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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-15071
D.C. No. 3:21-cv-07063-CRB

[Filed March 10, 2023]

ROGAN O'HANDLEY, *Plaintiff-Appellant*,	)
v.	)
SHIRLEY WEBER; TWITTER INC., a Delaware corporation; NATIONAL ASSOCIATION OF SECRETARIES OF STATE, a professional nonprofit organization, *Defendants-Appellees*.	)

OPINION

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted December 7, 2022
San Francisco, California

Filed March 10, 2023

Before: Susan P. Graber, Evan J. Wallach,[*] and Paul J. Watford, Circuit Judges.

Opinion by Judge Watford

SUMMARY[**]

Civil Rights

The panel affirmed the district court's order dismissing plaintiff's federal constitutional claims and declining to exercise supplemental jurisdiction over a state law claim in an action brought pursuant to 42 U.S.C. § 1983 alleging that the social media company Twitter Inc., and California's Secretary of State, Shirley Weber, violated plaintiff's constitutional rights by acting in concert to censor his speech on Twitter's platform.

Plaintiff alleged that the Secretary of State's office entered into a collaborative relationship with Twitter in which state officials regularly flagged tweets with false or misleading information for Twitter's review and that Twitter responded by almost invariably removing the posts in question. Plaintiff further alleged that, after a state official flagged one of his tweets as false or misleading, Twitter limited other users' ability to access his tweets and then suspended his account,

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[*] The Honorable Evan J. Wallach, United States Circuit Judge for the U.S. Court of Appeals for the Federal Circuit, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

ostensibly for violating the company's content-moderation policy.

The panel agreed with the district court's determination that Twitter's interactions with state officials did not transform the company's enforcement of its content-moderation policy into state action. The panel held that Twitter's content-moderation decisions did not constitute state action because (1) Twitter did not exercise a state-conferred right or enforce a state-imposed rule under the first step of the two-step framework set forth in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); and (2) the interactions between Twitter and the Secretary of State's Office of Elections Cybersecurity did not satisfy either the nexus or the joint action tests under the second step. The panel concluded that its resolution of this issue was determinative with respect to plaintiff's claims under § 1983 because each of those claims required proof of state action. Plaintiff's claim under 42 U.S.C. § 1985 also failed because the test for proving a conspiracy between a private party and the government to deprive an individual of constitutional rights under § 1985 tracked the inquiry under the conspiracy formulation of the joint action test.

The panel held that plaintiff had standing to seek injunctive relief against Secretary Weber and that, even though the Secretary was not responsible for Twitter's content-moderation decisions, state action existed insofar as officials in her office flagged plaintiff's November 12, 2020, post. Limiting its review to those actions, the panel nevertheless affirmed the district court's dismissal of plaintiff's federal claims

under Federal Rule of Civil Procedure 12(b)(6) because the Secretary's office did not engage in any unconstitutional act.

Having properly dismissed plaintiff's federal claims with prejudice, the district court did not abuse its discretion when it declined to exercise supplemental jurisdiction over plaintiff's remaining claim under the California Constitution.

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OPINION

WATFORD, Circuit Judge:

Rogan O'Handley contends that the social media company Twitter Inc. and California's Secretary of State, Shirley Weber, violated his constitutional rights by acting in concert to censor his speech on Twitter's platform. He alleges that the Secretary of State's office entered into a collaborative relationship with Twitter in which state officials regularly flagged tweets with false or misleading information for Twitter's review and that Twitter responded by almost invariably removing the posts in question. O'Handley further alleges that, after a state official flagged one of his tweets as false or misleading, Twitter limited other users' ability to access his tweets and then suspended his account, ostensibly for violating the company's content-moderation policy.

The district court determined that Twitter's interactions with state officials did not transform the

company's enforcement of its content-moderation policy into state action. We agree with that conclusion and, accordingly, affirm the dismissal of O'Handley's federal claims against Twitter, as each of those claims requires proof either that Twitter was a state actor or that it conspired with state actors to deprive O'Handley of his constitutional rights. We also affirm the dismissal of O'Handley's claims against Secretary of State Weber because her office did not violate federal law when it notified Twitter of tweets containing false or misleading information that potentially violated the company's content-moderation policy.

I

At the time of the events giving rise to this lawsuit, Twitter was a social media company with more than 300 million active users. The company had adopted and was enforcing a set of policies, called the Twitter Rules, governing what its users could post on the platform. These rules were publicly available on the company's website, and all Twitter users had to agree to comply with them as a condition of using the service.

The portion of the Twitter Rules relevant to this appeal—known as the Civic Integrity Policy—informed users that they "may not use Twitter's services for the purpose of manipulating or interfering in elections or other civic processes." This prohibition covered statements that "could undermine faith in the process itself, such as unverified information about election rigging, ballot tampering, vote tallying, or certification of election results." The Civic Integrity Policy warned users that Twitter would remove posts that violated

the policy's terms and that the company would suspend repeat violators.

Given the large volume of posts on its platform, Twitter was unable to review every tweet for compliance with its Civic Integrity Policy. Recognizing this reality, Twitter created several channels that enabled outside actors to assist in enforcement of the policy by reporting suspected violations. For example, ordinary Twitter users could report violations on the platform by clicking on the "Report Tweet" icon and selecting the option "[i]t's misleading about a political election or other civic event." A limited number of government agencies and civil society groups also had access to an expedited review process through what Twitter called its Partner Support Portal. After an approved partner flagged a tweet through the Portal, Twitter's content moderators reviewed the post and decided whether remedial action was warranted. Twitter granted Portal access to election officials in at least 38 States, including California's Secretary of State.

In 2018, California formed the Office of Elections Cybersecurity (OEC) within the Secretary of State's office "[t]o monitor and counteract false or misleading information regarding the electoral process that is published online or on other platforms and that may suppress voter participation or cause confusion and disruption of the orderly and secure administration of elections." Cal. Elec. Code § 10.5(b)(2). The OEC has stated that, to fulfill its mission, it prioritizes "working closely with social media companies to be proactive so

when there's a source of misinformation, we can contain it."

In the aftermath of the 2020 election, the OEC touted that it had flagged for Facebook and Twitter nearly "300 erroneous or misleading social media posts" and that "98 percent of those posts were promptly removed for violating the respective social media compan[ies'] community standards." Former Secretary of State Alex Padilla similarly noted that the OEC "worked in partnership with social media platforms to develop more efficient reporting procedures for potential misinformation" and that the content the OEC reported "was promptly reviewed and, in most cases, removed by the social media platforms."

O'Handley is one of the Twitter users whose posts the OEC flagged. As alleged in his complaint, O'Handley is a licensed attorney who makes his living as a political commentator, including on social media where he operates under the handle "@DC_Draino." On November 12, 2020, just over a week after the presidential election, he posted the following tweet on his Twitter account:

> Audit every California ballot
>
> Election fraud is rampant nationwide and we all know California is one of the culprits
>
> Do it to protect the integrity of that state's elections

Five days later, an unidentified member of the OEC allegedly sent the following message to Twitter through the Partner Support Portal:

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

O'Handley does not allege that the OEC communicated with Twitter about him on any other occasion. But based on past communications between the OEC and Twitter regarding other users, he alleges that the message constituted a request that Twitter "take down" his post from its platform. O'Handley further alleges that, on or about the same day that Twitter received the OEC's message, the company (1) appended a warning label to his tweet stating that the tweet's election fraud claim was "disputed," (2) limited other users' ability to access and interact with his tweet, and (3) assessed a "strike" against his account. O'Handley asserts that this was Twitter's first disciplinary action against him and that the company heavily scrutinized his activity on the platform thereafter.

The increased scrutiny that O'Handley allegedly faced aligned with a broader change in Twitter's policy around that time. In the aftermath of the January 6, 2021, attack on the U.S. Capitol, the company revamped its Civic Integrity Policy to "aggressively increase . . . enforcement action" against "misleading and false information surrounding the 2020 US presidential election." As part of this reform, Twitter

instituted a five-strike protocol under which it would impose progressively harsher sanctions with each subsequent violation of the policy. If a user received a fifth strike, Twitter would permanently suspend that user's account.

Under the terms of this new protocol, Twitter allegedly issued four additional strikes against O'Handley in early 2021 in response to his repeated posts insinuating that the 2020 presidential election had been rigged. Upon issuing a fifth strike against O'Handley in late February 2021, Twitter informed him that his account had been permanently suspended for "violating the Twitter Rules . . . about election integrity."

Four months after his suspension, O'Handley filed this action against Twitter, Secretary of State Weber in her official capacity, and several other defendants. Asserting claims under 42 U.S.C. § 1983, O'Handley alleged that the defendants violated the First Amendment, as well as the Equal Protection and Due Process Clauses of the Fourteenth Amendment, by censoring his political speech based on its content and viewpoint and by removing him from Twitter's platform. In addition, he alleged that the defendants conspired to interfere with the exercise of his First and Fourteenth Amendment rights in violation of 42 U.S.C. § 1985 and that their conduct violated the California Constitution's Liberty of Speech Clause. Finally, he asserted a claim under 42 U.S.C. § 1983 alleging that California Elections Code § 10.5—the provision defining the OEC's mission—is unconstitutionally vague.

The defendants moved to dismiss O'Handley's action under Federal Rule of Civil Procedure 12(b)(1) and (b)(6). The district court granted the motions. With respect to the claims against Twitter, the court held that the federal constitutional claims failed as a matter of law because Twitter is not a state actor and that its interactions with the OEC did not transform it into a state actor. It also held that O'Handley had not plausibly alleged that Twitter conspired with California officials to violate his constitutional rights. As to Secretary of State Weber, the court concluded that O'Handley's federal claims failed for three reasons: (1) he lacked standing to sue because his injuries were not fairly traceable to the Secretary's actions; (2) he failed to plausibly allege state action; and (3) he failed to allege facts plausibly stating claims upon which relief could be granted. The district court dismissed the federal claims against the other defendants and then declined to exercise supplemental jurisdiction over the remaining state law claim. Following entry of final judgment, O'Handley appealed.

On appeal, O'Handley challenges only the dismissal of his claims against Twitter and Secretary of State Weber. We address the claims against those two defendants in turn, beginning with Twitter.

II

As a private company, Twitter is not ordinarily subject to the Constitution's constraints. *See Prager University v. Google LLC*, 951 F.3d 991, 995–99 (9th Cir. 2020). Determining whether this is one of the exceptional cases in which a private entity will be treated as a state actor for constitutional purposes

requires us to grapple with the state action doctrine. This area of the law is far from a "model of consistency," *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 378 (1995) (citation omitted), due in no small measure to the fact that "[w]hat is fairly attributable [to the State] is a matter of normative judgment, and the criteria lack rigid simplicity," *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 295 (2001). Despite the doctrine's complexity, this case turns on the simple fact that Twitter acted in accordance with its own content-moderation policy when it limited other users' access to O'Handley's posts and ultimately suspended his account. Because of that central fact, we hold that Twitter did not operate as a state actor and therefore did not violate the Constitution.

We analyze state action under the two-step framework developed in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). Under this framework, we first ask whether the alleged constitutional violation was 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.* at 937. If the answer is yes, we then ask whether "the party charged with the deprivation [is] a person who may fairly be said to be a state actor." *Id.*

A

O'Handley's claims falter at the first step. Twitter did not exercise a state-created right when it limited access to O'Handley's posts or suspended his account. Twitter's right to take those actions when enforcing its

content-moderation policy was derived from its user agreement with O'Handley, not from any right conferred by the State. For that reason, O'Handley's attempt to analogize the authority conferred by California Elections Code § 10.5 to the "procedural scheme" in *Lugar* is wholly unpersuasive. *Id.* at 941. *Lugar* involved a prejudgment attachment system, created by state law, that authorized private parties to sequester disputed property. *Id.* Section 10.5, by contrast, does not vest Twitter with any power and, under the terms of the user agreement to which O'Handley assented, no conferral of power by the State was necessary for Twitter to take the actions challenged here.[1]

Nor did Twitter enforce a state-imposed rule when it limited access to O'Handley's posts and suspended his account for "violating the Twitter Rules . . . about election integrity." As the quoted message that Twitter sent to O'Handley makes clear, the company acted under the terms of its own rules, not under any provision of California law. That Twitter and Facebook allegedly removed 98 percent of the posts flagged by

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[1] The district court determined that Twitter has not only the power to control the content posted on its platform but also a First Amendment right to do so. Whether social media companies' content-moderation decisions are constitutionally protected exercises of editorial judgment has divided our sister circuits recently. *See NetChoice, LLC v. Attorney General of Florida*, 34 F.4th 1196 (11th Cir. 2022), *petition for cert. docketed*, No. 22-277 (U.S. Sept. 23, 2022); *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022), *petition for cert. docketed*, No. 22-555 (U.S. Dec. 19, 2022). We need not reach that constitutional issue to resolve this case.

the OEC does not suggest that the companies ceded control over their content-moderation decisions to the State and thereby became the government's private enforcers. It merely shows that these private and state actors were generally aligned in their missions to limit the spread of misleading election information. Such alignment does not transform private conduct into state action.

B

Under the original formulation of the *Lugar* framework, O'Handley's failure to satisfy the first step would have been fatal to his attempt to establish state action. More recent cases, however, have not been entirely consistent on this point. We have refused to apply the two-step framework rigidly, and we have suggested that the first step may be unnecessary in certain contexts. *See Mathis v. Pacific Gas & Electric Co.*, 75 F.3d 498, 503 n.3 (9th Cir. 1996) (evaluating only the second step of the *Lugar* framework to determine whether a private party operated as a state actor). Given this lack of clarity, we address the framework's second step for the sake of completeness. Nevertheless, our analysis of the first step makes it much less likely that O'Handley can satisfy the second because the two steps are united in a common inquiry into "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." *Pasadena Republican Club v. Western Justice Center*, 985 F.3d 1161, 1167 (9th Cir. 2021) (citation omitted).

The second step of the *Lugar* framework asks whether "the party charged with the deprivation [is] a person who may fairly be said to be a state actor." *Lugar*, 457 U.S. at 937. The Court in *Lugar* outlined four tests to determine the answer to that question: (1) the public function test, (2) the state compulsion test, (3) the nexus test, and (4) the joint action test. *Id.* at 939. O'Handley relies only on the nexus and joint action tests. We conclude that neither is satisfied here.

Nexus Test. There are two different versions of the nexus test. The first (and less common) formulation asks whether there is "pervasive entwinement of public institutions and public officials in [the private actor's] composition and workings." *Brentwood Academy*, 531 U.S. at 298. In applying this version of the test, we look to factors such as whether the private organization relies on public funding, whether it is composed mainly of public officials, and whether those public officials "dominate decision making of the organization." *Villegas v. Gilroy Garlic Festival Association*, 541 F.3d 950, 955 (9th Cir. 2008) (en banc). Twitter lacks all of those attributes, so O'Handley cannot show that Twitter is a state actor under this first version of the nexus test.

The second version asks whether government officials have "exercised coercive power or [have] provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). One circumstance in which this version of the test will be satisfied is when government officials threaten adverse action to coerce a private party into

performing a particular act. For example, we had no trouble finding the nexus test satisfied when a deputy county attorney threatened to prosecute a regional telephone company if it continued to carry a third party's dial-a-message service. *See Carlin Communications, Inc. v. Mountain States Telephone & Telegraph Co.*, 827 F.2d 1291, 1295 (9th Cir. 1987). No equivalent threat by any government official is present in this case. O'Handley has alleged that an OEC official flagged one of his tweets and, at most, requested that Twitter remove the post. This request, which Twitter was free to ignore, is far from the type of coercion at issue in *Carlin*.

This second version of the nexus test can also be satisfied when certain forms of government encouragement are present. The critical question becomes whether the government's encouragement is so significant that we should attribute the private party's choice to the State, out of recognition that there are instances in which the State's use of positive incentives can overwhelm the private party and essentially compel the party to act in a certain way. However, nothing of the sort is present here. The OEC offered Twitter no incentive for taking down the post that it flagged. Even construing the facts alleged in the light most favorable to O'Handley, the OEC did nothing more than make a request with no strings attached. Twitter complied with the request under the terms of its own content-moderation policy and using its own independent judgment.[2]

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[2] When articulating this version of the nexus test in *Blum*, 457 U.S. at 1008, the Supreme Court first suggested that government

A similar logic exists in our First Amendment cases. In deciding whether the government may urge a private party to remove (or refrain from engaging in) protected speech, we have drawn a sharp distinction between attempts to convince and attempts to coerce. Particularly relevant here, we have held that government officials do not violate the First Amendment when they request that a private intermediary not carry a third party's speech so long as the officials do not threaten adverse consequences if the intermediary refuses to comply. *See American Family Association v. City & County of San Francisco*, 277 F.3d 1114, 1125 (9th Cir. 2002); *accord Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003). This distinction tracks core First Amendment principles. A private party can find the government's stated reasons for making a request persuasive, just as it can be moved by any other speaker's message. The First Amendment does not interfere with this communication so long as the intermediary is free to disagree with the government and to make its own independent judgment about whether to comply with the government's request. Like the Tenth Circuit, we see no reason to draw the state action line in a different place. *See VDARE Foundation v. City of*

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encouragement will be insufficient for state action purposes if the private party later makes the challenged decision based on its own independent judgment. Although we have since clarified that a single act of independent judgment does not fully insulate a private party from constitutional liability when the party is otherwise deeply intertwined with the government, *see Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 748–55 (9th Cir. 2020), for reasons described below we also do not see the high degree of entwinement needed for state action in this case.

Colorado Springs, 11 F.4th 1151, 1160–68 (10th Cir. 2021) (applying the First Amendment's dichotomy between coercion and persuasion to determine that the plaintiff had not alleged a sufficient nexus for state action).

In this case, O'Handley has not satisfied the nexus test because he has not alleged facts plausibly suggesting that the OEC pressured Twitter into taking any action against him. Even if we accept O'Handley's allegation that the OEC's message was a specific request that Twitter remove his November 12th post, Twitter's compliance with that request was purely optional. With no intimation that Twitter would suffer adverse consequences if it refused the request (or receive benefits if it complied), any decision that Twitter took in response was the result of its own independent judgment in enforcing its Civic Integrity Policy. As was true under the first step of the *Lugar* framework, the fact that Twitter complied with the vast majority of the OEC's removal requests is immaterial. Twitter was free to agree with the OEC's suggestions—or not. And just as Twitter could pay greater attention to what a trusted civil society group had to say, it was equally free to prioritize communications from state officials in its review process without being transformed into a state actor.

Joint Action Test. A plaintiff can show joint action either "by proving the existence of a conspiracy or by showing that the private party was a willful participant in joint action with the State or its agents." *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012) (citation and internal quotation marks

omitted). O'Handley has not alleged facts satisfying the joint action test under either approach.[3]

The conspiracy approach to joint action requires the plaintiff to show a "meeting of the minds" between the government and the private party to "violate constitutional rights." *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983). O'Handley's allegations establish, at most, a meeting of the minds to promptly address election misinformation, not a meeting of the minds to violate constitutional rights. There is nothing wrongful about Twitter's desire to uphold the integrity of civic discourse on its platform. Nor is there anything illicit in seeking support from outside actors, including government officials, to achieve this goal. A constitutional problem would arise if Twitter had agreed to serve as an arm of the government, thereby fulfilling the State's censorship goals. As explained above, however, O'Handley has not plausibly alleged that Twitter removed his posts to advance the OEC's purported censorship goals as opposed to Twitter's own mission of not allowing users to leverage its platform to mislead voters.

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[3] We have held that joint action also "exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party." *Ohno v. Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013). This approach to joint action subsumes the nexus test under its banner. *Id.* at 995 n.13. Although combining the two tests makes some sense given that they often bleed together, *see Lugar*, 457 U.S. at 937, we analyze them separately here. But to the extent *Ohno* provides an alternative path to establishing joint action, our nexus test analysis applies with equal force.

As to the "willful participant" approach, O'Handley contends that Twitter willfully participated in the OEC's efforts to censor political speech online. He points to former Secretary of State Padilla's description of the OEC's "partnership with social media platforms" and to Twitter's creation of the Partner Support Portal to facilitate input from "select government and civil society partners." O'Handley argues that those allegations of a partnership are sufficient to survive a motion to dismiss. We disagree.

For purposes of the state action doctrine, "joint action exists when the state has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity." *Tsao*, 698 F.3d at 1140 (citation and internal quotation marks omitted). In other words, joint action is present when the State "significantly involves itself in the private parties' actions and decisionmaking" in a "complex and deeply intertwined process." *Rawson*, 975 F.3d at 753. This test is intentionally demanding and requires a high degree of cooperation between private parties and state officials to rise to the level of state action. *See Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir. 2002).

As the Supreme Court has noted, "examples may be the best teachers" of what is necessary to meet this demanding standard given the variety of relevant facts that may lead to an attribution of state action. *Brentwood Academy*, 531 U.S. at 296. In *Tsao*, there was sufficient joint action when the Las Vegas police trained private casino security guards and authorized them to issue citations with the force of law. 698 F.3d

at 1140. In *Rawson*, we held that joint action was shown when medical professionals who leased property connected to the State's psychiatric hospital involuntarily confined the plaintiff after his arrest, in part based on the prosecutor's "heav[y] involve[ment] in the decisionmaking process." 975 F.3d at 754.

The allegations in O'Handley's complaint do not give rise to a plausible inference of a similar degree of entwinement between Twitter's actions and those of state officials. The only alleged interactions are communications between the OEC and Twitter in which the OEC flagged for Twitter's review posts that potentially violated the company's content-moderation policy. The fact that the OEC engaged in these communications on a repeated basis through the Partner Support Portal does not alter the equation, especially because O'Handley alleges only one such communication regarding him. The Portal offered a priority pathway for the OEC to supply Twitter with information, but in every case the company's employees decided how to utilize this information based on their own reading of the flagged posts and their own understanding of the Twitter Rules.

The relationship between Twitter and the OEC more closely resembles the "consultation and information sharing" that we held did not rise to the level of joint action in *Mathis*, 75 F.3d at 504. In that case, PG&E decided to exclude one of its employees from its plant after conducting an undercover investigation in collaboration with a government narcotics task force. *Id.* at 501. The suspended employee then sued PG&E for violating his

constitutional rights under a joint action theory. *Id.* We rejected his claim because, even though the task force engaged in consultation and information sharing during the investigation, the task force "wasn't involved in the decision to exclude Mathis from the plant," and the plaintiff "brought no evidence PG&E relied on direct or indirect support of state officials in making and carrying out its decision to exclude him." *Id.* at 504.

The same is true here. The OEC reported to Twitter that it believed certain posts spread election misinformation, and Twitter then decided whether to take disciplinary action under the terms of its Civic Integrity Policy. O'Handley alleges no facts plausibly suggesting either that the OEC interjected itself into the company's internal decisions to limit access to his tweets and suspend his account or that the State played any role in drafting Twitter's Civic Integrity Policy. As in *Mathis*, this was an arm's-length relationship, and Twitter never took its hands off the wheel.

In sum, we conclude that Twitter's content-moderation decisions did not constitute state action because (1) Twitter did not exercise a state-conferred right or enforce a state-imposed rule under the first step of the *Lugar* framework, and (2) the interactions between Twitter and the OEC do not satisfy either the nexus or the joint action tests under the second step. Our resolution of this issue is determinative with respect to O'Handley's claims under 42 U.S.C. § 1983 because each of those claims requires proof of state action. *See Lugar*, 457 U.S. at 928. His claim under 42

U.S.C. § 1985 also fails because the test for proving a conspiracy between a private party and the government to deprive an individual of constitutional rights under § 1985 tracks the inquiry under the conspiracy formulation of the joint action test. *See Caldeira v. County of Kauai*, 866 F.2d 1175, 1181 (9th Cir. 1989).[4]

III

The district court dismissed the federal claims against Secretary of State Weber based on a lack of Article III standing, the absence of state action, and the failure to state a viable claim for relief. We conclude that O'Handley has standing to seek injunctive relief against Secretary Weber and that, even though the Secretary was not responsible for Twitter's content-moderation decisions, state action exists insofar as officials in her office flagged O'Handley's November 12, 2020, post. Limiting our review to those actions, we nevertheless affirm the district court's dismissal of O'Handley's federal claims under Federal Rule of Civil Procedure 12(b)(6).

A

To establish Article III standing to sue, a plaintiff must demonstrate that he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged

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[4] Because we hold that O'Handley did not plausibly allege a meeting of the minds to violate any constitutional right, we need not decide whether § 1985 applies in this context. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267–68 (1993) (noting that § 1985 claims must involve "some racial, or perhaps otherwise class-based, invidiously discriminatory animus" (citation omitted)).

conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). It is clear that O'Handley suffered a concrete injury when Twitter limited other users' ability to access his posts and then later suspended his account. It is less obvious whether those injuries are traceable to the Secretary of State's conduct and whether a court can provide effective injunctive relief.

As to traceability, the injuries that O'Handley alleges in his complaint—his inability to communicate with his followers and pursue his chosen profession as a social media influencer—resulted from Twitter's decision to suspend his account in February 2021. That decision is several steps removed from the OEC's flagging of his November 12th post three months earlier. In the interim, Twitter had increased its enforcement efforts, implemented a new five-strike protocol, and assessed four additional strikes against O'Handley's account based on other posts that O'Handley does not allege the OEC had any role in flagging.

Despite the distance between Secretary Weber's actions and O'Handley's alleged injuries, two overriding factors weigh in favor of concluding that his injuries are fairly traceable to the Secretary's actions. First, the traceability requirement is less demanding than proximate causation, and thus the "causation chain does not fail solely because there are several links" or because a single third party's actions intervened. *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (citation and internal quotation marks

omitted); *see also Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014). It is possible to draw a causal line from the OEC's flagging of the November 12th post to O'Handley's suspension from the platform, even if it is one with several twists and turns. Drawing that line is even easier when we credit, as we must, O'Handley's allegation that Twitter had never imposed any disciplinary action against him until the OEC placed his account on the company's radar. Second, O'Handley now seeks to broaden the conception of his injuries to include the limitations that Twitter placed on other users' ability to access his November 12th post. Those limitations also represent a concrete injury fairly traceable to the OEC's actions.

As to redressability, O'Handley sued Secretary Weber in her official capacity seeking a permanent injunction stating that "the Secretary of State and the OEC may not censor speech." Until recently, it was doubtful whether this relief would remedy O'Handley's alleged injuries because Twitter had permanently suspended his account, and the requested injunction would not change that fact. Those doubts disappeared in December 2022 when Twitter restored his account. *See* @DC_Draino, Twitter (Dec. 16, 2022, 10:35 AM), https://twitter.com/DC_Draino/status/1603821014730801161?cxt=HHwWkoCwpeWt9cEsAAAA. With the redressability issue now resolved in O'Handley's favor, we conclude that he has standing to seek injunctive relief against Secretary Weber.

B

We turn next to the state action issue. In accord with our analysis above, we agree with the district court that Secretary Weber is not responsible for any of Twitter's content-moderation decisions with respect to O'Handley. This fact precludes O'Handley from bringing his claim against Secretary Weber under the Due Process Clause for the deprivation of his property or liberty interests as a social media influencer because that grievance arises solely out of Twitter's decisions to limit access to his posts and to suspend his account.[5] By contrast, our state action analysis does not preclude O'Handley from challenging the Secretary's own conduct in directing the OEC because those acts are, by definition, acts of the State. Thus, the state action requirement does not bar O'Handley from proceeding against the Secretary on his remaining four federal claims: the conspiracy claim under 42 U.S.C. § 1985, the First Amendment claim, the Equal Protection Clause claim, and his void-for-vagueness challenge to California Elections Code § 10.5.[6]

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[5] To the extent O'Handley claims that Secretary Weber interfered with his liberty interest in free speech, that claim overlaps entirely with his First Amendment challenge and fails for the reasons stated below.

[6] Although the complaint also alleges that Secretary Weber violated the California Constitution's Liberty of Speech Clause, O'Handley now concedes that he cannot sue the Secretary in her official capacity in federal court for violating state law. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984).

C

Turning to the merits, we affirm the district court's dismissal of O'Handley's claims against Secretary Weber under Rule 12(b)(6) because he has failed to state a claim on which relief can be granted.

Conspiracy. The conspiracy claim against Secretary Weber under 42 U.S.C. § 1985 has the same fatal flaw as the analogous claim against Twitter. As explained above, O'Handley has not alleged that Twitter and Secretary Weber shared a goal of violating his or anyone else's constitutional rights. There is no unconstitutional conspiracy without this shared specific intent. *See Caldeira*, 866 F.2d at 1181.

First Amendment. O'Handley asserts two theories supporting his First Amendment claim against Secretary Weber, one alleging that the OEC abridged his freedom of speech when the agency pressured Twitter to remove disfavored content, and the other alleging that the OEC engaged in impermissible retaliation against his protected political expression. O'Handley's allegations fail to state a viable First Amendment claim under either theory.

The first theory rests on *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), which held that a State may not compel an intermediary to censor disfavored speech. *Id.* at 68–72. *Bantam Books* and its progeny draw a line between coercion and persuasion: The former is unconstitutional intimidation while the latter is permissible government speech. *See American Family Association*, 277 F.3d at 1125. This line holds even when government officials ask an intermediary

not to carry content they find disagreeable. *See id.* Here, as discussed above, the complaint's allegations do not plausibly support an inference that the OEC coerced Twitter into taking action against O'Handley. The OEC communicated with Twitter through the Partner Support Portal, which Twitter voluntarily created because it valued outside actors' input. Twitter then decided how to respond to those actors' recommendations independently, in conformity with the terms of its own content-moderation policy.

O'Handley argues that intimidation is implicit when an agency with regulatory authority requests that a private party take a particular action. This argument is flawed because the OEC's mandate gives it no enforcement power over Twitter. *See* Cal. Elec. Code § 10.5. Regardless, the existence or absence of direct regulatory authority is "not necessarily dispositive." *Okwedy*, 333 F.3d at 344. Agencies are permitted to communicate in a non-threatening manner with the entities they oversee without creating a constitutional violation. *See, e.g.*, *National Rifle Association of America v. Vullo*, 49 F.4th 700, 714–19 (2d Cir. 2022).

The retaliation-based theory of liability fails as well. To state a retaliation claim, a plaintiff must show that: "(1) he engaged in constitutionally protected activity; (2) as a result, he was subjected to adverse action by the defendant that would chill a person of ordinary firmness from continuing to engage in the protected activity; and (3) there was a substantial causal relationship between the constitutionally protected activity and the adverse action." *Blair v. Bethel School*

District, 608 F.3d 540, 543 (9th Cir. 2010) (footnote omitted).

O'Handley's claim falters on the second prong because he has not alleged that the OEC took any adverse action against him. "The most familiar adverse actions are exercise[s] of governmental power that are regulatory, proscriptive, or compulsory in nature and have the effect of punishing someone for his or her speech." *Id.* at 544 (citation and internal quotation marks omitted). Flagging a post that potentially violates a private company's content-moderation policy does not fit this mold. Rather, it is a form of government speech that we have refused to construe as "adverse action" because doing so would prevent government officials from exercising their own First Amendment rights. *See Mulligan v. Nichols*, 835 F.3d 983, 988–89 (9th Cir. 2016). California has a strong interest in expressing its views on the integrity of its electoral process. The fact that the State chose to counteract what it saw as misinformation about the 2020 election by sharing its views directly with Twitter rather than by speaking out in public does not dilute its speech rights or transform permissible government speech into problematic adverse action. *See Hammerhead Enterprises, Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983).

Equal Protection. O'Handley alleges that Secretary Weber violated the Fourteenth Amendment's Equal Protection Clause because the OEC targeted conservative commentators for special treatment and did not equally scrutinize liberal critics of the electoral process. Uneven enforcement can pose an equal

protection issue, *see United States v. Lopez-Flores*, 63 F.3d 1468, 1472 (9th Cir. 1995), but O'Handley has not alleged facts plausibly supporting his speculation of political bias. He does not name any other conservative commentators whose speech the OEC allegedly targeted or identify any "self-identified political liberals" whose false or misleading tweets the OEC allegedly declined to flag. A cursory assertion of differential treatment unsupported by factual allegations is insufficient to state a claim for relief. *See Lindsay v. Bowen*, 750 F.3d 1061, 1064–65 (9th Cir. 2014).

Vagueness. Finally, O'Handley alleges that California Elections Code § 10.5 is void for vagueness because the statute requires the OEC to "monitor and counteract false or misleading information regarding the electoral process" without providing a sufficiently concrete definition of what the phrase "false or misleading information" means in this context. Cal. Elec. Code § 10.5(b)(2). A statute is facially vague when it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008).

Section 10.5 does not attempt to prohibit anything (and hence raises no fair notice concerns), and it vests no government official with enforcement authority that could be discriminatorily applied. It is merely a statement of the OEC's general mission. Similar to many unenforceable government pronouncements, it is "not amenable to a vagueness challenge." *Beckles v.*

United States, 580 U.S. 256, 265 (2017). O'Handley's as-applied challenge also fails because Elections Code § 10.5 was never applied against him. Twitter instead enforced its own Civic Integrity Policy, as it made clear in all of its communications with O'Handley.

* * *

We affirm the district court's dismissal of all federal claims against Twitter because the company was neither a state actor nor a co-conspirator with state officials acting with the shared goal of violating constitutional rights. We affirm the dismissal of all federal claims against Secretary of State Weber because her office did not engage in any unconstitutional acts. Having properly dismissed O'Handley's federal claims with prejudice, the district court did not abuse its discretion when it declined to exercise supplemental jurisdiction over his remaining claim under the California Constitution. *See Lima v. United States Department of Education*, 947 F.3d 1122, 1128 (9th Cir. 2020).

AFFIRMED.

APPENDIX B

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

Case No. 21-cv-07063-CRB

[Filed January 10, 2022]

ROGAN O'HANDLEY, Plaintiff,	)
v.	)
ALEX PADILLA, et al., Defendants.	)

ORDER GRANTING MOTIONS TO DISMISS

Plaintiff Rogan O'Handley believes that he is the victim of a conspiracy to censor conservative voices surrounding the 2020 Presidential Election. See generally Compl. (dkt. 1). After Twitter appended labels to several of O'Handley's tweets and then permanently suspended his Twitter account, O'Handley brought suit against Twitter, as well as three other sets of defendants with whom he contends Twitter conspired: State defendants (Dr. Shirley Weber, in her official capacity as California Secretary of State, Jenna Dresner, Akilah Jones, Sam Mahood, Paula Valle, and former Secretary of State Alex

Padilla); a private contractor, SKDKnickerbocker ("SKDK"); and the National Association of Secretaries of State ("NASS"). Id. Each of those four sets of defendants has now brought a motion to dismiss, and Twitter has brought a Motion to Strike Count II of the Complaint under California's anti-SLAPP statute.[1] See generally Twitter MTD (dkt. 60); State MTD (dkt. 59); SKDK MTD (dkt. 57); NASS MTD (dkt. 58); Twitter Anti-SLAPP (dkt. 61). The Court held a motion hearing on December 16, 2021. See Motion Hearing (dkt. 85). As discussed below, the Court GRANTS the motions to dismiss, and does not reach the anti-SLAPP motion.

I. BACKGROUND[2]

A. Parties and Actions Leading Up to Enforcement Action

1. O'Handley

O'Handley, an attorney licensed to practice in California, makes his living as a political commentator. Compl. ¶ 9. He alleges that he "left private practice in order to better utilize his legal education in defense of liberty and constitutional ideals." Id. ¶ 70. He posts on social media, speaks at colleges and political conferences, and comments on television. Id. O'Handley's social media handle is "DC_Draino"; in the

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[1] This refers to California's Anti-Strategic Lawsuits Against Public Participation statute, Cal. Civ. Proc. Code § 425.16(b)(1).

[2] This Background section draws from the allegations in the Complaint and the facts of which the Court can take judicial notice.

lead-up to the 2020 election, DC_Draino had 420,000 Twitter followers. Id. ¶¶ 69, 71.

2. Twitter

Twitter is a social media platform with roughly 330 million monthly active users. Id. ¶ 17. Twitter has content-moderation policies called the Twitter Rules that are designed, among other things, to minimize the reach of harmful and misleading information. See Twitter, The Twitter Rules, https://help.twitter.com/en/rules-and-policies/twitter-rules.[3] The rules are publicly available on Twitter's website. Id. In the User Agreement, to which individuals agree as a condition of using Twitter, Twitter reserves the right to remove content that violates the Twitter Rules. See Twitter, Twitter Terms of Service, https://twitter.com/en/tos/previous/version_15 ("By using the Services you agree to be bound by these Terms"; "We reserve the right to remove Content that violates the User Agreement").

The relevant content-moderation policy in this case is the Civic Integrity Policy, which prohibits the posting of "false or misleading information intended to undermine public confidence in an election or other civic process." See Civic Integrity Policy (1/12/21); Civic Integrity Policy (11/12/20); Civic Integrity Policy

[3] The Court takes judicial notice of the Twitter Rules as they are referenced in the Complaint and their authenticity is not questioned. See Twitter MTD at 1 n.1.

(5/27/20).[4] That policy begins by explaining that "The public conversation occurring on Twitter is never more important than during elections" and that "attempts to undermine the integrity of our service is antithetical to our fundamental rights and undermines the core tenets of freedom of expression, the value upon which our company is based." Sprankling Decl. Ex. C (dkt. 60-4). It explains how to report violations of the Civic Integrity Policy, and states that Twitter will "work with select government and civil society partners . . . to provide additional channels for reporting and expedited review." Id.

One of the mechanisms for reporting suspected violations of the Twitter Rules is the Partner Support Portal. Compl. Ex. 2. The Portal was a priority pathway for persons and entities that Twitter believed had an interest in promoting civic processes "to flag concerns directly to Twitter," including "technical issues . . . and content on the platform that . . . may violate our policies." Id. Twitter granted access to the Portal to election officials from at least 38 states, including California. Compl. Ex. 3.

The Civic Integrity Policy of October 2020 defines what does and does not violate it, and states that Twitter will "label or remove false or misleading information intended to undermine public confidence in an election or other civic process." Sprankling Decl.

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[4] Copies of the relevant pages are at Sprankling Decl. (dkt. 60-1) Exs. C through F. Twitter's Civic Integrity Policy is also the subject of the State Defendants' Request for Judicial Notice (dkt. 59-1), which the Court grants.

Ex. D (dkt. 60-5). It explains that "[i]n circumstances where we do not remove content which violates this policy, we may provide additional context on Tweets," which "means we may . . . Apply a label and/or warning message to the content where it appears in the Twitter product," or "Provide a link to additional explanations or clarifications. . .," among other options. Id. It adds that "[f]or severe or repeated violations of this policy, accounts will be permanently suspended." Id.

On January 12, 2021, following the Capitol insurrection on January 6, 2021, Twitter announced that it had again updated its Civic Integrity Policy to "aggressively increase . . . enforcement action" in light of "misleading and false information surrounding the 2020 US presidential election [that] has been the basis for incitement to violence around the country." Sprankling Decl. Ex. E (dkt. 60-6). Twitter continued: "Ahead of the inauguration, we'll continue to monitor the situation, keep open lines of communication with law enforcement, and keep the public informed of additional enforcement actions." Id. Twitter instituted a five-strike enforcement protocol, pursuant to which enforcement actions became more severe as an account holder continued to violate the policy, progressing from no account-level action for one strike to permanent suspension for five or more strikes. See Sprankling Decl. Ex. F (dkt. 60-7); see also Compl. ¶ 78.

Twitter analyzes the reports it receives through the Portal: it determines that some of the reported tweets violate its Rules, and others do not. While O'Handley contends that Twitter complied with the State defendants' requests to remove content 98% of the

time, see Opp'n to State MTD (dkt. 68) at 1 ("98% of the [Office of Election Cybersecurity ('OEC')] reported posts were 'promptly removed'"), the underlying materials are less clear. An excerpted OEC IDEAS award application in the Complaint allegedly stated that "The [OEC] discovered nearly 300 erroneous or misleading social media posts that were identified and forwarded to Facebook and Twitter to review and 98 percent of those posts were promptly removed for violating the respective social media company's community standards."). Compl. ¶ 64 (emphasis added). On the other hand, an OEC spreadsheet attached to the Complaint (involving content from Citizen, Facebook, Instagram, and Twitter) reflects that Twitter took no action on OEC-reported content in about one-third of the instances of alleged misinformation covered by that exhibit. See Compl. Ex. 9 (numerous entries listing "No Action Taken").

3. State Defendants

In 2018, in response to concerns about election interference in the 2016 presidential election, the California Legislature established the OEC within the Secretary of State's office to monitor and respond to potential interference with election security and integrity. 2018 Cal. Stat. c. 241, § 1. OEC is "[t]o monitor and counteract false or misleading information regarding the electoral process that is published online or on other platforms and that may suppress voter participation or cause confusion and disruption of the orderly and secure administration of elections." Cal. Elec. Code § 10.5(b)(2). The statute directed OEC to undertake three functions: (1) "assess . . . false or

misleading information regarding the electoral process"; (2) "mitigate the false or misleading information"; and (3) "educate voters . . . with valid information from election officials such as a county elections official or the Secretary of State." Id.

Padilla was the Secretary of State at the time of O'Handley's alleged injury. Compl. ¶ 10. Padilla authorized the contract with SKDK, discussed below, and, per the Complaint, "oversaw the efforts to take down disfavored speech." Id. The Complaint alleges that Padilla "was reportedly already under consideration to fill then Vice-Presidential candidate Kamala Harris's California seat" if the Biden/Harris ticket prevailed, and therefore "stood to personally benefit from that ticket's elevation to higher office." Id. ¶¶ 46, 47. Weber, sued in her official capacity, is the current California Secretary of State. Id. ¶ 16. And the four remaining State defendants—Dresner, Jones, Mahood, and Valle—are or were all employees of the Secretary of State's office.[5]

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[5] The Complaint alleges that Valle was the Deputy Secretary of State, Chief Communications Officer for Padilla, id. ¶ 12, that Dresner was the Senior Public Information Officer for the OEC, id. ¶ 13, that Mahood was the Press Secretary for Padilla "and one of the OEC employees responsible for receiving reports of alleged election misinformation . . . and requesting social media platforms censor speech with which the OEC disagreed"), id. ¶ 14, and that Jones was OEC's Social Media Coordinator, responsible for receiving reports of election misinformation . . . and requesting social media platforms censor speech," id. ¶ 15. The State's motion refers to all four as "current and former OEC employees." State MTD at 3.

The Complaint quotes from what it asserts is an OEC response to a reporter's question in 2020 about how OEC handles voter misinformation.[6] Compl. ¶ 25. OEC allegedly responded that "We have working relationships and dedicated reporting pathways at each major social media company. When we receive a report of misinformation on a source where we don't have a pre-existing pathway to report, we find one." Id., Ex. 1. It continues: "We worked closely and proactively with social media companies to keep misinformation from spreading, take down sources of misinformation as needed, and promote our accurate, official election information at every opportunity." Id.

4. SKDK

In 2020, the California Secretary of State's Office recruited political consultants to help monitor misinformation online. Id. ¶ 37. The Complaint alleges that many of those invited to bid were affiliated with the Democratic Party, and that Padilla ran afoul of the competitive bidding process in the course of awarding the contract. Id. ¶¶ 37–41.[7] SKDK, "a public affairs and consulting firm known for working with Democrat[s]," id. ¶ 11, won the $35-million contract, id. ¶ 42. It then allegedly "rapidly went to work as hatchet for hire to target Padilla's political enemies, relabeling even

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[6] This Exhibit has perplexing formatting and does not identify the title of the document, the date of the document, the author of the document, the source of the documents, or even the first question the document purports to answer. See Compl. Ex. 1.

[7] The Complaint includes a number of allegations about the impropriety of the contract. See Compl. ¶¶ 43–55.

innocuous speech that criticized Padilla's handling of election administration as 'false' and 'dangerous' attempts at voter suppression and voter fraud." Id. ¶ 56.

SKDK created a document called "Misinformation Daily Briefing," which it sent to Valle, Dresner, Mahood, and Jones at the California Secretary of State's office. Id. ¶¶ 57–58. The Complaint alleges that OEC would then "curate" the "misinformation" from those daily briefings to submit to social media companies. Id. ¶ 59.

5. NASS

NASS is a nonprofit professional organization for secretaries of state, headquartered in Washington, D.C. Id. ¶ 18. It is incorporated in Kentucky. Reynolds Decl. (dkt. 58-1) ¶ 7. NASS is not a government agency. Id. ¶ 4. The Complaint alleges that NASS does business in California, and that the California Secretary of State is a member, Compl. ¶ 18, but NASS disputes that it has any presence in California, see NASS MTD at 9–10; Reynolds Decl. ¶ 8.

The Complaint alleges that NASS "spearheaded efforts to censor disfavored election speech." Compl. ¶ 26. It alleges that NASS did so by creating "direct channels of communication between Secretaries of States' staff and social media companies to facilitate the quick take-down of speech deemed 'misinformation.'" Id. ¶ 27. The Complaint cites to an email from NASS's Director of Communications stating that "Twitter asked her to let Secretary of States' offices know that it had created a separate dedicated

way for election officials to 'flag concerns directly to Twitter.'" Id. ¶ 28, Ex. 2 (10/1/20 email). It cites to another email from the same individual at NASS, which explains that "if your state is onboarded into the partner support portal, it provides a mechanism to report election issues and get them bumped to the head of the queue." Id. ¶ 29, Ex. 3 (8/28/20 email). And it cites to an email in which the same individual, in the context of passing along reporting mechanisms for Facebook, Twitter, and Google, stated, "If you see something on a platform, please report it. In addition, please pass this on to your local election officials as well. I would also appreciate a heads up so I know what is going on, this helps us create a more national narrative." Id. ¶ 30, Ex. 4 (4/30/19 email).[8]

O'Handley alleges that OEC sometimes reported misinformation directly to social media companies and sometimes did so "through NASS." See id. ¶¶ 60–61. He further alleges that NASS had an annual award that recognized "[s]ignificant state contributions to the mission of NASS," and that the California Secretary of State's office won the award in 2020 for OEC's work. Id. ¶¶ 63, 64. In accepting the award, Padilla allegedly stated: "We worked in partnership with social media platforms to develop more efficient reporting procedures for potential misinformation. Misinformation identified by our office or voters was

[8] The Complaint alleges that this email directs election officials to keep NASS's guidance for reporting mis/disinformation handy as they "prepare[d] for battle," id. ¶ 31, but the document does not say this, see id. Ex. 4.

promptly reviewed and, in most cases, removed by the social media platforms." Id. ¶ 65, Ex. 8.

B. Enforcement Action Regarding Certain O'Handley Tweets

On November 12, 2020, just over a week after the 2020 Presidential Election, O'Handley tweeted the following: "Audit every California ballot / Election fraud is rampant nationwide and we all know California is one of the culprits / Do it to protect the integrity of that state's elections." Id. ¶ 72. The following day, SKDK included O'Handley's tweet in its Misinformation Daily Briefing, which it emailed to Valle, Dresner, Mahood, and Jones. Id. ¶ 74. Although the Complaint reads as though O'Handley's tweet was the only one SKDK sent to the State defendants that day, see id., it was one of eighteen articles or tweets included in the November 13 Misinformation Daily Briefing, see Compl. Ex. 6. SKDK included no commentary about O'Handley's tweet; it just included it, along with other tweets and articles, under the heading "California." Id.

Four days after SKDK flagged O'Handley's tweet, "a Secretary of State agent or staff member"—not identified in the Complaint—included the tweet as one of 30 total posts for Twitter to review. See Compl. ¶ 76; Compl. Ex. 9. The Secretary of State's office included the message:

> Hi, We wanted to flag this Twitter post:
> https://twitter.com/DC_Draino/status/1327073866578096129
> From user @DC_Draino. In this post user claims

> California of being a culprit of voter fraud, and ignores the fact that we do audit votes.
> This is a blatant disregard to how our voting process works and creates disinformation and distrust among the general public.

Id. The Complaint does not allege that Twitter ever responded to the Secretary of State's office about O'Handley's tweet. But Twitter subsequently applied a label to the tweet, adding text immediately below it that said: "This claim about election fraud is disputed." Compl. ¶¶ 72, 77. The Complaint alleges that Twitter then added a strike to O'Handley's account. Id. ¶ 78.

The other tweets at issue in the Complaint occurred more than two months later, shortly after the insurrection at the U.S. Capitol. The Complaint does not allege that any of the other defendants communicated with Twitter about any of these subsequent tweets. On January 18, 2021, two days before the inauguration, O'Handley tweeted: "When your country is stolen and you aren't even allowed to talk about it, that's not freedom / It's fascism." Id. ¶ 84. On January 21, 2021, he tweeted: "We are captives under a government we didn't elect / It was forced upon us / That is by definition a dictatorship." Id. ¶ 85. On January 22, 2021, he tweeted: "How about a 9/11 commission-style report on what the hell just happened this past election?! When half our country stops believing in the integrity of our vote, that's an *emergency* issue." Id. ¶ 86. Twitter allegedly applied the following label to each of those tweets: "This claim of election fraud is disputed, and this Tweet can't be replied to, Retweeted, or liked due to a risk of violence."

Id. ¶¶ 84–86. The Complaint also alleges that Twitter treated each tweet as an additional strike against O'Handley's account, and locked his account for seven days after the fourth strike. Id.

On February 22, 2021, O'Handley tweeted his last tweet: the words "'Most votes in American history'" in quotation marks above an image of the Capitol building with a fence around it. Id. ¶ 87. In response to that tweet, Twitter permanently suspended O'Handley's account. Id. ¶ 88. It then sent him the following message:

> Hello,
> Your account, DC_Draino has been suspended for violating the Twitter Rules.
> Specifically, for:
> Violating our rules about election integrity.
> You may not use Twitter's services for the purpose of manipulating or interfering in elections. This includes posting or sharing content that may suppress voter turnout or mislead people about when, where, or how to vote.

Id.

O'Handley alleges that "As a rising political commentator, Twitter's ban has had a direct and detrimental impact on [his] ability to make a living in his chosen profession." Id. ¶ 91. He claims to have "lost

his platform to communicate with his followers." Id. ¶ 94.[9]

C. Procedural History

O'Handley challenges Twitter's decisions to label his tweets and to permanently suspend his account. See generally id. He does not dispute that Twitter has rules that govern the use of its platform. Id. ¶ 99 (acknowledging that Twitter has Terms of Service). Instead, he asserts that "Twitter's stated reasons for suspending [him] were pretextual," and that it coordinated and conspired with the State defendants, SKDK, and NASS to censor him "because of his criticism of the government." Id. ¶¶ 98, 99. Based on this theory, he brings suit for: (1) violation of the First Amendment (42 U.S.C. § 1983), against all Defendants; (2) violation of the California Constitution (Free Speech clause), against all Defendants; (3) violation of the Equal Protection Clause (42 U.S.C. § 1983), against all Defendants; (4) violation of the Due Process Clause (42 U.S.C. § 1983), against SKDK, Twitter, and the State defendants; (5) a Void for Vagueness challenge (42 U.S.C. § 1983) to California Elections Code § 10.5, against the State defendants only; and (6) civil conspiracy (42 U.S.C. § 1985), against all Defendants. See id. ¶¶101–76.

All of the defendants move to dismiss, and Twitter moves to strike the California Constitutional claim.

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[9] Specifically, he has lost one platform: Twitter. His "combined social media following across all his accounts currently reaches over 3 million people" and he has made "75 national news appearances in the last year and [a] half." Id. ¶ 70.

Twitter MTD; State MTD; SKDK MTD; NASS MTD; Twitter Anti-SLAPP.

II. LEGAL STANDARD

A. 12(b)(6) Motion to Dismiss

All of the defendants move to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Twitter MTD at 6; State MTD at 6–7; NASS MTD at 8; SKDK MTD at 3–4.

Under Rule 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) applies when a complaint lacks either "a cognizable legal theory" or "sufficient facts alleged" under such a theory. Godecke v. Kinetic Concepts, Inc., 937 F.3d 1201, 1208 (9th Cir. 2019). Whether a complaint contains sufficient factual allegations depends on whether it pleads enough facts to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678. "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." Id. (quoting Twombly, 550 U.S. at 557). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id.

Courts should allow a plaintiff leave to amend unless amendment would be futile. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246–47 (9th Cir. 1990).

B. 12(b)(1) Motion to Dismiss

The State defendants and SKDK also move to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, arguing that O'Handley lacks standing to sue them. State MTD at 6; SKDK MTD at 3.

"The doctrine of standing limits federal judicial power." Or. Advocacy Ctr. v. Mink, 322 F.3d 1101, 1108 (9th Cir. 2003). The question of whether plaintiffs have standing "precedes, and does not require, analysis of the merits." Equity Lifestyle Props., Inc. v. Cnty. of San Luis Obispo, 548 F.3d 1184, 1189 n.10 (9th Cir. 2008). To have standing, plaintiffs must establish (1) that they have suffered an injury in fact, (2) that their injury is fairly traceable to a defendant's conduct, and (3) that their injury would likely be redressed by a favorable decision. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992). Each of these elements must be supported "with the manner and degree of evidence required at the successive stages of the litigation." Id. at 561. And plaintiffs "must have standing to seek each form of relief requested in the complaint." Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1651 (2017).

Under Rule 12(b)(1), a defendant may move to dismiss for lack of standing and thus lack of subject matter jurisdiction. See White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). Rule 12(b)(1) attacks on standing

can be either facial, confining the court's inquiry to allegations in the complaint, or factual, permitting the court to look beyond the complaint. Id.; Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). For facial attacks, courts accept the jurisdictional allegations in the complaint as true. See, e.g., Whisnant v. U.S., 400 F.3d 1177, 1179 (9th Cir. 2005). When addressing a factual attack, however, courts may consider evidence like declarations submitted by the parties, and the party opposing the motion to dismiss has the burden of establishing subject matter jurisdiction by a preponderance of the evidence. See, e.g., Leite v. Crane Co., 749 F.3d 1117, 1121 (9th Cir. 2014).

C. 12(b)(2) Motion to Dismiss

NASS also moves to dismiss under Rule 12(b)(2) of the Federal Rules of Civil Procedure, arguing that the Court does not have personal jurisdiction over it. NASS MTD at 8.

Under Rule 12(b)(2), a defendant may move to dismiss for lack of personal jurisdiction. The plaintiff bears the burden of establishing the court's personal jurisdiction over a defendant. Cubbage v. Merchent, 744 F.2d 665, 667 (9th Cir. 1984). In assessing whether personal jurisdiction exists, the court may consider evidence presented in affidavits or order discovery on jurisdictional issues. Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280, 1285 (9th Cir. 1977). "When a district court acts on a defendant's motion to dismiss under Rule 12(b)(2) without holding an evidentiary hearing, the plaintiff need make only a prima facie showing of jurisdictional facts to withstand the motion

to dismiss." Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995). A prima facie showing is established if the plaintiff produces admissible evidence which, if believed, would be sufficient to establish personal jurisdiction. See Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clemens Ltd., 328 F.3d. 1122, 1129 (9th Cir. 2003). "[U]ncontroverted allegations in [plaintiff's] complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in [plaintiff's] favor." Brayton Purcell LLP v. Recordon & Recordon, 606 F.3d 1124, 1127 (9th Cir. 2010). But "bare bones assertions of minimum contacts with the forum or legal conclusions unsupported by specific factual allegations will not satisfy a plaintiff's pleading burden." Swartz v. KPMG LLP, 476 F.3d 756, 766 (9th Cir. 2007).

D. Anti-SLAPP Motion

Twitter brings a Motion to Strike under California's anti-SLAPP statute. That law provides that any "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue" is "subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Cal. Code Civ. Proc. § 425.16(b)(1). The statute facilitates "the early dismissal of unmeritorious claims filed to interfere with the valid exercise of the constitutional rights of freedom of speech and petition." Club Members for an Honest Election v. Sierra Club, 45 Cal. 4th 309 (2008).

III. DISCUSSION

This order will discuss each of the pending motions, beginning with Twitter's motions.

A. Twitter Motion to Dismiss

Twitter moves to dismiss all of O'Handley's claims against it based on three main arguments: (1) the federal constitutional claims fail because Twitter is not a state actor; (2) the remaining claims fail on the merits; and (3) Twitter's own First Amendment rights are at stake.[10] See generally Twitter MTD. The Court largely agrees.

1. State Action

Twitter moves to dismiss the First Amendment claim, the Equal Protection claim, and the Due Process claim against it, arguing that it is not a state actor. Twitter MTD at 6. "[T]he First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on State action." Hudgens v. N.L.R.B., 424 U.S. 507, 519 (1976) (quoting Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 567 (1972)). Put another way, "conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). That means both that 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 it or by a person for whom it is

[10] Twitter also argues that Section 230 of the Communications Decency Act, 47 U.S.C. § 230, separately bars O'Handley's claims. Twitter MTD at 19–21. The Court does not reach this argument.

responsible" and that "the party charged with the deprivation must be a person who may fairly be said to be a state actor." Id. Twitter argues the second prong: that it is not a state actor, but a private company that made independent decisions about O'Handley's account. Twitter MTD at 6.

Twitter is a private entity. Compl. ¶ 17. The Ninth Circuit reaffirmed just recently that "a private entity hosting speech on the Internet is not a state actor" subject to constitutional constraints. See Prager Univ. v. Google LLC, 951 F.3d 991, 995 (9th Cir. 2020) ("Despite YouTube's ubiquity and its role as a public-facing platform, it remains a private forum, not a public forum subject to judicial scrutiny under the First Amendment.").[11] The Supreme Court also recently explained that "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints." Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019). O'Handley knows this. See Opp'n to State MTD at 4 ("The fact that no social media company has ever been treated as a state actor under § 1983 might be relevant if any plaintiff had ever filed a complaint

[11] O'Handley argued at the motion hearing that Twitter is like the corporate-owned town in Marsh v. Alabama, 326 U.S. 501 (1946), which the Supreme Court held was a state actor. But the Ninth Circuit rejected that argument in Prager University, noting that the Court has "unequivocally confined Marsh's holding to the unique and rare context of 'company town[s]' and other situations where the private actor 'perform[s] the full spectrum of municipal powers.'" Id. at 998 (quoting Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 569 (1972); Hudgens, 424 U.S. at 518–20).

alleging facts, and documentation to support those allegations, that were remotely like the ones Mr. Handley does here.").

O'Handley argues that Twitter's coordination with the State (and others) in this case transforms what might otherwise be private content-moderation decisions into state action. Id.; Opp'n to Twitter MTD (dkt. 69) at 3–8 (citing Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2000) ("private behavior" may be treated as state action "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.") (cleaned up)). At the motion hearing, he characterized this case as a "very different scenario" due to an unprecedented degree of "interconnectedness" between Twitter and the State.

"The United States Supreme Court has articulated four different factors or tests to determine state action." Gorenc v. Salt River Project Agr. Imp. & Power Dist., 869 F.2d 503, 506 (9th Cir. 1989) (citing Lugar, 457 U.S. at 939); Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1140 (9th Cir. 2012). These are the nexus test, the joint action test, the public function doctrine, and the state compulsion test. Gorenc, 869 F.2d at 506–09. O'Handley argues that the joint action test applies. See Opp'n to Twitter MTD at 48; Compl. ¶ 110 ("Defendants . . . willfully and cooperatively participated in the government Defendants' efforts to censor"), ¶ 112 ("Defendants . . . took action, jointly . . . against Mr. O'Handley").

The joint action test asks "whether the state has 'so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity." Gorenc, 869 F.2d at 507 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)). "[A] bare allegation of such joint action will not overcome a motion to dismiss." DeGrassi v. City of Glendora, 207 F.3d 636, 647 (9th Cir. 2000). The Supreme Court has explained:

> [A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives.

Blum v. Yaretsky, 457 U.S. 991, 1004–05 (1982). And this circuit has required "substantial cooperation" or that the private entity's and government's actions be "inextricably intertwined." Brunette v. Humane Society of Ventura Cnty., 294 F.3d 1205, 1211 (9th Cir. 2002). "A conspiracy between the State and a private party to violate constitutional rights may also satisfy the joint action test." Id. However, the private and government actors must have actually agreed to "violate constitutional rights." Fonda v. Gray, 707 F.2d 435, 438 (9th Cir. 1983).

The allegations here fall short of plausibly alleging joint action.

a. November 2020 Message to Twitter

Despite O'Handley's assertions at the motion hearing about unprecedented "interconnectedness" and "back-and-forth" communications, the Complaint alleges that an unidentified OEC official sent a single message to Twitter, flagging a single O'Handley tweet. See Compl. ¶¶ 28–29, 32–33, 76–78. That is the central act in the Complaint. OEC's message did not direct or even request that Twitter take any particular action in response to the tweet. See id. ¶ 76, Ex. 9. This single message occurred in November 2020. Id. ¶ 76. The Complaint does not allege that there was any further communication between Twitter and the government about that tweet, or about any other O'Handley tweets—including the February 2021 tweet that prompted Twitter to permanently suspend O'Handley's account for violating its Civic Integrity Policy. See id. ¶ 88; see also id. ¶ 81 (arguing instead: "Prior to OEC requesting Twitter censor the [first] Post, Twitter had never before suspended Mr. O'Handley's account or given him any strikes. He suddenly became a target of Twitter's speech police, at the behest of Defendants.").

One party supplying information to another party does not amount to joint action. See Lockhead v. Weinstein, 24 Fed. App'x 805, 806 (9th Cir. 2001) ("[M]ere furnishing of information to police officers does not constitute joint action"); Fed. Agency of News LLC v. Facebook, Inc., 432 F. Supp. 3d 1107, 1124 (N.D. Cal. 2020) ("supplying information to the state alone [does not amount] to conspiracy or joint action") (alteration added); Deeths v. Lucile Slater Packard

Children's Hospital at Stanford, No. 1:12-cv-02096-LJO, 2013 WL 6185175, at *8, 9 (E.D. Cal. Nov. 26, 2013) ("Even if Dr. Stirling made false statements to Kern County social workers regarding the need to remove R.D. from Plaintiff's care, supplying information alone does not amount to conspiracy or joint action under color of state law.").[12]

Moreover, the one-off, one-way communication here does not reflect "substantial cooperation." See Brunette, 294 F.3d at 1212. Nor does it reflect that the State of California "exercised coercive power" over Twitter's decisions to progressively discipline and ultimately suspend O'Handley, such that those decisions "must in law be deemed to be that of the State." See Blum, 457 U.S. at 1004–05. O'Handley's reference to Desert Palace at the motion hearing only illustrates how meager the allegations here are. In Desert Palace, the government "train[ed casino] security guards, provid[ed] information from the records department, and delegate[ed to the casino's security guards] the authority to issue citations," thereby "insinuat[ing] itself into a position of interdependence with [the casino]." 698 F.3d at 1140 (internal quotation marks omitted). Here, OEC on a single occasion alerted Twitter to a single O'Handley tweet. See Compl. Ex. 9 ("Hi, We wanted to flag this Twitter post. . . ."). The State did not delegate to Twitter any "authority, normally reserved to the state."

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[12] O'Handley accurately notes that these cases all involve a private party giving information to the government and not the other way around. See Opp'n to Twitter MTD at 6–7. But he does not point to any authority holding that the distinction makes a difference.

See Desert Palace, 698 F.3d at 1140. Nor, in its single email sending Twitter information, did the State "exert[] control over how [Twitter] used the information [it] obtained." See Deeths, 2013 WL 6185175, at *10. While the State might have approved of how Twitter acted in response to O'Handley's tweet—and it might just as well not have—mere approval or acquiescence does not make the State responsible for Twitter's actions. See Blum, 457 U.S at 1004–05.[13]

b. Working Together and the Portal

O'Handley argues, though, that there is more involved than the single November 2020 message from OEC to Twitter about his tweet. He points to OEC and Twitter's broader efforts on election misinformation, and he quotes from OEC's alleged statements about "working closely with social media companies" as evidence of how intertwined Twitter was with the government. Opp'n to Twitter MTD at 5 (citing Compl. Ex. 2). At the motion hearing, O'Handley asserted that the State said in its "own words" that it partnered with Twitter "to take down speech," which was inaccurate; the Complaint instead includes an alleged OEC statement that "We worked closely and proactively with social media companies to . . . take down sources of misinformation. . . ." See Compl. Ex. 1. O'Handley further argues that Twitter created the Portal to allow OEC's "censorship reports" to be "bumped to the head

[13] Nor do the Complaint's conclusory allegations of joint action bolster O'Handley's case. See Compl. ¶¶ 108–10; Dietrich v. John Asuaga's Nugget, 548 F.3d 892, 900 (9th Cir. 2008) (bare allegation that defendants acted in concert "insufficient to establish joint action").

of the queue." Opp'n to Twitter MTD at 5 (citing Compl. Ex. 3).

Generalized statements about working together do not demonstrate joint action. See Children's Health Def. v. Facebook, Inc., No. 20-cv-05787-SI, 2021 WL 2662064, at *10–11 (N.D. Cal. June 29, 2021). In addition, the government can work with a private entity without converting the private entity's decisions into government decisions. In Mathis v. Pacific Gas Company, 75 F.3d 498, 501 (9th Cir. 1996), where PG&E conducted an undercover operation in close partnership with the county narcotics Task Force, the plaintiff argued that PG&E's "later decision to exclude him from the plant was attributable to the Task Force as part of a 'joint action,' exposing PG&E to liability under 42 U.S.C. § 1983." The Ninth Circuit explained that "the specific action [the plaintiff challenged] is the procedure by which PG&E decided to exclude him from its plant," and that while "PG&E conducted its investigation in close cooperation with the Task Force," his "challenge is limited to PG&E's decision-making process after the investigation was completed." Id. at 504. The plaintiff argued that "without an investigation, he wouldn't have been excluded." Id. But the Ninth Circuit found it significant that "the Task Force wasn't involved in the decision to exclude [the plaintiff] from the plant. Whether or not its previous acts facilitated the decision, the mantle of its authority didn't." Id. (emphasis added). Because PG&E had independently decided to exclude the plaintiff, there was no joint action and no 1983 liability for PG&E. Id.

In Mathis, general "consultation and information sharing" in advance of the challenged decision were not enough for joint action. Id. Here, Twitter created a Portal and informed the state about it through NASS, see Compl. Exs. 2, 3, and the state may have used the Portal to report election misinformation on Twitter's platform, see id. ¶ 32. There was no consultation and very little information sharing about O'Handley. See Compl. Ex. 9. Arguably, "without" OEC flagging O'Handley's tweet to Twitter, O'Handley "wouldn't have" had his first tweet labeled. See Mathis, 75 F.3d at 504.[14] O'Handley indeed suggests this. See Compl. ¶ 81 ("Prior to OEC requesting Twitter censor the [first] Post, Twitter had never before suspended Mr. O'Handley's account. . . ."). But there is no evidence or even allegation that the government played any role in Twitter's "internal . . . decisions," see Mathis, 75 F.3d at 504, to label O'Handley's tweets, or to add strikes to and ultimately suspend O'Handley's account.

O'Handley disputes the notion that Twitter "always acted independently, only 'sometimes' acquiescing to the OEC's censorship requests." Opp'n to Twitter MTD at 5. He emphasizes OEC's alleged claim that Facebook and Twitter "promptly removed" 98% of erroneous or misleading posts. Id. (citing Compl. ¶ 64). And he suggests that this high number reveals that Twitter "understood its role" as government censor. Id. at 6. The 98% number is of somewhat limited value, as it represents both Facebook and Twitter posts. See Compl. ¶ 64. It is also of limited value because

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[14] On the other hand, someone else could have reported the tweet to Twitter.

O'Handley does not actually allege that the "misinformation" identified by OEC was not really misinformation. He suggests that his own tweets were not misinformation, see id. ¶ 74 (incorrectly characterizing his tweet that "Election fraud is rampant nationwide and we all know California is one of the culprits" as "personal opinion"), but does not squarely address the other "misinformation" identified by OEC. The 98% number is also in conflict with the OEC spreadsheet attached to the Complaint, which shows that Twitter took no action on OEC-reported content in about one-third of the instances of alleged misinformation listed. See id. Ex. 9.

Regardless of the percentage of flagged tweets that Twitter ultimately removed, there is ample evidence that it was Twitter who decided whether to remove them. The spreadsheet reflects that when Twitter responded to OEC about its reports, it described its decision of whether to remove a post, or take no action on it, by referencing its own interpretation of its own Rules. See, e.g., id. ("After our review, we've locked the account for breaking our rules regarding civic integrity"; "We're writing to let you know that after a review, we didn't find a violation of our civic integrity policy in the content you reported."). This is consistent with Twitter's characterization of the Portal as a tool for people interested in promoting civic processes "to flag concerns directly to Twitter," including "technical issues . . . and content on the platform that . . . may violate our policies." See Compl. Ex. 2 (emphasis added). The spreadsheet does not show, and the Complaint does not allege, that Twitter consulted or conferred with the government on content decisions.

See Compl. Ex. 9. Twitter's Terms of Service gave it unlimited authority to remove or discipline accounts, see Twitter Terms of Service, and Twitter referenced its own policies when it exercised that authority, see Compl. ¶ 88 ("Your account, DC_Draino has been suspended for violating the Twitter Rules. Specifically, for: Violating our rules about election integrity.").

The allegations about working together and the Portal therefore do not demonstrate joint action.

c. Conspiracy

Finally, there is no support for O'Handley's assertion that Twitter was a willful participant in "an agreement or meeting of the minds to violate constitutional rights." See Opp'n to Twitter MTD at 5. Participants in a conspiracy need not know the exact details of the plan, so long as they share the general conspiratorial objective. Fonda, 707 F.2d at 438; Franklin v. Fox, 312 F.3d 423, 441 (9th Cir. 2002). Whether an unlawful conspiracy exists is "generally" an issue for the jury, "so long as . . . the jury can infer from the circumstances that the alleged conspirators had a meeting of the minds and thus reached an understanding to achieve the conspiracy's objectives." Mendocino Env'tl Ctr. v. Mendocino Cnty., 192 F.3d 1283, 1301–02 (9th Cir. 1999) (internal marks and citation omitted). A jury can infer an agreement if "alleged conspirators have committed acts that 'are unlikely to have been undertaken without an agreement.'" Id. (citation omitted).

Here, though, the only allegations that O'Handley points to in support of a conspiracy are the allegations

that OEC "work[ed] closely with social media companies to be proactive so when there's a source of misinformation, we can contain it." See Opp'n to Twitter MTD at 5 (quoting Compl. ¶¶ 24–25, Ex. 2); see also Opp'n to State MTD at 4 (referencing, incorrectly, a "myriad of direct communications demonstrating extensive coordination").[15] Such allegations might demonstrate a meeting of the minds to promptly address election misinformation, but not a meeting of the minds to "violate constitutional rights," let alone O'Handley's constitutional rights. See Fonda, 707 F.2d at 438; see also Children's Health Def., 2021 WL 2662064, at *11 (general statements about working together "do[] not support the inference that Facebook (or Zuckerberg) worked in concert with the CDC to censor CHD's speech, retaliate against CHD, or otherwise violate CHD's constitutional rights."). Nor does the Court find generalized statements about working together to counteract the dissemination of election misinformation particularly nefarious—such statements do not support an inference of an illegal conspiracy.

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[15] He also points to an email exchange between OEC and Twitter in which OEC emailed Twitter on December 30, 2019 asking that a tweet by an entirely different Twitter account be taken down, to which Twitter responded the following morning that it had removed the tweet. Id. (citing Compl. ¶ 35). That tweet allegedly shared "a doctored image of a California Registration Card (inaccurately claiming that the Republican Party is not an option)," see Comp. ¶ 34, and so its prompt removal is not evidence of wrongdoing or an action unlikely to have been taken without an agreement to violate rights.

The Complaint makes a single conclusory allegation that Twitter's "real reasons for suspending Mr. O'Handley do not stem from a violation of Twitter's terms of service, but from the content of his speech raising concerns about election administration and integrity, specifically concerns related to the work of then-California Secretary of State Alex Padilla." Compl. ¶ 99. There is no support for this allegation. There is no basis in the Complaint for a jury to infer that Twitter agreed with the government to retaliate against O'Handley because of his criticism of Padilla.

Far from it being "unlikely" for Twitter to have acted the way it did "without an agreement," see Mendocino Env'tl Ctr., 192 F.3d at 1301, the Complaint reflects that Twitter routinely took the enforcement actions it did based on violations of its Civic Integrity Policy. See, e.g., Compl. Ex. 2 (Portal is a way to "to flag concerns directly to Twitter," including "technical issues . . . and content on the platform that . . . may violate our policies."); Compl. Ex. 9 ("After our review, we've locked the account for breaking our rules regarding civic integrity"; "We're writing to let you know that after a review, we didn't find a violation of our civic integrity policy in the content you reported."); Compl. ¶ 88 ("Your account, DC_Draino has been suspended for violating the Twitter Rules. Specifically, for: Violating our rules about election integrity.").

OEC's lone message to Twitter did not state that Twitter should remove (or do anything with) O'Handley's tweet because it criticized Padilla. See Compl. ¶ 76, Ex. 9 (asserting that O'Handley's tweet "is a blatant disregard to how our voting process works

and creates disinformation and distrust among the general public"). Moreover, none of the other O'Handley tweets at issue in this case even referred to Padilla, California, or the OEC. All referred to the 2020 Presidential Election in national terms. See id. ¶¶ 84–87. It is simply not plausible that Twitter shared a conspiratorial objective with the OEC to retaliate against O'Handley for criticizing Padilla.

O'Handley has therefore failed to plausibly allege that Twitter was a state actor by virtue of the joint action test. Because Twitter was not a state actor, it cannot be liable under § 1983, and the Court DISMISSES the First Amendment, Equal Protection, and Due Process Claims against Twitter.

2. Remaining Claims

Twitter next moves to dismiss the two remaining claims against it on the merits. See Twitter MTD at 14.

a. Section 1985

The elements of conspiracy under 42 U.S.C. § 1985(3) are (1) a conspiracy; (2) "for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws"; (3) an "act in furtherance" of the conspiracy; and (4) an injury or deprivation of rights. Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 502 (9th Cir. 1979) (quoting Griffin v. Breckenridge, 403 U.S. 88, 102–03 (1971)). Because "the purpose[] of the Ku Klux Klan Act . . .[is] only to protect against deprivations of equal protection," Hickman v. Block, 81 F.3d 168 (9th Cir. 1996), a plaintiff must also show "[5] some racial, or perhaps

otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action" and [6] that the conspiracy "aimed at interfering with rights" that are "protected against private, as well as official, encroachment," Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 267–68 (1993). "A mere allegation of conspiracy without factual specificity is insufficient to support a claim." Sanchez v. City of Santa Ana, 936 F.2d 1027, 1039 (9th Cir. 1990).

Twitter moves to dismiss the section 1985 claim, arguing that O'Handley fails to plausibly allege the first, third, and fifth elements. Twitter MTD at 15. The Court agrees that O'Handley fails to plausibly allege a conspiracy to deprive anyone "of the equal protection of the laws, or of equal privileges and immunities under the laws." See Life Ins. Co. of N. Am., 591 F.2d at 502.

As discussed above in connection with the joint action test, O'Handley fails to plausibly allege a conspiracy between the defendants—whether that conspiracy is framed as one to "violate the constitutional rights of individuals who questioned election processes and outcomes—or in Defendants' words, spread 'misinformation,'" see Compl. ¶ 168, "to seek out and swiftly censor speech with which they disagreed," see id. ¶ 169, "to jointly deprive Mr. O'Handley of his rights," see id. ¶ 170, or "to censor speech which they found objectionable or 'misleading,'" see id. ¶ 171. There are allegations that support the notion that the defendants collaborated to counteract election misinformation generally. See id. ¶¶ 24–25, Ex. 2. And there are allegations that an unnamed OEC official communicated with Twitter one time to alert

Twitter to O'Handley's first tweet. See id. ¶ 76, Comp. Ex. 9. But these allegations do not support any of the conspiracies alleged in this claim, particularly given the evidence discussed above that Twitter made content decisions based on its own application of its own Rules. Nor do the Complaint's conclusory allegations of conspiracy aid O'Handley in stating a claim. See Compl. ¶ 99 (re Twitter's "real reasons for suspending Mr. O'Handley").

Because the Complaint fails to plausibly allege a conspiracy to deprive O'Handley of his rights, the Court DISMISSES the section 1985 claim against Twitter.

b. California Constitution (Free Speech Clause)

Twitter argues that "[l]ike his federal constitutional claims, Plaintiff's claim under the free speech cause of the California Constitution must be dismissed because Twitter is a private entity, not a state actor." Twitter MTD at 16. Having dismissed the federal claims against Twitter, the Court declines to exercise supplemental jurisdiction over the California Constitution (Free Speech Clause) claim. See 28 U.S.C. § 1367(c)(3) (district court may decline to exercise supplemental jurisdiction where it has dismissed all claims over which it has original jurisdiction); Oliver v. Ralphs Grocery Co., 654 F.3d 903, 911 (9th Cir. 2011) (not error to decline supplemental jurisdiction where "balance of the factors of 'judicial economy, convenience, fairness, and comity' did not 'tip in favor of retaining the state-law claims' after dismissal of the [federal] claim"); Acri v. Varian Assocs., Inc., 114 F.3d 999, 1000 (9th Cir. 1997) ("[S]tate law claims 'should'

be dismissed if federal claims are dismissed before trial") (emphasis in original). That claim involves novel issues that are best addressed, in the first instance, by the state court.

3. Twitter's First Amendment Rights

Twitter finally argues that its own First Amendment rights are at stake in this lawsuit. Twitter MTD at 18–19. O'Handley has argued that his case stems from "Twitter's retaliatory strikes and [the] eventual removal of Mr. O'Handley from its platform,"[16] and so "simply does not require, nor do the factual allegations rest on, Twitter engaging in expressive activity of any sort." Opp'n to Twitter Anti-SLAPP (dkt. 70) at 6 (emphasis in original). To be clear, the Complaint repeatedly objects to Twitter having "appended commentary [to his tweets] asserting that [his] claim about election fraud was disputed." See Compl. ¶ 77; see also id. ¶ 86. Indeed, in other briefs, O'Handley argues that Twitter "retaliated against Mr. O'Handley . . . by appending a public label" to his tweets. See Opp'n to State MTD at 2; Opp'n to SKDK MTD (dkt. 66) at 2 ("Twitter punished Mr. O'Handley for criticizing a California state official . . . by appending commentary asserting that Mr. O'Handley's tweet was false"). His case against Twitter is therefore based on Twitter appending labels to his tweets for allegedly violating Twitter's Civic Integrity Policy, its imposition of strikes on his account, its limitation on the reach of his tweets, and its ultimate removal of his

[16] He also argued at the motion hearing that Twitter's conduct limited the reach of his tweets.

account from the platform. Those acts are all interrelated.

Moreover, those acts are expressive. "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment" and are protected by the First Amendment. See Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 257–58 (1974); see also Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133, 135 (9th Cir. 1971) ("Appellant has not convinced us that the courts . . . should dictate the contents of a newspaper."); cf. Pacific Gas & Elec. Co. v. Public Utilities Com'n of California, 475 U.S. 1, 4 (1986) (government cannot force PG&E to include in billing statements speech of third party with which PG&E disagreed). Likewise, "where . . . an action directly targets the way a content provider chooses to deliver, present, or publish news content on matters of public interest, that action is based on conduct in furtherance of free speech rights." Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc., 742 F.3d 414, 424–25 (9th Cir. 2014).

Like a newspaper or a news network, Twitter makes decisions about what content to include, exclude, moderate, filter, label, restrict, or promote, and those decisions are protected by the First Amendment. See NetChoice, LLC v. Paxton, No. 1:21-cv-840-RP, 2021 WL 5755120, at *7 (W.D. Tex. Dec. 1, 2021) ("Social media platforms have a First Amendment right to moderate content disseminated on

their platforms."); Isaac v. Twitter, Inc., No. 21-cv-20684-BLOOM/Otazo-Reyes, 2021 WL 3860654, at *6 (S.D. Fla. Aug. 30, 2021) (Twitter "has a First Amendment right to decide what to publish and what not to publish on its platform") (internal quotation marks and citation omitted); Cross v. Facebook, Inc., 14 Cal. App. 5th 190, 202 (2017) ("source of . . . alleged injuries . . . is the content of the pages and Facebook's decision not to remove them, an act 'in furtherance of the . . . right of petition or free speech'"); La'Tiejira v. Facebook, Inc., 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017) (acknowledging "Facebook's First Amendment right to decide what to publish and what not to publish on its platform"); Publius v. Boyer-Vine, 237 F. Supp. 3d 997, 1008 (E.D. Cal. 2017) (owner of website has "First Amendment right to distribute and facilitate protected speech on the site"); Zhang v. Baidu.com Inc., 10 F. Supp. 3d 433, 437–43 (S.D.N.Y. 2014) (holding that suit "to hold [website] liable for . . . a conscious decision to design its search-engine algorithms to favor certain expression on core political subjects over other expression on those same political subjects" would "violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."); Kronemyer v. Internet Movie Database, Inc., 150 Cal. App. 4th 941, 946–47 (2007) ("[L]isting of credits on respondent's Web site is an act in furtherance of the right of free speech. . . ."). Indeed, the Supreme Court recently cautioned against treating a defendant as a state actor, even though it was regulated by the State and provided a forum for speech, because doing so could "eviscerate certain private entities' rights to exercise editorial control over speech and speakers on their properties or

platforms." Manhattan Community Access Corp., 139 S. Ct. at 1932.

The Court therefore rejects O'Handley's argument that this case is analogous to Rumsfeld v. Forum for Acad. & Institutional Rts., Inc. ("FAIR"), 547 U.S. 47, 48 (2006), which involved a law requiring law schools to provide equal access on campus to military recruiters. See Opp'n to Twitter Anti-SLAPP at 7. The Court held that that law did not violate the law schools' freedom of speech because "[u]nlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive." FAIR, 547 U.S. at 64. O'Handley contends that banning someone from a social media platform, or issuing a strike against his account, is like allowing military recruiters on campus—not a form of speech. Opp'n to Twitter Anti-SLAPP at 7. But unlike an entity that organizes itself for non-expressive purposes, Twitter is "the primary social channel for political commentary and news in American society at present." See Compl. ¶ 90. As O'Handley commented at the motion hearing, "on Twitter, all there is is discussion of issues." Twitter's decisions to include, exclude, or label a tweet on a site that is entirely a "discussion of issues" are expressive. As Twitter explained, it "expressed its negative opinions about the content of O'Handley's tweets by labeling them as disputed and/or likely to cause violence," and it expressed its "view that O'Handley's particular tweets were not appropriate for sharing on its platform" by suspending O'Handley's account. Reply re Twitter Anti-SLAPP (dkt. 80) at 1; see also Kronemyer, 150 Cal. App. 4th at 947 ("It is, of course, well established that the constitutional right of

free speech includes the right not to speak."). These decisions operated "together with numerous decisions regarding other tweets and users to more broadly shape and develop the nature, tone, and substance of the ongoing dialogue that Twitter seeks to foster and present on its platform." Reply re Twitter Anti-SLAPP at 1. That is expression.

O'Handley disagrees, arguing at the motion hearing that no one would think that O'Handley's tweets were Twitter's speech, and that Twitter could simply have used its own Twitter account to express its disagreement with O'Handley. But a Twitter user encountering O'Handley's tweets would indeed think that Twitter is the kind of place that allows such tweets on its platform. A user who encountered enough such tweets might think that Twitter was content to be complicit in spreading election misinformation. This is because a platform's decision to publish or not publish particular tweets says something about what that platform represents.[17] See NetChoice, LLC, 2021 WL 5755120, at *8 ("This Court is convinced that social media platforms . . . curate both users and content to convey a message about the type of community the platform seeks to foster and, as such, exercise editorial

[17] The Court thus finds Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 655–56 (1994), which involved provisions requiring cable operators to carry local broadcast stations, distinguishable. The Court there noted that "Given cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." Turner Broadcasting System, Inc., 512 U.S. at 655. Not so here.

discretion over their platform's content."). The notion that Twitter should be powerless to do anything but post its own tweets responding to every tweet on its platform that spreads misinformation makes very little sense from either a legal or practical perspective.

Additionally, as the court noted in Zhang, 10 F. Supp. 3d at 441, O'Handley's assertion that Twitter's challenged conduct is not expressive "is belied by [O'Handley's] own theory of the case, which is that by exercising editorial discretion, [Twitter] favors some 'political speech' over other 'political speech,'" see, e.g., Compl. ¶¶ 4 ("Defendants' exercise of government force to censor political speech with which they disagree"), 83 (commentators who supported Democrats were not censored while conservative commentators were). See also NetChoice, LLC, 2021 WL 5755120, at *8 ("Without editorial discretion, social media platforms could not skew their platforms ideologically, as the State accuses [] them of doing.").

Twitter has important First Amendment rights that would be jeopardized by a Court order telling Twitter what content-moderation policies to adopt and how to enforce those policies. The Court will issue no such order. For the foregoing reasons, Twitter prevails on its motion to dismiss all of the claims against it, save and except for the California Constitution (Free Speech Clause) claim, over which this Court declines to exercise jurisdiction.

B. Twitter Anti-SLAPP Motion

Twitter has also filed an anti-SLAPP motion against O'Handley in connection with the California

Constitution (Free Speech Clause) claim only.[18] Twitter Anti-SLAPP. Analysis of a motion to strike pursuant to the anti-SLAPP statute consists of two steps. The defendant must first show that the statute applies because the defendant was "engaged in conduct (1) in furtherance of the right of free speech; and (2) in connection with an issue of public interest." See Doe, 730 F.3d at 953. If the defendant makes the requisite showing, the court then considers whether the plaintiff has demonstrated "a reasonable probability" of prevailing on the merits of his claims. In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1273 (9th Cir. 2013) (quoting Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003)).

Because the Court does not exercise supplemental jurisdiction over the California Constitution (Free Speech Clause) claim, the Court cannot rule on whether O'Handley has demonstrated a reasonable probability of prevailing on the merits of that claim. Accordingly, the Court does not reach the anti-SLAPP motion.

C. State Defendants Motion to Dismiss

The State defendants move to dismiss all of O'Handley's claims against them, for five reasons: (1) the Complaint fails to establish O'Handley's standing; (2) the Complaint fails to establish liability under section 1983; (3) the Complaint fails to state a claim as to each cause of action; (4) qualified immunity

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[18] "The anti-SLAPP statute does not apply to federal law causes of action." Doe v. Gangland Prods., Inc., 730 F.3d 946, 955 n. 3 (9th Cir. 2013).

bars all claims against the individual defendants; and (5) Eleventh Amendment immunity bars the California Constitutional claim, and any claim for damages, against Secretary Weber. See generally State MTD.[19] The State defendants prevail.

1. Standing

The State defendants argue first that the Complaint fails to establish standing over them because it does not establish that they took any action that is fairly traceable to the suspension of O'Handley's Twitter account. State MTD at 7–8 (citing Lujan, 504 U.S. at 560–61). Traceability is one of the requirements for standing. See Lujan, 504 U.S. at 560–61.

The State defendants assert that the only conduct the Complaint actually attributes to Dresner, Jones, Mahood and Valle is receiving the Misinformation Daily Briefing email from SKDK that highlighted election-related news and social media posts, including O'Handley's "[a]udit every California ballot" post. See Compl. ¶ 74 & Ex. 6. But the State receiving an email did not harm O'Handley. The non-conclusory allegations about Padilla are that he authorized the State's contract with SKDK. See Compl. ¶¶ 37–56. But the alleged improper granting of a state contract to an outside contractor did not harm O'Handley.

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[19] The Court declines to exercise supplemental jurisdiction over the California Constitution (Free Speech Clause) claim, but notes that O'Handley fails to dispute the State defendants' Eleventh Amendment argument. See generally Opp'n to State MTD; Reply re State MTD (dkt. 78) at 15. This order addresses only the four disputed arguments.

The central allegation in the Complaint is that an unidentified agent or staff member—not even, necessarily, one of the individual State defendants—flagged the O'Handley tweet identified in the Misinformation Daily Briefing in an email to Twitter. See id. ¶¶ 76, 77, Ex. 9. The State defendants argue that O'Handley cannot trace his injury—the permanent suspension of his Twitter account—back to this event: "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." State MTD at 7 (citing the Civic Integrity Policy). And again, the State email to Twitter involved just one O'Handley tweet; there is no allegation that the State had any contact with Twitter about any of O'Handley's subsequent tweets, including the final one, which prompted the suspension of his account. Nor is there any allegation that the State was involved in any of Twitter's content moderation decisions.

O'Handley argues that "a defendant need not be the injury's 'sole source' or 'proximate cause' as long as the link is 'not tenuous or abstract.'" Opp'n to State MTD at 3 (quoting 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 846, 860 (9th Cir. 2005)). That is correct. See Maya v. Centex Corp., 658 F.3d 1060, 1070 (9th Cir. 2011) ("A causal chain does not fail simply because it has several links, provided those links are not hypothetical or tenuous and remain plausible.") (cleaned up). In Barnum Timber, the Ninth Circuit held that the plaintiff's injury—a reduction in property value—was fairly traceable to the EPA's

decision to deem the creek that the property was on an impaired water body; the plaintiff had submitted declarations explaining that the EPA's decision would make the property appear to be subject to "additional and onerous regulation." 633 F.3d at 898–99. The link there was not particularly tenuous, and the plaintiff had "more than met its burden . . . at the pleading stage." Id. at 899. Similarly, in Ocean Advocates, the Ninth Circuit held that the plaintiff's harm—increased tanker traffic and the risk of an oil spill—was traceable to the planned extension of an oil tanker dock. 402 F.3d at 860. The court explained that while "[t]he causal connection put forward for standing purposes cannot be too speculative, or rely on conjecture about the behavior of other parties," "the link [between the action and the harms was] not tenuous or abstract." Id.

In Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41 (1976), the Supreme Court found the link too tenuous. The plaintiffs there had been denied hospital services, and brought suit against the government, alleging that by adopting a revenue ruling allowing favorable tax treatment to hospitals that offered only emergency room services to indigents, the government had encouraged the hospitals to deny services to indigents. Id. at 41. The Court held that the plaintiffs had no standing against the government, as it was "purely speculative whether the denials of service specified in the complaint fairly can be traced to [the government's] 'encouragement or instead result from decisions made by the hospitals without regard to the tax implications." Id. at 42.

As in Simon, the link here is tenuous. The Court would have to conclude that Twitter's decision to suspend O'Handley's account for violating its Civic Integrity Policy stemmed from the State's flagging of a single O'Handley's post three months earlier, rather than from Twitter's application of its own Rules. But, as discussed above, Twitter described its decision of whether to remove a post, or take no action on it, by referencing its own interpretation of its own Rules. See, e.g., Compl. Ex. 9 ("After our review, we've locked the account for breaking our rules regarding civic integrity"; "We're writing to let you know that after a review, we didn't find a violation of our civic integrity policy in the content you reported."). Twitter characterized the Portal as a tool "to flag concerns directly to Twitter," including "technical issues . . . and content on the platform that . . . may violate our policies." See Compl. Ex. 2 (emphasis added). Twitter's Terms of Service gave it unlimited authority to remove or discipline accounts, see Twitter Terms of Service, and Twitter referenced its own policies when it exercised that authority, see Compl. ¶ 88 ("Your account, DC_Draino has been suspended for violating the Twitter Rules. Specifically, for: Violating our rules about election integrity.").

"In cases where a chain of causation 'involves numerous third parties' whose 'independent decisions' collectively have a 'significant effect' on plaintiffs' injuries," the causal chain is "too weak to support standing." See Maya, 658 F.3d at 1070 (citation omitted); see also Clapper v. Amnesty Int'l USA, 568 U.S. 398, 414 (2013) (expressing reluctance about allegations that "rest on speculation about the

decisions of independent actors"); Ass'n of Am. Physicians & Surgeons v. U.S. FDA, 13 F.4th 531, 546 (6th Cir. 2021) (collecting cases holding "that a plaintiff failed to establish that an injury was traceable to a defendant when the injury would arise only if some third party decided to take the action triggering the injury."). Here, the causal chain alleged in the Complaint is the State improperly installing SKDK, SKDK flagging O'Handley's tweet to the State, the State flagging O'Handley's tweet to Twitter, O'Handley tweeting several more times, Twitter applying several more labels and strikes over the course of multiple months, and then Twitter suspending O'Handley's account. See Compl. ¶¶ 19–88. That chain involves "numerous third parties" making "independent decisions," culminating in Twitter making the decision to suspend O'Handley's account.

O'Handley's response is again to cry conspiracy: Twitter used the Portal to "streamline state censorship submissions for priority actions"; the State's use of the Portal was an instruction to Twitter to "take down" the flagged tweets; and, "[a]cting as the arm of the OEC," Twitter complied with the State's censorship requests 98% of the time. Opp'n to State MTD at 3. He argues: "These were not 'independent decisions,' but coordinated steps taken in furtherance of a conspiracy." Id. Because, as discussed above, the conspiracy allegations are not plausible—particularly as to the purpose of the defendants' work together—they do not save O'Handley's standing.

Standing allegations "need not be so airtight at this stage of litigation as to demonstrate that the plaintiffs

would succeed on the merits." See Ocean Advocates, 402 F.3d at 860. Even so, given the tenuous causal chain alleged, the Court DISMISSES the claims against the State defendants for lack of standing.[20]

2. State Action

The State defendants next argue that the claims brought under section 1983 all fail because they are not "fairly attributable to" the State. See State MTD at 8 (quoting Pasadena Republican Club v. W. Just. Ctr., 985 F.3d 1161, 1167 (9th Cir. 2021)). O'Handley responds that Twitter is a state actor by virtue of the joint action and nexus tests. Opp'n to State MTD at 3–5.

As discussed above in connection with Twitter's motion to dismiss, the Complaint does not satisfy the joint action test. The nexus test "asks 'whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so the action of the latter may be fairly treated as that of the state itself.'" Gorenc, 869 F.2d at 506 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)); see also Villegas v. Gilroy Garlic Festival Ass'n, 541 F.3d 950, 955 (9th Cir. 2008) (listing factors to consider for nexus test, including whether state officials dominate decision-making of organization and whether organization's funds largely come from state). For the same reasons the Complaint does not meet the joint action test, it also does not meet the nexus test.

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[20] The Court's ruling does not pertain to the California Constitution (Free Speech Clause) claim, over which the Court declines to exercise supplemental jurisdiction.

Because Twitter's actions are not attributable to the State, the Court DISMISSES the First Amendment, Equal Protection, and Due Process[21] claims against the State.

3. Failure to State a Claim

The State defendants next argue that the Complaint fails to state a claim as to each cause of action. See State MTD at 10–15. The Court need not reach most of these arguments. As discussed above in connection with Twitter's motion, the Court also DISMISSES the section 1985 conspiracy claim for failure to state a claim, and declines to exercise supplemental jurisdiction over the California Constitution (Free Speech Clause) claim.

That leaves the claim that O'Handley brings against the State defendants only, alleging that California Elections Code § 10.5 violates the Due Process Clause because it "is impermissibly vague because it fails to provide a reasonable opportunity to know what conduct is prohibited or is so indefinite as to allow arbitrary and discriminatory enforcement." Compl. ¶ 162. A statute can be void for vagueness where it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." United States v. Williams, 553 U.S. 285,

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[21] This refers to the fourth claim for relief, which alleges that the defendants "cause[d] Twitter to inflict the constitutional injury of depriving Plaintiff of his occupation and taking the business goodwill he had garnered through his Twitter account." See Compl. ¶ 152.

304 (2008). The State defendants move to dismiss the void-for-vagueness claim, arguing that "[b]ecause section 10.5 proscribes no speech or conduct, there is no need to provide fair notice of any proscription." State MTD at 14. O'Handley responds that the statute is void for vagueness because it grants OEC the right to "counteract false or misleading information" without defining those terms, and that O'Handley "had no way of knowing what it prohibited, while OEC officials had unbridled discretion to determine what speech warranted action." Opp'n to State MTD at 9.

The State defendants are right, though, that section 10.5 does not prohibit any conduct. It simply sets out the mission of the OEC. See Cal. Elec. Code § 10.5(b)(2) ("To monitor and counteract false or misleading information regarding the electoral process"); id. § (c)(8) ("Assess the false or misleading information regarding the electoral process . . . mitigate the false or misleading information, and educate voters"). It does not restrict what anyone can say. It is therefore "not amenable to a vagueness challenge." See United States v. Beckles, 137 S. Ct. 886, 895 (2017) (no vagueness challenge to U.S. Sentencing Guidelines, which "do not regulate the public by prohibiting any conduct"); see also State v. Dums, 149 Wis. 2d 314, 324 (1989) (void-for-vagueness statute does not apply where statute "does not prohibit conduct, but instead regulates the court's procedure"). And while O'Handley objects to the OEC's "unbridled discretion" under section 10.5, the Supreme Court in Beckles observed that "we have never suggested that unfettered discretion can be void for vagueness." 137 S. Ct. at 895. Unbridled discretion in enacting a statutory mission that does not proscribe

or restrict an individual's conduct is particularly unproblematic.

The Court also rejects O'Handley's suggestion that "false and misleading" are vague terms that he could never hope to understand. See Opp'n to State MTD at 9. "False" and "misleading" are not vague. See, e.g., First Resort, Inc. v. Herrera, 860 F.3d 1263, 1274–75 (9th Cir. 2017) (ordinance prohibiting false or misleading advertising by clinics that do not offer abortion not vague); United States v. Matanky, 482 F.2d 1319, 1321–22 (9th Cir. 1973) (statute proscribing false statements in a manner within the jurisdiction of a department or agency of the United States not vague); United States v. Rodriguez-DeHaro, 192 F. Supp. 2d 1031, 1038–39 (E.D. Cal. 2002) (statute criminalizing the making of "any false or fictitious oral or written statement" in connection with acquisition of firearm not unconstitutionally vague). While O'Handley repeatedly seeks to blur the line between truth and opinion,[22] the word "false" is not up for debate.

Accordingly, the Court DISMISSES the void-for-vagueness claim against the State defendants.

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[22] O'Handley asserts repeatedly that his statements were mere opinions. See, e.g., Compl. ¶ 3 ("Twitter promptly complied with OEC's request to censor Mr. O'Handley's problematic opinions"); id. ¶ 73 (re 11/12/20 tweet: "Mr. O'Handley's Post expressed an opinion widely held by California voters"); ¶ 74 ("personal opinion"); Opp'n to State MTD at 1 ("politically inconvenient opinions"); Opp'n to SKDK MTD at 2 ("labeled Mr. O'Handley's opinion as 'misinformation'"). But "Election fraud is rampant nationwide" is not an opinion. It is an assertion of fact.

4. Qualified Immunity

The State defendants next argue that the five defendants named in their individual capacity (Padilla, Dresner, Jones, Mahood and Valle) are all entitled to qualified immunity. See State MTD at 16. Qualified immunity shields government officials who are performing a discretionary function from money damages unless a plaintiff has pled "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (qualified immunity protects government officials performing a discretionary function).

The State defendants seeking qualified immunity were exercising a discretionary function by identifying and mitigating election misinformation pursuant to section 10.5. What the parties dispute is whether O'Handley has pled that in exercising that discretionary function, those officials violated a constitutional right of O'Handley's that was clearly established. This order already concludes that the Complaint fails to adequately allege the violation of a constitutional right. But the Court also agrees that "there is no controlling precedent that would have informed the State [d]efendants in November 2020 that identifying social media posts containing false or misleading election information to the private platform on which they are posted violates a clearly established constitutional right to a point that is 'beyond debate.'" See State MTD at 16.

O'Handley argues that he need not identify case law arising from analogous circumstances because "a general constitutional rule already identified in the decisional law [applies] with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful." Opp'n to State MTD at 11 (quoting Villarreal v. City of Laredo, Texas, No. 20-40359, 2021 WL 5049281, at *1 (5th Cir. Nov. 1, 2021) (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002))). He maintains that even if section 10.5 is valid, OEC's enforcement of it, "censoring and punishing private speech from public discourse because of the speech's viewpoint," is so clearly unlawful that "no reasonable person would consider it constitutional." Id. at 12.

But the Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." Ashcroft, 563 U.S. at 742. The Complaint here does not plausibly allege that the State defendants engaged in viewpoint discrimination. It alleges that an unidentified OEC official sent a single message to Twitter, flagging a single O'Handley tweet without directing or even requesting that Twitter take any particular action in response to the tweet. See Compl. ¶ 76; Compl. Ex. 9. If there is clearly established law holding that a state employee violates an individual's constitutional rights by flagging his post to the social media company where he posted, O'Handley has not identified it. Indeed, section 10.5 instructed such employees to mitigate false or misleading information. See Cal. Elec. Code § 10.5(b)(2).

Because O'Handley failed to adequately allege that the State defendants violated his constitutional rights or that there was clearly established law such that "every reasonable official would have understood that what he [was] doing violate[d] that right," see Ashcroft, 563 U.S. at 741, the Court GRANTS qualified immunity to the individual State defendants.[23]

Accordingly, the Court GRANTS the State defendant's motion to dismiss as to each of the claims against them, save and except for the California Constitution (Free Speech Clause) claim.

D. SKDK Motion to Dismiss

SKDK moves to dismiss all of O'Handley's claims against it, arguing that (1) the Complaint fails to establish O'Handley's standing; and (2) the Complaint fails to state a claim as to each cause of action. SKDK is correct.

1. Standing

SKDK's first argument is that the Court should dismiss the claims against it because O'Handley lacks standing. To have standing, a plaintiff must establish (1) that he suffered an injury in fact, (2) that his injury is fairly traceable to a defendant's conduct, and (3) that his injury would likely be redressed by a favorable decision. See Lujan, 504 U.S. at 560–61. SKDK argues that O'Handley failed to establish an injury in fact resulting from SKDK's actions and that O'Handley's

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[23] The Court rejects O'Handley's invitation to revisit the law of qualified immunity more broadly. See Opp'n to State MTD at 13 n7.

alleged injury is not traceable to SKDK's conduct. SKDK MTD at 4–6. This is two different ways of saying the same thing: SKDK is not to blame.

The Court agrees. The only relevant allegation about SKDK's actions is that on November 13, 2020, SKDK included one of O'Handley's tweets in its "Misinformation Daily Briefing," which it emailed to Valle, Dresner, Mahood, and Jones at the OEC. Compl. ¶¶ 57–58, 74, Ex. 6. That briefing did not include any commentary about the tweet other than to list it under the heading "California." Id. Ex. 6. It did not instruct the State, or Twitter, to take any action. That was the extent of SKDK's involvement with O'Handley. SKDK's email to OEC did not cause O'Handley any direct harm, and the Complaint does not allege otherwise. O'Handley instead must argue that the harm he experienced when Twitter suspended his account in February 2021—or perhaps when it labeled his tweets or added strikes to his account leading up to that—is traceable to SKDK's November 2020 conduct. See Opp'n to SKDK MTD at 2. He cannot do so.

"In cases where a chain of causation 'involves numerous third parties' whose 'independent decisions' collectively have a 'significant effect' on plaintiffs' injuries," the causal chain is "too weak to support standing." See Maya, 658 F.3d at 1070. If Twitter's enforcement actions regarding O'Handley's tweets cannot be traced back to the State's November 17, 2020 email to Twitter—which the Court concludes above—then those enforcement actions also cannot be traced back to SKDK's November 13, 2020 briefing

email to the State. That causal chain is even longer and involves additional independent decisions.

O'Handley again falls back on his allegations of conspiracy. See Opp'n to SKDK at 2 ("Mr. O'Handley was injured by the foreseeable consequences of the Defendants' conspiracy, whose objectives SKDK both agreed to and contributed overt acts towards.") (citing Compl. ¶¶ 56–57, 68, 74). As discussed above, the conspiracy allegations are not plausible, particularly as to the purpose of the defendants' work together. See Reply re SKDK MTD (dkt. 77) at 9 ("Without any non-conclusory allegations that SKDK had a meeting of the minds with the other Defendants with the shared goal of depriving him of his constitutional rights, O'Handley has failed to plead a conspiracy."). They therefore do not save O'Handley's standing.

Accordingly, the Court DISMISSES the claims against SKDK for lack of standing.[24]

2. Failure to State a Claim

SKDK's second argument is that the Complaint fails to state a claim as to each cause of action. SKDK MTD at 6–15. SKDK argues that the constitutional claims fail because of lack of state action and because SKDK

[24] The Court's ruling does not pertain to the California Constitution (Free Speech Clause) claim, over which the Court declines to exercise supplemental jurisdiction.

did not act under color of state law,[25] and that the claims also fail on their merits. Id.

a. State Action

SKDK maintains that "O'Handley's claims under the First and Fourteenth Amendments, Section 1983, and the California Constitution each fail because those provisions do not apply to private actors like SKDK, but only against the government or those acting under color of state law." SKDK Reply at 6. The Court does not reach the California Constitution (Free Speech Clause) claim. "[C]onduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State." Lugar, 457 U.S. at 937. O'Handley responds that SKDK acted pursuant to a $35 million contract with the State, and that, by joining in a conspiracy with the other defendants, SKDK was a state actor. Opp'n to SKDK MTD at 3–5.

i. Contract

That SKDK acted pursuant to a contract with the State does not means that its actions were state actions. In Rendell-Baker v. Kohn, 457 U.S. 830, 841 (1982), a private high school received funds from the state and had to comply with state regulations. Plaintiffs were former teachers at the school who alleged that their discharges were unconstitutional. Id. at 834. The Supreme Court held that the school's

[25] SKDK treats these as separate arguments in its opening brief, see SKDK MTD at 6–10, but reluctantly adopts O'Handley's combined organization for its reply brief, see SKDK Reply at 6 n.2. This order also handles the state action inquiry all at once.

decisions to discharge the teachers were not "compelled or even influenced by any state regulation." Id. at 841. It stated that "[t]he school . . . is not fundamentally different from many private corporations whose business depends primarily on contracts [with] the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." Id. at 841–42. In Manhattan Community Access Corp., 139 S. Ct. at 1932, the Court likewise explained:

> Numerous private entities in America obtain government licenses, government contracts, or government-granted monopolies. If those facts sufficed to transform a private entity into a state actor, a large swath of private entities in America would suddenly be turned into state actors and be subject to a variety of constitutional constraints on their activities. As this Court's many state-action cases amply demonstrate, that is not the law.

To state a section 1983 claim against SKDK, O'Handley must demonstrate that, notwithstanding SKDK's status as a private entity, SKDK was acting under color of state law. See Gorenc, 869 F.2d at 506. O'Handley argues that SKDK was doing so, based on the joint action and the nexus tests. Opp'n to SKDK MTD at 3.

ii. Conspiracy

O'Handley primarily asserts that he satisfies those tests because he has "plausibly allege[d] that SKDK

conspired with Defendants to deprive individuals of their constitutional rights." Id. at 4 (citing Compl. ¶ 99). But paragraph 99 of the Complaint is a conclusory three sentences about "Twitter's real reasons for suspending" his account, and the only possible reference to SKDK is the line that "[t]he trigger for Twitter's censorship of Mr. O'Handley was its coordination and conspiracy with other Defendants to silence the protected speech of many Americans." See Compl. ¶ 99. O'Handley lists as "Actions in furtherance of the conspiracy" a series of utterly unremarkable events: "creating a state agency to 'monitor and counteract false or misleading information,' outsourcing this task to SKDK with instructions to identify social media 'election misinformation,' and 'working closely and proactively' with social media companies to 'take down sources of misinformation.'" Opp'n to SKDK MTD at 4. Again, such allegations might demonstrate a meeting of the minds to promptly address election misinformation, but not a meeting of the minds to violate anyone's constitutional rights. See Fonda, 707 F.2d at 438. The conspiracy allegations are not plausible.

iii. Other Evidence of Joint Action/Nexus

O'Handley next contends that "[e]ven without evidence of conspiracy," it is possible to demonstrate joint action. Opp'n to SKDK MTD at 4–5. That is true. But then he insists that he has met the joint action and nexus tests "[f]or the same reasons that SKDK and OEC 'conspired.'" Id. at 5. This is problematic for him

given the lack of plausible allegations that the two conspired.

Moreover, the Complaint does not allege that the State exercised any control over the substance of the "Misinformation Daily Briefing," or SKDK's decision to flag O'Handley's tweet. "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives." Blum, 457 U.S at 1004–05. The State may have acquiesced in SKDK's decision to flag O'Handley's tweet, but there are no plausible allegations that the State substantially cooperated with SKDK's flagging of the tweet. See Brunette, 294 F.3d at 1212. Nor was SKDK's decision to flag O'Handley's tweet "compelled or even influenced by any state regulation." See Rendell-Baker, 457 U.S. at 841.

The Complaint therefore fails to satisfy the joint action test. For the same reasons, there are not plausible allegations that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so the action of the latter may be fairly treated as that of the state itself.'" See Gorenc, 869 F.2d at 506 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)); see also Villegas, 541 F.3d at 955. And so the Complaint also fails to satisfy the nexus test. SKDK was not a state actor. It cannot be liable under § 1983. The Court therefore DISMISSES the First Amendment, Equal Protection, and Due Process Claims against SKDK. The Court declines to exercise supplemental jurisdiction over the California Constitution (Free Speech Clause) claim.

b. Remaining Claim

While SKDK makes a number of arguments about O'Handley's claims in addition to the state action argument, see SKDK MTD at 11–14, the Court need not reach them. That leaves only the section 1985 conspiracy claim against SKDK. As discussed above in connection with Twitter and the State defendants, the Complaint fails to adequately allege a meeting of the minds to violate O'Handley's constitutional rights, and therefore fails to adequately allege a conspiracy. See Bray, 506 U.S. at 268 (conspiracy must be aimed at interfering with protected rights); Sanchez, 936 F.2d at 1039 ("mere allegation of conspiracy without factual specificity is insufficient."). The Court DISMISSES that claim against SKDK as well.

Accordingly, the Court GRANTS SKDK's motion to dismiss as to each of the claims against it, save and except for the California Constitution (Free Speech Clause) claim.

E. NASS Motion to Dismiss

Finally, NASS moves to dismiss all of O'Handley's claims against it, arguing that (1) the Court lacks personal jurisdiction over NASS, and (2) the Complaint fails to state a claim as to each cause of action. See NASS MTD.[26] While a "plaintiff need make only a prima facie showing of jurisdictional facts to withstand [a] motion to dismiss," Ballard, 65 F.3d at 1498, O'Handley has not done so; the Court therefore lacks

[26] NASS does not argue, as the State defendants and SKDK do, that O'Handley lacks standing to sue it.

jurisdiction over NASS. In addition, the Complaint fails to state a claim.

1. Personal Jurisdiction

NASS argues that it is an out-of-state nonprofit organization over which the Court has no personal jurisdiction. See NASS MTD at 12–17. NASS notes that it has never had subsidiaries or offices or employees or bank accounts or registered agents in California, has never been registered to do business in California, has no current officers or directors in California, does not direct advertising toward California, and has not contracted with anyone in California to do advertising here. Id. at 9–10 (citing Reynolds Decl. ¶¶ 2, 8). A court has personal jurisdiction over a non-resident defendant when that defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal quotations omitted). California's long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U.S. Constitution. Daimler AG v. Bauman, 571 U.S. 117, 125 (2014).

Personal jurisdiction can be either general or specific. Data Disc, 557 F.2d at 1287. NASS argues that the Court lacks both general jurisdiction and specific jurisdiction. See NASS MTD at 12–17. O'Handley does not contest that this Court lacks general jurisdiction. See generally Opp'n to NASS MTD (dkt. 67). The question is therefore whether the Court has specific jurisdiction.

"There are three requirements for a court to exercise specific jurisdiction over a nonresident defendant: (1) the defendant must either 'purposefully direct his activities' toward the forum or 'purposefully avail himself of the privileges of conducting activities in the forum'; (2) 'the claim must be one which arises out of or relates to the defendant's forum-related activities'; and (3) 'the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.'" