at 1757.

Here, the portal communication was the means through which the State regulated O’Handley’s speech. As discussed, when the OEC “flags” a tweet to Twitter, that constitutes a directive from the State for Twitter to take action against the tweet. 3-ER-486, ¶34. Such action is governmental regulation of private speech, not government speech. *Eagle Point Educ. Ass’n/SOBC/OEA v. Jackson Cnty. Sch. Dist. No. 9*, 880 F.3d 1097, 1102 (9th Cir. 2018) (holding government speech doctrine does not apply when government creates “regulatory policies restricting private speech”); *see also Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 239 (2d Cir. 2019), *cert. granted, judgment vacated sub nom. Biden v. Knight First Amend. Inst. At Columbia Univ.*, 141 S. Ct. 1220, 209

L. Ed. 2d 519 (2021) (holding “blocking” users from President’s official Twitter account constituted regulation, not government speech). O’Handley has never claimed the State should be prevented from expressing its own viewpoints on his opinions, only that it may not censor his speech.

The State’s reliance on *American Family Ass’n, Inc. v. City & Cnty. of San Francisco* is misplaced. In *American Family*, the government resolution merely condemned the plaintiffs’ anti-gay advertising campaign. 277 F.3d 1114, 1119 (9th Cir. 2002). The plaintiffs did not state a claim because the government engaged in nothing more than “mere criticism of [private] speech.” *Id.* at 1124. Here, by contrast, the email from the Secretary of State’s office directed Twitter to infringe O’Handley’s speech, which goes well beyond the “mere criticism” in *American Family*. Because the State sought to censor O’Handley’s speech, the government speech doctrine does not apply.

2. The State restricted O’Handley’s speech.

The State argues it did not censor O’Handley’s speech because the OEC did not “try to coerce Twitter” to take action against O’Handley’s tweets. AB at 44. But as discussed, the State and Twitter acted jointly to deprive O’Handley of his First Amendment rights. Whether the State *also* threatened to coerce Twitter is irrelevant.

In any event, O’Handley’s allegations create the reasonable inference that the State implicitly coerced Twitter into censoring his tweets. Governmental coercion of a private entity need not be express. Instead, it may be implied “where the comments of a government official can reasonably be interpreted as . . . intimating that some form of . . . adverse regulatory action will follow the failure to accede to the official’s request.” *Okwedy v. Molinari*, 333 F.3d 339, 342 (2d Cir. 2003) (cleaned up); *see also Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (holding coercion was present); *Rattner v. Netburn*, 930 F.2d 204, 209–10 (2d Cir.1991) (holding coercion was a question for the jury).

Here, it was implicit that adverse regulatory action could follow if Twitter did not accede to the State’s request to take action against O’Handley’s tweets. The Secretary of State is the “chief state elections official” in California. Cal. Elec. Code § 2402. As such, he or she investigates and has the power to threaten prosecution for election-related violations of state law. *Porter v. Bowen*, 496 F.3d 1009, 1012 (9th Cir. 2007). The OEC, a division of the Secretary of State’s office, is charged with “monitor[ing],” “counteract[ing]” and “mitigate[ing]” “false or misleading information regarding the electoral process that is published online.” Cal. Elec. Code §10.5 (emphasis added). Thus, the OEC has regulatory authority

over allegedly false or misleading information located on Twitter.³ Pursuant to that authority, the OEC established a practice where it would identify tweets that it deemed to be in violation of § 10.5 and instruct Twitter to remove those tweets. 3-ER-486, ¶34. In the light most favorable to O’Handley, the facts he set forth sufficiently alleged the email from the Secretary of State’s office to Twitter intimated that some form of election-related adverse regulatory action could follow if Twitter did not act against his Twitter account.

3. The State’s action was sufficiently severe to constitute retaliation.

Third, the State argues the action Twitter took against O’Handley’s account was “insufficiently [severe] to amount to retaliation.” AB at 47. But the severity standard in the First Amendment retaliation context is not onerous. *Hyland v. Wonder*, 972 F.2d 1129, 1135 (9th Cir. 1992) (“[The] type of sanction imposed [to discourage the exercise of First Amendment rights] need not be particularly great.”); *Coszalter v. City of Salem*, 320 F.3d 968, 975 (9th Cir. 2003) (“[E]ven minor acts of retaliation can infringe on . . . First Amendment rights.”). Limiting the dissemination of O’Handley’s November 12 tweet and restricting how users could interact with it—not to mention issuing strikes against O’Handley and

³ The State asserts, without citation or explanation, that “[t]he OEC has no oversight responsibility over Twitter.” AB at 44. In light of § 10.5’s text and the allegations here, this assertion is baffling.

banning him from Twitter—easily satisfies this standard. *Ariz. Students' Assn. v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016) (noting the “wide variety of conduct that impermissibly interferes with speech,” including but not limited to “withholding a license, right, or benefit” and “detaining mail”).

