

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 TWITTER INC.

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INTRODUCTION

While a private actor’s speech is “not ordinarily constrained by the Constitution,” Twitter Ans. Br. (“AB”) at 18, this is no ordinary case. California created the Office of Election Cybersecurity (“OEC”) to combat “election misinformation.” Rather than communicate the State’s version of the truth, the OEC interpreted its mandate as license to partner with social-media companies to censor speech. For over a year, Twitter and the State (“Appellees”) worked in concert to streamline the speech censorship process to make it more efficient, even creating a dedicated portal to prioritize State censorship requests. And Twitter acceded to the State’s requests to censor speech 98 percent of the time. Despite the Complaint’s detailed factual record—showing Appellees’ extensive coordination, shared speech censorship goals, and even public statements touting the efficacy of the State’s censorship program with Twitter—the district court dismissed O’Handley’s Complaint without leave to amend. In so doing, the district court made factual findings, impermissibly setting aside plausibly plead allegations and the reasonable inferences drawn therefrom.

Moreover, the district court incorrectly concluded that Twitter’s actions were protected by the First Amendment. Because Twitter is a state actor with respect to its dealings with O’Handley, it does not have any First Amendment rights. Even if the First Amendment did protect state actors, Twitter has not shown

that it has a First Amendment right here, and any First Amendment rights Twitter asserts would be outweighed by O’Handley’s constitutional rights.

This Court should reverse the district court’s Order and Judgment and remand this case back to the district court for further proceedings.

ARGUMENT

I. IT IS NOT TWITTER’S PREROGATIVE TO REWRITE THE DISTRICT COURT’S OPINION

The district court failed to “presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of [O’Handley].” *Usher v. Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Rather than engage with the district court’s opinion, Twitter makes sweeping generalizations—without any supporting citations—about what the district court surely must have *meant* instead of what it *stated*. AB at 31–35. The district court ignored O’Handley’s allegations, weighed facts, and failed to credit the reasonable inferences from the facts alleged. Twitter claims that, every time the district court stepped into the jury box, what the court was *really* trying to say was that, even if O’Handley’s allegations were true, Twitter would still prevail. But as demonstrated by Twitter’s failure to defend the district court’s reasoning on this point in its Answering Brief, Twitter ignores the plain fact that the district court made no such conclusion.

O’Handley alleged Twitter censored speech at the State’s request 98 percent of the time. This factual allegation came directly from the Secretary of State’s own public statements. 3-ER-459. But the district court failed to credit this allegation, and instead found it lacked credibility because the OEC’s spreadsheet allegedly contradicted the Secretary of State’s statements. 1-ER-006:4–15; 1-ER-020:4–15. This spreadsheet, however, does not purport to reflect the entirety of OEC’s take-down requests. 3-ER-449–52. Thus, the district court erred in failing to provide O’Handley the most favorable inference from this allegation. *Usher*, 828 F.2d at 561.

O’Handley also alleged Appellees’ year of coordination, communication, and creation of a dedicated portal to prioritize state censorship requests was evidence that by the time O’Handley’s speech had come into Appellees’ sights, each actor 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. Yet the district court did not grant O’Handley this reasonable inference; instead, it determined there was nothing more here than a “single message to Twitter, flagging a single O’Handley tweet,” 1-ER-017 (emphasis removed), ignoring both the reasonable inferences from O’Handley’s allegations and the fact that discovery is likely to reveal the existence of many other similar communications. The district court further failed to grant O’Handley the

reasonable inference that Appellees’ past use of the term “flagging” a tweet to serve as a directive to “take down” that speech meant the same thing when the State used the term a year later. 1-ER-020. Instead, the district court found that “flagging” a tweet did “not demand a particular action.” AB at 34. Rather than granting O’Handley the benefit of his allegations and the reasonable inferences drawn therefrom, the district court repeatedly granted the *implausible* inferences suggested by Appellees, and then relied on those inferences to dismiss O’Handley’s Complaint. In so doing, the district court impermissibly took sides and ignored the legal standard applicable to motions under Rule 12(b)(6). These errors alone warrant overturning the district court’s decision to dismiss O’Handley’s Complaint.

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

Twitter cannot claim that it is a mere private entity, free from constitutional constraints, while partnering with the State to censor speech. *Cf.* AB at 17–19; 3-ER-483–500. O’Handley’s allegations concerning Appellees’ partnership show that O’Handley was deprived of his rights through state action and that Twitter was, therefore, “acting under color of state law in participating in that deprivation.” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 (1982).

A. O’Handley’s Allegations Satisfy *Lugar*’s First Prong.¹

The first prong of *Lugar* asks whether the 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.

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 found offensive, 3-ER-484–85, ¶¶26–31; that Twitter created a channel for communication to streamline OEC’s censorship efforts, *id.*; that Appellees used this portal often to accomplish OEC’s censorship requests, 3-ER-485–91, ¶¶32–65; and, that

¹ O’Handley maintains that Appellees waived their argument that this prong was not satisfied. Opening Brief (“OB”) at 16.

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 the acts of the Secretary of State’s office—and Twitter willingly participated in the scheme. This easily satisfies *Lugar*’s first prong.

B. O’Handley Plausibly Alleged 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 “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. 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; 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-500–1, ¶¶99–100; 3-ER-507–8, ¶¶167–176. The joint-action test can be satisfied by 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 explained that the joint-action test is satisfied under both rubrics.²

O’Handley sufficiently alleged a “substantial degree of cooperative action” between OEC and Twitter to make Twitter a state actor in this circumstance. *Collins v. Womancare*, 878 F.2d 1145,1154 (9th Cir.1989). OEC stated its “priority [wa]s 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 (emphasis added). Standing alone,

² Twitter perplexingly suggests that O’Handley abandoned the substantial cooperation theory, AB at 24, but O’Handley discussed Appellees’ extensive cooperation throughout Section I.A of his Opening Brief, OB at 17–23.

this allegation of cooperative action is enough for O’Handley’s claim to survive dismissal.

But the Complaint pleads more, alleging that the goal of OEC’s partnership 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” of alleged misinformation. 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)). This constitutes substantial cooperation.

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

Twitter’s analysis of O’Handley’s conspiracy allegations is flawed because it relies on reasoning that ignores the holdings of the cases Twitter cites and

mischaracterizes O’Handley’s allegations to fit into its inapplicable framework. This effort begins with Twitter’s citation to *Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir. 2002).

The bar set by *Franklin* is not as “high” as Twitter suggests. AB at 24. 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. *Id.* Further, *Franklin* was decided at the summary judgment stage, after the benefit of discovery. *Id.*

O’Handley alleged that Twitter not only made repeated requests and solicited government input about how Appellees could best “partner” to censor speech, but also that they set up a system to streamline State censorship requests. Unlike *Franklin*, the State *asked* Twitter to censor the speech on its behalf, and Twitter complied 98 percent of the time. The allegations here soar over *Franklin*’s bar.

Twitter’s reliance on dicta from other cases is similarly unavailing. AB at 25. In *Manhattan Community Access Corp. v. Halleck*, the Court, discussing the public function test, held that operation of a public access television channel was not a function that has “traditionally and exclusively been performed by government.” 139 S. Ct. 1921, 1929 (2019). But O’Handley does not argue that state action is present

merely because Twitter performs a public function. *Id.* Instead, Twitter jointly worked in concert with the State to censor speech. The joint-action test was not at issue in *Halleck*, and *Halleck's* reasoning thus does not apply.

In *Fonda v. Gray*, 707 F.2d 435 (9th Cir. 1983), decided on a motion for summary judgment, the Court contrasted the facts of *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970). Whereas *Adickes* involved a “meeting of the minds” to violate constitutional rights, in *Fonda*, the plaintiff, even after the benefit of discovery, “failed to sufficiently rebut the defendant banks’ proof of a lack of a common conspiratorial objective.” *Fonda*, 707 F.2d at 438. Notably, the *Fonda* Court found it instructive that “the banks had no knowledge of any improper motive to harm plaintiff because of her outspoken political views.” *Id.* at 439. Here, O’Handley has plausibly alleged a meeting of the minds to violate constitutional rights, which is enough. O’Handley also has set forth plausible facts that Twitter knew, and agreed to, “the improper motive to harm [O’Handley] because of [his] outspoken political views.” *Id.* *Fonda* thus supports O’Handley’s position, not Twitter’s.

Zhou v. Breed, 2022 WL 135815 (9th Cir. Jan. 14, 2022), is also inapposite. In *Zhou*, the plaintiff alleged one fact, and only one fact, in support of the state-action theory: “public officials criticized a billboard or called for its removal.” *Id.* at *1. That fact, standing alone, was not sufficient to establish that the private company

that removed the billboard was a state actor. *Id.* Here, O’Handley has alleged that the OEC did more than just generally criticize his tweet or call for its removal in the abstract. The State reached out directly to Twitter—through a special portal created to streamline the State’s censorship requests—and brought his November 12 tweet to Twitter’s attention as part of a partnership and close working relationship to “take down” speech. 3-ER-484–91, ¶¶24–65. These facts set forth state action under the “joint action” and “close nexus” theories, which were not at issue in *Zhou*. 2022 WL 135815, at *1 (“Appellants do not ... put forward any plausible legal theory that would support treating Clear Channel as a state actor in this case.”).

Twitter also cites *Cruz v. Donnelley*, 727 F.2d 79, 81 (3d Cir. 1984), but that case—again—was decided at the summary judgment stage, whereas O’Handley has not had the benefit of discovery. Further, the facts of that case involved a store clerk who called the police on a suspected shoplifter. There is no analogy to the facts here.

Twitter’s citation to *United States v. Rosenow*, 33 F.4th 529 (9th Cir. 2022) is similarly far afield. That case did not deal with the *Lugar* test for state action. It involved the Fourth Amendment rights of a criminal defendant, and a test set forward *only* for determining whether a private party is a state actor while conducting a search. *Rosenow*, 33 F.4th at 538–43; *see also United States v. Cleaveland*, 38 F.3d 1092, 1093 (9th Cir. 1994), *as amended* (Jan. 12, 1995) (noting unique test for determination whether “private party’s search implicates the Fourth Amendment”).

Twitter did not cite, and undersigned counsel could not find, a single case in which the Court applied the *Rosenow* state-action framework in a *Lugar* analysis. Tellingly, rather than discussing one of the thousands of cases in which the *Lugar* state-action test has been applied, Twitter made *Rosenow* the backbone of its legal analysis. *Rosenow*'s inapplicable, out of context, "legitimate, independent motivation" dictum, has nothing to do with the "joint action" test for state action under *Lugar*. Instead, *Lugar* asks merely whether there is a plausible allegation of concerted action. *Tsao*, 698 F.3d at 1140.

O'Handley has plausibly alleged that the OEC interpreted its statutory authority to empower it to target speech, 3-ER-483–84, ¶¶21–25; that Twitter created a streamlined channel for State censorship requests and solicited the State's input, 3-ER-484–85, ¶¶26–31; that the OEC used this channel repeatedly, with back-and-forth communications and a series of directives flowing to Twitter, not just in a one-time, one-way manner, 3-ER-485–491, ¶¶32–65; that there was what the Secretary of State termed a "partnership" between the OEC and Twitter, 3-ER-491, ¶65; and, that O'Handley was specifically targeted as part of this conspiracy, 3-ER-491–500, ¶¶66–99.

That Twitter had its own policy, AB at 28–29, does not affect the "joint action" analysis. Saying Twitter had its own policy is like saying an individual co-conspirator made its own decisions. It is irrelevant. The "joint action" test does not

ask, “Did the private actor have its own policy?” The “joint action” test asks, “Is there a plausible allegation of concerted action?” *E.g.*, *Tsao*, 698 F.3d at 1140. Or, alternatively, “Is there a plausible allegation of a conspiracy?” *E.g.*, *Sutton*, 192 F.3d at 840. O’Handley plausibly alleges both alternatives. The State’s conduct was the impetus for Twitter censoring O’Handley’s account, not the independent operation of Twitter’s own policy. This concerted action between Twitter and the State to specifically target O’Handley is the quintessential example of “joint action.”

3. O’Handley plausibly alleged a sufficiently “close nexus” between the OEC and Twitter.

The “close nexus” test asks 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 (cleaned up). As the OEC explained, “our priority is working *closely* with social media companies to be proactive so when there’s a source of misinformation, *we* can contain it” and “take down sources of misinformation as needed.” 3-ER-486, ¶¶24–25. Surely working “*closely*” with the State to take down information establishes a “close nexus.” Further, the OEC did more than simply work closely with Twitter; it also provided significant encouragement, through its public statements and otherwise, to Twitter to target, censor, and suppress speech. 3-ER-485–91, ¶¶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-475–77; 3-ER-485, ¶29; 3-ER-490, ¶64.

These allegations establish at least “significant encouragement” and a dominant role in decision-making, *Rawson*, 975 F.3d at 753, thus creating the plausible inference of a “close nexus.” Thus, O’Handley plausibly alleged state action under a “close nexus” theory.

4. The *Lugar* framework does not need a new state-action test.

Twitter’s final counterargument to O’Handley’s state-action argument is built on the same sandy foundation created by its flawed analysis of inapplicable caselaw. Twitter creates its own state-action test from whole cloth, stating, “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.” AB at 30. Twitter cites no precedent (or justification) for this brand-new test, and this Court should decline Twitter’s invitation to rewrite settled law.

Finally, Twitter plucks two out-of-context phrases of dicta from *Shurtleff v. City of Bos.*, 142 S. Ct. 1583 (2022), in an effort to convince the Court that finding for O’Handley could somehow impair the State’s ability to set policy. AB at 31. But *Shurtleff* establishes nothing of the kind. In *Shurtleff*, the Supreme Court held that the city’s refusal to allow the plaintiff to fly a “Christian flag” as part of the city’s flag-raising program was not government speech and, instead, “discriminated based

on religious viewpoint.” *Id.* at 1593. For the reasons set forth in O’Handley’s Reply to the State’s Answering Brief (“RSB”), RSB 13–15, Appellees may not trample individuals’ constitutional rights under the guise of the government speech doctrine. In short, the State is free to set policy, but it may not—acting alone or in partnership with a private entity—violate the Constitution, as it did here.

III. O’HANDLEY PLAUSIBLY ALLEGED THE ELEMENTS OF HIS CLAIMS

A. O’Handley Alleged the Other Elements of his § 1983 Claims.

Twitter did not address O’Handley’s argument that he has alleged the other elements of his § 1983 claims. Instead, Twitter contends the Court should remand for the district court to consider that question in the first instance. But this Court may resolve issues not decided below “if the question is purely a legal one and the record below has been fully developed.” *Quinn v. Robinson*, 783 F.2d 776, 814 (9th Cir. 1986). These conditions are satisfied here.

Moreover, as O’Handley has elsewhere explained, he has stated the other elements of his § 1983 claims. (OB at 28–37; RSB at 13–25.) Twitter does not argue otherwise, and, in its memorandum in support of its motion to dismiss below, Twitter relegated its discussion of the elements of these claims to a single footnote, which only skirted the issues. 3-ER-365. Accordingly, the resolution of these issues is clear. Further, Twitter’s unlawful conduct is ongoing, and no injustice would result from resolving these questions now. Accordingly, the Court

may—and should—conclude that O’Handley has stated the other elements of his § 1983 claims.

B. O’Handley Alleged a Plausible Claim Under the Liberty of Speech Clause.

Twitter does not dispute that O’Handley has alleged a viable Liberty of Speech claim. The State asserts O’Handley has failed to allege such a claim, but, as demonstrated in O’Handley’s Reply to the State’s Answering Brief, the State’s arguments are without merit. RSB 30-31.

Twitter does object to O’Handley’s alternative request for certification of this claim because, it asserts, the request was made at the “last minute.” AB at 60. Under California Rule of Court 8.548(a)(1), however, district courts may not certify questions. *Ayon v. Hedgpeth*, No. C08-4180WHA (PR), 2008 WL 4816623, at *2 (N.D. Cal. Nov. 5, 2008). Because O’Handley made his alternate request for certification at the first possible opportunity, the timing of his request presents no impediment should the Court conclude certification is appropriate.

C. O’Handley Alleged a Plausible § 1985(3) Claim.

Appellees make similar arguments to one another regarding O’Handley’s § 1985(3) claim. O’Handley addresses those arguments jointly in his Reply to the State’s Answering Brief. RSB at 26-29.

IV. TWITTER MAY NOT TAKE REFUGE IN THE FIRST AMENDMENT³

A. As a State Actor, Twitter May Not Invoke the First Amendment.

Because Twitter is a state actor here, it does not have First Amendment rights vis-à-vis its treatment of O’Handley. Twitter argues that *Marsh v. Alabama* balanced the parties’ respective rights in that case, but the Court conducted that balancing in the context of deciding *whether the corporation was a state actor in the first place*. 326 U.S. 501, 509 (1946) (holding corporate owner of town was state actor). Once the Court concluded it was, any First Amendment rights the corporation might have otherwise had fell by the wayside. *Id.*; *see also Warner Cable Commc’ns v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990) (noting that a state actor “is not itself protected by the first amendment”); *Libin v. Town of Greenwich*, 625 F. Supp. 393, 396 (D. Conn. 1985) (“[A] state actor does not have . . . First Amendment right[s] . . . , at least in those situations in which such a right would conflict with the First Amendment rights of citizens.”).⁴

³ Unless the Court concludes O’Handley has stated a claim, it should refrain from addressing Twitter’s First Amendment argument under the canon of avoidance. Further, it should vacate that portion of the district court’s opinion concluding that Twitter is protected by the First Amendment. *Sony BMG Music Ent. v. Tenenbaum*, 660 F.3d 487, 510–15 (1st Cir. 2011) (vacating portion of district court order that improperly considered constitutional question).

⁴ Even if *Marsh* could be conceptualized as balancing the parties’ respective rights (and it cannot), it still stands for the proposition that state actors’ constitutional rights

The other cases Twitter cites do not help it. In *Denver Area Educational Television Consortium v. FCC*, television programmers challenged a federal statute that granted cable operators permission to prohibit sexually explicit programming. 518 U.S. 727, 734–35 (1996) (plurality op.). The plurality did not conclude, as Twitter claims, that cable operators *themselves* were state actors, much less balance their rights against those of television programmers. *Id.* at 737. Instead, the plurality held state action was present because of the *Congressional imprimatur on cable operators’ decisions* to restrict programming. *Id.* (rejecting conclusion that no state action existed because the statute itself did not “restrict[] speech”); *see also id.* at 782 (concluding state action was present because “Congress . . . single[d] out . . . speech for vulnerability to private censorship” (emphasis added)) (Kennedy, J., concurring). Indeed, the plurality noted that holding cable operators were state actors “could itself interfere with their freedom to speak” precisely because state actors are subject to—and not protected by—the First Amendment. *Id.* at 738. In *Halleck*, the Supreme Court recently made a similar observation, concluding that classifying media companies as state actors could “eviscerate their rights to exercise editorial control.” 139 S. Ct. at 1932; *see also Columbia Broad. System v. Democratic National Comm.*, 412 U.S. 94, 139 (1973) (“To hold that

necessarily yield to the First Amendment rights of non-state actors. Either way, the result is the same—O’Handley prevails.

broadcaster[s are state actors] would . . . strip [them] of their own First Amendment rights.”) (Stewart, J., concurring).

In *Associates & Aldrich Co. v. Times Mirror Co.*, this Court considered whether an advertiser had a First Amendment right to compel a newspaper to publish its advertisement exactly as submitted. 440 F.2d 133, 133 (9th Cir. 1971). The Court said no, holding that the newspaper was not a state actor. *Id.* at 135. The Court added that, even if the newspaper were a state actor, the advertiser would not have had the right to compel publication. *Id.* This dictum, however, means only that non-state actors’ bundle of First Amendment rights does not include the right to compel a state-actor newspaper to publish advertisements as submitted. *Id.* at 135 (“The right to freedom of speech does not open every avenue to one who desires to use a particular form of expression.” (cleaned up)); *see also Alvins v. Rutgers, State Univ. of N.J.*, 385 F.2d 151, 153–54 (1st Cir. 1967) (holding plaintiff failed to show “he ha[d] a [First Amendment] right to” compel law review at state law school to publish his article). *Accord Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 675 (1998) (“[T]he First Amendment of *its own force* does not compel public broadcasters to allow third parties access to their programming.” (emphasis added)). Thus, *Times Mirror* and *Alvins* concluded only that the *non-state actor’s* First Amendment right did not require compelled inclusion in those cases, not that the *state actor* had a First Amendment right to refuse inclusion.

Here, Twitter makes no argument that O’Handley’s bundle of constitutional rights does not include the right to have his tweets hosted on its website. Even if Twitter had made such an argument, it would fail. Instead, Twitter interposes its own First Amendment rights as a defense to O’Handley’s claims. But because Twitter is a state actor, it has no such rights.⁵

B. Twitter Does Not Have a First Amendment Right to Take the Actions it Took Here.

Even if state actors have First Amendment rights (and they do not), Twitter does not have a First Amendment right to take the actions it took against O’Handley here under *Rumsfeld v. Forum for Academic and Institutional Rts., Inc.* (“FAIR”) and *PruneYard Shopping Center v. Robins* (“Pruneyard II”). Twitter argues FAIR and Pruneyard II are distinguishable because, unlike law schools and mall owners, it is engaged in “expressive activity.” AB at 53–55. This argument has five fatal flaws:

First, Twitter impermissibly asks the Court to consider evidence beyond the Complaint and judicially noticed materials. In making this argument, Twitter relies

⁵ The other two cases Twitter cites—*Carlin Communications v. Mountain States Telephone and Telegraph Co.* and *Hammerhead Enterprises, Inc. v. Brezenoff*—do not help it either. In *Carlin*, this Court vacated an injunction against a telephone provider because state action was not present. 827 F.2d at 1297. The Court did not suggest the telephone provider had First Amendment rights. And in *Hammerhead*, the Second Circuit refrained from discussing the First Amendment because of its conclusion that state action was lacking. 707 F.2d 33, 39 n.6 (2d Cir. 1983).

heavily on *Netchoice, LLC v. Attorney General, Florida*, 34 F.4th 1196 (11th Cir. 2022). *Netchoice*, however, was an appeal of a preliminary injunction in which the district court made extensive factual findings about how Twitter functions. *Id.* at 1203. The record in that case (apparently) established that Twitter “curated” its users’ posts—mainly by computer-based algorithms but also occasional human review—to create its users’ Twitter feeds. *Id.* at 1204.

Here, there are no facts before the Court on which it could conclude that Twitter curated its users’ tweets to create user Twitter feeds in the way set forth in *Netchoice*. O’Handley’s Complaint does not make any allegations regarding Twitter’s user feeds, Twitter did not ask the district court (or this Court) to take judicial notice of any such facts, and, in any event, these are not the type of facts about which judicial notice could be taken. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) (holding court may take judicial notice of facts “generally known” or that “can be accurately and readily determined”). Because the record contains no information regarding how Twitter’s users’ feeds functioned during the relevant period, Twitter cannot satisfy its burden of demonstrating it was engaged in expressive activity. *ASARCO, LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014) (“Dismissal under Rule 12(b)(6) on the basis of an affirmative defense is proper only if the *defendant* shows some obvious bar to securing relief on the face of the complaint [and] judicially noticed materials.”)

(emphasis added)); *see also Foley v. Univ. of Hous. Sys.*, 355 F.3d 333, 341–42 (5th Cir. 2003) (holding party with burden of proof must offer “precise identification of the speech as to which First Amendment protection is claimed”).⁶

Second, Twitter’s argument conflicts with the position it has taken in this and other cases under § 230 of the Communications Decency Act, 47 U.S.C. § 230. Under § 230, a website is immune from liability for content it hosts so long as it only “passively displays content that is created entirely by third parties.” *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008). When, however, a website actively “creates” content or is “responsible, in whole or in part for” the creation of content, the website can be liable. *Id.* Twitter’s First Amendment argument here conflicts with its long-standing position that it only passively displays user content, a position that has been uniformly successful under § 230. *See, e.g., Morton v. Twitter, Inc.*, No. CV 20-10434-GW-JEMX, 2021 WL 1181753 (C.D. Cal. Feb. 19, 2021); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 876 (N.D. Cal. 2017). In this very case, Twitter argued below that O’Handley’s tweets are exclusively his. 3-ER-370–71. Given

⁶ Twitter also failed to argue below that it was engaged in expressive activity through its users’ Twitter feeds. Twitter has thus waived this argument. *Castro v. Terhune*, 712 F.3d 1304, 1310 (9th Cir. 2013) (holding party “waives . . . issue by failing to raise it below” (cleaned up)).

Twitter’s conflicting positions, there is a prima facie factual dispute over whether the information Twitter hosts is its own speech or that of its users.

Third, Twitter’s acts are not expressive. In determining whether hosting speech is expressive, the Supreme Court evaluates whether the individual units hosted “contribute[s] something to a common theme” of the whole. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 576 (1995). Considering that Twitter hosts billions upon billions of tweets—none of which Twitter reviews before posting—Twitter is no more than a cacophonous barrage of unrelated, disparate, and conflicting speech. Twitter’s hosting of others’ speech does not convey any message and thus is not expressive.

Twitter points out that it hosts speech, not recruiters, but that does not render its conduct expressive. *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022, 1059 (N.D. Cal. 2007) (“Simply publishing information written by [others] does not suffice to transform . . . [hosting] conduct into speech . . .”). Like *FAIR*, “[n]othing about [the fact Twitter hosts its users’ speech] suggests that [Twitter] agree[s] with any speech by [its users].” 547 U.S. 47, 65 (2006). Further, Twitter’s interface—which involves the display of users’ username, profile photograph, and link to the users’ homepage on each tweet, 3-ER-493, ¶72, 3-ER-495–98, ¶¶84–87, makes clear that users’ tweets are the user’s speech, not Twitter’s. In addition, Twitter’s Terms of Service expressly disclaims responsibility for the user content it

hosts, stating that Twitter does “not endorse [or] support . . . any Content or communications posted . . . or endorse any opinions expressed All Content is the sole responsibility of the person who originated such Content [and Twitter] cannot take responsibility for such Content.” 3-ER-321. On these facts, Twitter’s hosting of others’ speech does not render its conduct expressive.

Twitter notes that the mall owner in *Pruneyard II* did not object to the content of the speech he was being required to host whereas it has “rules [governing] what content accountholders may post.” AB at 53–54. This, however, is distinction without difference. *FAIR* teaches that whether a host objects to the content of the speech at issue is not dispositive. 547 U.S. at 64–65. In addition, whether the mall owner in *Pruneyard II* objected to the content of the speech had no bearing on the Supreme Court’s conclusion that the speech would “not likely be identified with . . . the owner.” 447 U.S. 74, 87 (1980). The choice to remain silent itself is speech, *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943), yet forcing the mall owner to host others’ speech did not violate the First Amendment, 447 U.S. at 87–88.

Fourth, Twitter’s actions against O’Handley’s account were not expressive either. Twitter asserts those actions “convey[ed] a message about Twitter’s values and the platform and community it hopes to foster,” AB at 52, but even a quick glance at Twitter reveals it is rife with tweets containing the same basic claims as

O’Handley’s tweets. In any event, *FAIR* “rejected the view that conduct can be labelled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” 547 U.S. at 65–66 (cleaned up). Rather, conduct is inherently expressive only if it “would reasonably be understood by the viewer to be communicative.” *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984). Twitter’s actions do not meet this standard. Twitter did not simply act against O’Handley’s account. Instead, Twitter *also* engaged in speech explaining its actions, including, but not limited to, labeling O’Handley’s tweets as “disputed.” 3-ER-493, ¶72, 3-ER-495–98 ¶¶ 84–87. “The fact that such explanatory speech is necessary is strong evidence that the conduct . . . is not . . . inherently expressive.” *FAIR*, 547 U.S. at 66.

Moreover, without Twitter’s labels, Twitter users would not even know what Twitter had done, much less why. *See NetChoice*, 34 F.4th at 1218 n.15 (“It might be . . . that some content-moderation decisions—for instance, to prioritize or deprioritize individual posts—are so subtle that users wouldn’t notice them but for the platforms’ speech explaining their actions.”). It is only through Twitter’s speech that its actions have meaning. *FAIR*, 547 U.S. at 66. While that speech may be protected, Twitter’s conduct is not.⁷

⁷ Twitter asserts that O’Handley should not be permitted to withdraw his challenge to Twitter’s labeling of his tweets—which he did below, 1-ER-88:14–15—claiming its labels are “inextricably intertwined” with its actions. AB at 51. Twitter cites no

Twitter contends the fact it could distance itself from O’Handley’s tweets is immaterial because “[r]equring [it] to express itself . . . would amount to more compelled speech, not less.” AB at 56. But this argument conflicts with *FAIR* and *Pruneyard II*. See 547 U.S. at 65 (“[N]othing in the Solomon Amendment restricts what the law schools might say about the military’s policies.”); 447 U.S. at 88 (noting mall owner was “free to publicly dissociate [himself] from [the speaker’s] views”). In any case, any “fear of a mistaken inference of endorsement . . . is largely self-imposed because” Twitter “has control over any impressions it gives its” users. *Bd. of Educ. of Westside Cmty. Schs. (Dist.66) v. Mergens*, 496 U.S. 226, 250 (1990) (plurality); *accord id.* at 268 (Marshall, J., concurring in judgment).

Further, Twitter has already permanently disabled O’Handley’s account, and, by this lawsuit, he does not seek reinstatement from Twitter. While O’Handley account was active, there was no risk of misattribution. But now that Twitter has banned him, any argument that O’Handley’s speech affects Twitter’s speech—or that Twitter would somehow be “required” to distance itself from him—is nonsense.

authority in support of this assertion, and it flies in the face of *FAIR*, which evaluated the law schools’ speech about their actions separately from their actions themselves. 547 U.S. at 66. Twitter’s stubborn refusal to let go of an argument O’Handley has abandoned reveals the weakness in its position.

Fifth, Twitter seeks to shoehorn this case into *Tornillo*, but *Tornillo* is distinguishable, primarily because Twitter is not engaged in expressive activity. *FAIR*, 547 U.S. at 63–64 (distinguishing *Tornillo*, *Hurley*, and *Pac. Gas & Elec. Co. v. Public Utilities Comm’n of Ca.* on this ground). Moreover, unlike newspapers, Twitter is not spatially limited, and therefore compelled hosting is unlikely to affect any message Twitter may wish to convey.

In addition, the facts here are not analogous to *Tornillo*. There, the right-of-reply statute was content-based whereas O’Handley is seeking neutral treatment. 418 U.S. at 244. In addition, the right-of-reply statute inhibited debate because newspapers might conclude the “safest course [was] to avoid controversy.” *Id.* at 257. Here, it is *Twitter’s* actions that “dampen[] the vigor and limits the variety of public debate.” *Id.* (cleaned up).

Twitter asserts that its lack of spatial limitation is irrelevant, AB at 52, but *FAIR* concluded the First Amendment offense in *Tornillo* was predicated on the fact that “the compelled printing of a reply . . . takes up space that could be devoted to other material the newspaper may have preferred to print.” 547 U.S. at 64 (cleaned up). In addition, because of Twitter’s lack of spatial limitation, Twitter is open to all comers and can house their billions of tweets, which reinforces the conclusion that Twitter users understand their tweets are their own. Because of a

newspaper’s spatial limitations, it is more likely a reader would assume a newspaper endorses the articles contained within its pages.

Finally, Twitter suggests the Court should ignore the technological differences between newspapers and internet hosting and reflexively apply *Tornillo* to the internet. AB at 53. This argument is meritless. While the “basic principles” of the First Amendment apply to every medium of expression, *Brown v. Entertainment Merchandising Ass’n*, 564 U.S. 786, 790 (2011), “each medium . . . presents special First Amendment problems” that must be rigorously evaluated, *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978). Accounting for those differences, *Tornillo* is distinguishable.

C. Any First Amendment Right Twitter Has Must Yield to O’Handley’s Rights.

Even if Twitter’s actions implicated the First Amendment (and they do not), the First Amendment does not insulate Twitter from liability under *Turner Broadcasting System, Inc. v. FCC*. Remedying O’Handley’s constitutional injury is indisputably an important governmental interest that goes no further than necessary and would not limit Twitter’s speech in any way.

Twitter argues *Turner* is distinguishable because “the public [holds] Twitter responsible for its content-moderation rules and practices,” AB at 57, but this assertion has no support in the record. In any event, Twitter’s argument that it must have the freedom to censor speech it disagrees with lest its users think it is the kind

of place that tolerates such speech is circular reasoning that overlooks *FAIR*. 547 U.S. at 65 (rejecting argument that allowing military recruiters could be viewed as “sending the message” that law schools endorse “the military’s policies”).

Twitter also points out that cable operators could “silence the voice of competing speakers” based on their physical control of cable hardware. AB at 58. As the Supreme Court has observed, however, social media is the “modern public square” and “provide[s] perhaps the most powerful mechanism available to a private citizen to make his or her voice heard.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Indeed, Twitter is the “primary social channel for political commentary and news in American society.” 3-ER-499, ¶9. Twitter’s assertion of absolute control over its platform, no less than physical control of the cables, “restrict[s] . . . the free flow of information and ideas.” *Turner*, 512 U.S. at 656. Accordingly, any First Amendment right Twitter may have must yield to O’Handley’s rights.

V. TWITTER HAS WAIVED RELIANCE ON § 230

Twitter does not invoke § 230 in its Answering Brief. Twitter has thus waived any reliance on that provision for purposes of this appeal.

CONCLUSION

O’Handley requests this Court reverse the district court’s grant of Twitter’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

Dhillon Law Group Inc.

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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.

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