The cases the State cites do not support a conclusion otherwise. In *Mulligan v. Nichols*, this Court concluded that reputational harm, standing alone, was insufficient to give rise to a retaliation claim. 835 F.3d 983, 987 (9th Cir. 2016). In *Nunez v. City of Los Angeles*, this Court arrived at the same conclusion with respect to “mere threats and harsh words.” 147 F.3d 867, 875 (9th Cir. 1998). And in *Blair v. Bethel School District*, this Court concluded a government board’s vote to remove the plaintiff from a leadership position was insufficient, noting that “more is fair in electoral politics than in other contexts.” 608 F.3d 540, 544 (9th Cir. 2010). Here, O’Handley has alleged his speech was actually censored. This was not mere damage to his reputation, threats, harsh words, or electoral politics. *Mulligan*, *Nunez*, and *Blair* are thus inapposite.

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

Appellees violated O’Handley’s equal protection rights by discriminating against him because of (1) his identification as a political conservative and (2) his speech.

The State does not dispute that political affiliation is a protected class under the Equal Protection Clause. Instead, it argues O’Handley’s equal protection claim fails because he failed to identify any political liberals whose tweets were not censored. The case the State cites, however, involved only a class-of-one claim. *See Lindsay v. Bowen*, 750 F.3d 1061, 1065 (9th Cir. 2014). Unlike class-of-one claims, to prevail on a class-based claim, a plaintiff must show that the defendants acted with an intent or purpose to discriminate . . . based upon *membership in a protected class.*” *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005) (emphasis added). Accordingly, for class-based claims, the plaintiff must only allege membership in a protected class, which O’Handley has done.

Moreover, *Lindsay* does not hold that a plaintiff in a class-of-one claim must identify similarly situated individuals *by name*. Instead, it holds only that such a plaintiff must identify *the existence* of such individuals. *Id.* (holding plaintiff’s allegations insufficient because she did not identify another “person who appeared on the California ballot despite admitting that he wasn’t qualified”); *see also Capra v. Cook Cnty. Bd. of Rev.*, 733 F.3d 705, 717 (7th Cir. 2013) (“Plaintiffs alleging class-of-one equal protection claims do not need to identify specific examples of similarly situated persons in their complaints.”). Here, O’Handley has alleged he was treated differently than “political liberals” whose tweets were similar to his. 3-ER-495, ¶83; *see also* 3-ER-505, ¶145 (alleging “similarly situated

individuals were not censored for their speech”). Thus, O’Handley has alleged the existence of similarly situated individuals.

In any event, to this day, Twitter contains numerous tweets from political liberals alleging voter fraud and / or calling for audits of election results in the 2020 Presidential election and other elections. If the Court concludes O’Handley must identify specific comparators by name, O’Handley should be given the opportunity to amend his Complaint to do so.

The State also argues O’Handley failed to allege discriminatory intent. But O’Handley alleges Appellees intentionally discriminated against political conservatives like him and in favor of political liberals without any adequate basis for the differential treatment. 3-ER-495, ¶83; 3-ER-504–05, ¶¶140, 144. O’Handley also alleges the Secretary of State’s office took personal offense to him because he questioned its “administration of . . . his political office.” 3-ER-493, ¶74; 3-ER-504, ¶139. These allegations easily raise the “inference” of an impermissible discriminatory intent. *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1026 (9th Cir. 1998); *see also De La Cruz v. Tormey*, 582 F.2d 45, 58 (9th Cir. 1978) (concluding plaintiffs alleged discriminatory intent because of arbitrariness of categorization); *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990) (same with respect to class-of-one claim). O’Handley has thus stated a plausible equal protection claim.

C. O’Handley Plausibly Alleged a Due Process Violation.

Appellees violated O’Handley’s due process rights. The State argues O’Handley does not have either a property interest in business goodwill or a liberty interest to pursue a profession. The State ignores, however, that O’Handley has a liberty interest in the speech contained in his tweets. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 575 n.14 (1972). For this reason alone, O’Handley has stated a viable procedural due process claim.

Moreover, this Court has held individuals have a protectable property interest under California law in the goodwill from their businesses. *Soranno’s Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989). The State cites *In re Marriage of McTiernan & Dubrow*, a non-binding decision of the California Court of Appeal, in support of the proposition that only *businesses* have a protectable interest in their goodwill. *McTiernan*, however, involved the equitable division of property, a setting in which limiting goodwill to a business right makes sense from a policy perspective. 133 Cal.App.4th 1090, 1099 (Cal. Ct. App. 2005). Because O’Handley’s claims do not involve the equitable division of property, *Soranno’s Gasco*, not *McTiernan*, is controlling. Accordingly, O’Handley has an *individual* right to his business goodwill.

In addition, the right to pursue one’s chosen profession is a protected liberty interest under the substantive Due Process Clause. The State contends this right is

not considered “fundamental,” but the case the State cites stands only for the proposition that this right is not fundamental *for purposes of equal protection analysis*. *Marilley v. Bonham*, 844 F.3d 841, 854 (9th Cir. 2016). As O’Handley set forth in his Opening Brief, case law from both the Supreme Court and this Court establishes that the right to pursue one’s chosen profession is indeed a protected interest under the Due Process Clause. OB at 34–35.

Further, even if rational basis review applied (and it does not), Appellees’ actions do not satisfy that standard. The State asserts it has a legitimate interest in “preventing voter confusion, voter suppression, and interference with orderly and secure elections,” AB at 54, but the State has not explained how censoring O’Handley’s tweets—all of which occurred *after* the 2020 Presidential election—furthered that interest. Moreover, censoring O’Handley while allowing liberal Twitter users to make allegations of election fraud without consequence is “drastically underinclusive” to the State’s putative end and, thus, “founded on [an] . . . arbitrary ground.” *In re Levenson*, 587 F.3d 925, 933 (9th Cir. 2009).

Accordingly, O’Handley has stated plausible procedural and substantive due process claims.⁴

⁴ The State incorrectly contends that O’Handley invoked the substantive due process clause for the first time on appeal. Below, citing *Benigni v. City of Hemet*, 879 F.2d 473, 478 (9th Cir. 1989), O’Handley argued that “the ‘right to pursue an occupation’ is a recognized liberty . . . interest subject to due process rights,” and that “he . . . had a reasonable entitlement [to his Twitter account] deriving from existing rules,

D. O’Handley Plausibly Alleged § 10.5 is Void for Vagueness.

Section 10.5 is void for vagueness because it (1) does not give persons of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) fails to provide sufficiently definite standards for those who apply them.

The State argues the vagueness doctrine does not apply because § 10.5 “neither prohibits private conduct nor gives the OEC any ‘enforcement’ powers with respect to private conduct.” AB at 55. The State, however, acting through the OEC, exercised “enforcement power” over O’Handley by, at least, directing Twitter to take action against his November 12 tweet. Censoring speech constitutes sufficient “enforcement power” to sustain a vagueness challenge. *See Procunier v. Martin*, 416 U.S. 396, 416 (1974) (holding standard governing censorship of prisoner mail was unconstitutionally vague).

In any event, a statute need not prohibit private conduct to be subject to a vagueness challenge. *Id.* In *Bullfrog Films, Inc. v. Wick*, this Court held regulations governing whether films were exempt from import duties were subject to a vagueness challenge even though the regulations did not prohibit any private conduct. 847 F.2d 502, 513 (9th Cir. 1988). *Beckles v. United States* is not to the contrary. In *Beckles*, the Supreme Court held the Sentencing Guidelines were not

with which the State’s censorship actions interfered.” 2-ER-206:22-24. This was sufficient to preserve the argument.

subject to a vagueness challenge because courts “merely [rely on them] for advice in exercising [their] discretion to choose a sentence within . . . statutory limits” set by Congress. 137 S. Ct. 886, 895 (2017). Here, by contrast, § 10.5 *itself* authorizes the OEC to act as it sees fit. The Sentencing Guidelines are not remotely analogous.

The State also contends the meaning of the phrase “false and misleading” is clear, but the cases the State cites do not establish that proposition. In *United States v. Matank*, this Court did not even interpret the phrase “false . . . statements.” 482 F.2d 1319, 1321 (9th Cir. 1973). Rather, it held only that submitting reimbursement forms to private insurance carriers satisfied the statutory condition under 18 U.S.C. § 1001 that a claim must be made to a “department or agency of the United States.” *Id.* at 1322. In *First Resort, Inc. v. Herrera*, this Court held an ordinance prohibiting “false and misleading advertising about pregnancy-related services” was sufficiently definite. 860 F.3d 1263, 1275 (9th Cir. 2017). In *First Resort*, however, the text of the ordinance was directed toward misrepresentations claiming such centers performed abortions, and the ordinance further clarified what type of advertising was *not* prohibited. *Id.* at 1269, 1275. Unlike the ordinance in *First Resort*, § 10.5 does not contain any language adequately defining the type of “false and misleading information” to which it applies, nor does it contain any language specifying the type of statements that are permitted. A reasonable person

in O’Handley’s shoes would have had no way of knowing, for example, that the State would take the position that tweets after an election “may suppress voter participation” in *future* elections. Cal. Elec. Code §10.5.

Moreover, the State’s interpretation of the phrase “may suppress voter participation” is so broad it could refer to almost any information about an election, such as a weatherman predicting rain on election day. *Id.* The State argues O’Handley’s November 12 tweet could have caused voter “confusion,” but, even putting aside the problem that § 10.5 does not obviously apply to future elections, it applies only to information that may cause “confusion *and disruption.*” *Id.* The State does not explain how O’Handley’s November 12 tweet could have caused “disruption” of any election—present or future—nor could it on any reasonable interpretation of that term.

Finally, the State has not established O’Handley’s November 12 tweet was actually “false and misleading.” For one thing, the State has made no effort to demonstrate voter fraud is non-existent, either nationwide or in California, nor could it at the Rule 12(b)(6) stage. The State argues that O’Handley’s November 12 tweet “implies that California does not audit ballots,” AB at 60, but his tweet does nothing of the kind. Rather, O’Handley’s tweet called upon California to audit “*every*” one of its election ballots, 3-ER-493, ¶72 (emphasis added), and the State does not argue that audits *every* election ballot.

For all these reasons, §10.5 is void for vagueness.

E. O’Handley Plausibly Alleged a Violation of 42 U.S.C. § 1985(3).⁵

Appellees violated § 1985(3) by conspiring to deprive O’Handley of his constitutional rights. Appellees argue O’Handley failed to allege the existence of a conspiracy, but the standards for alleging a conspiracy are the same under §§ 1983 and 1985(3). Thus, for the same reasons O’Handley has plausibly alleged a conspiracy under § 1983, he has also alleged a conspiracy under § 1985(3).

Appellees also argue O’Handley failed to allege “class-based” animus because his proposed class “defines the class . . . by reference to his individual disagreement with the California Secretary of State’s views.” AB at 63. But O’Handley defines the class here as political conservatives. 3-ER-495, ¶83; 3-ER-507, ¶172. This class definition is sufficiently definite and adequate to state a claim.

Appellees contend *United Brotherhood of Carpenters and Joiners of America v. Scott* undermines the conclusion that § 1985(3) applies to discrimination based on political affiliation, but the holding in *Scott* was more limited than Appellees let on. In *Scott*, the issue was whether § 1985(3) applied to conspiracies directed against “*economic* views, status, or activities.” 463 U.S. 825,

⁵ The State and Twitter make similar arguments with respect to O’Handley’s § 1985(3) claim. To avoid duplication, O’Handley addresses both the State’s and Twitter’s arguments in this section.

837 (1983) (emphasis in original). In holding it did not, the Supreme Court observed “it [was] a close question” whether § 1985(3) applied to *any* classes other than those involving a racial component. *Id.* at 836–37. Ultimately, however, the Supreme Court “withheld judgment” on that question, holding instead only that § 1985(3) did not apply to economic-based classes. *Id.* at 837–39.

After *Scott*, this Court has consistently affirmed its pre-*Scott* case law holding that § 1985(3) applies where (1) courts have determined the class at issue was a suspect or quasi-suspect class or (2) Congress has indicated the class warrants heightened protection. *See Schulz v. Sandburg*, 759 F.2d 714, 718 (9th Cir. 1985) (citing *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 333 (9th Cir. 1979), *abrogated on other grounds by Nichols v. Azteca Rest. Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001)). And, importantly, after *Scott*, this Court has observed that the *Schulz* test *necessarily* means § 1985(3) applies to conspiracies “beyond race.” *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1537 (9th Cir. 1992). Indeed, district courts within the Ninth Circuit routinely apply the *Schulz* test to hold § 1985(3) protects against classifications beyond race, including political affiliation. *See Stevens v. Rifkin*, 608 F. Supp. 710, 725 (N.D. Cal. 1984) (political affiliation); *see also Dickerson v. Cal Waste Sols.*, No. C 08-03773 WHA, 2009 WL 2913452, at *9 (N.D. Cal. Sept. 8, 2009) (sex); *Diem v. City & Cnty. of San Francisco*, 686 F. Supp. 806, 809 (N.D. Cal. 1988) (religion). Accordingly, *Scott*

does not undermine the conclusion § 1985(3) protects against conspiracies based on political affiliation.

Moreover, discrimination based on political affiliation satisfies the *Schulz* test. First, courts have designated political affiliation as a protected category. *See Am. Sugar-Ref. Co. v. State of Louisiana*, 179 U.S. 89, 92 (1900) (noting that discrimination based on “political affiliation” would be “a denial of the equal protection of the laws”); *Abcarian v. McDonald*, 617 F.3d 931, 938 (7th Cir. 2010) (identifying “political affiliation” as a protected category); *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 529 (1st Cir. 2009) (“[G]overnment officials may not sanction a citizen because of his political affiliation”). Appellees do not dispute this fact.

Second, contrary to Appellees’ argument, Congress has indicated through legislation that political affiliation requires special protection. *See, e.g.*, 5 U.S.C. § 2302(b)(1)(E) (prohibiting discrimination on the basis of “political affiliation” in personnel decisions); 8 U.S.C. § 1231(b)(3)(A) (prohibiting removal of alien to country where his life or freedom would be threatened based on “political opinion”); 18 U.S.C. § 227 (prohibiting government employees from influencing private employment decision based on “political affiliation”); 20 U.S.C. § 1232h(b) (providing students shall not be requiring to disclose “political affiliation[.]” in connection with federal educational programs); 29 U.S.C. § 3248

(prohibiting discrimination in employment and program access on the basis of “political affiliation” to programs); 42 U.S.C. § 5057 (same); 42 U.S.C. § 9821 (same); 42 U.S.C. § 9849 (same) 42 U.S.C. § 12635 (same). Under *Schulz*, discrimination based on political affiliation is thus class-based discrimination under § 1985(3).

Finally, the State argues O’Handley has not alleged facts suggesting its actions were motivated by his conservative political views as opposed to the fact “he posted demonstrably false and misleading information.” AB at 65. This is not a serious argument. O’Handley alleged Appellees “focused their . . . efforts on *conservative* requests for transparency in election processes rather than the same calls from self-identified political *liberals*.” 3-ER-495, ¶83 (emphasis added); *see also* 3-ER-481, ¶8; 3-ER-484, ¶25; 3-ER-489, ¶56; 3-ER-500, ¶99. In the light most favorable to O’Handley, the Complaint is plainly sufficient to plausibly allege Appellees’ actions were motivated by an impermissible discriminatory animus.

IV. O’HANDLEY STATED A VIABLE LIBERTY OF SPEECH CLAIM AGAINST TWITTER⁶

The State argues O’Handley has not stated a viable Liberty of Speech claim because he has not alleged the existence of state action. But as O’Handley has demonstrated in Section II, above, state action is present here.

Regardless, the Liberty of Speech Clause does not require state action. *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 492 (2000) (holding the Liberty of Speech Clause “runs against the world, including private parties as well as governmental actors”). The State cites *Golden Gateway Center v. Golden Gateway Tenants Association* in support of its contention otherwise, but *Golden Gateway* was a plurality decision. 26 Cal. 4th. 1013, 1016–1035 (2001) (plurality). *Gerawan Farming* is thus binding.

In any event, the question of whether the Liberty of Speech Clause requires “state action” is a red herring. In *Golden Gateway*, even the plurality concluded state action was present when private property is the functional equivalent of a traditional public forum. *Id.* at 1032 (plurality op.). As O’Handley has demonstrated, Twitter is the functional equivalent of a traditional public forum for purposes of the Liberty of Speech Clause. Thus, even if “state action” were

⁶ O’Handley does not dispute that the State’s invocation of Eleventh Amendment immunity bars his Liberty of Speech claim against it in federal court. Twitter, however, neither claims nor has immunity under the Eleventh Amendment.

required to state a claim under the Liberty of Speech Clause (and it is not), it exists here.

CONCLUSION

O’Handley requests this Court reverse the district court’s grant of the State’s motion to dismiss and remand this case for further proceedings. In the alternative, O’Handley asks this Court to grant him the opportunity to amend his Complaint to cure any perceived pleading defects.

Date: September 14, 2022

Respectfully submitted,

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Date: September 14, 2022

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I hereby certify that on September 14, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: September 14, 2022

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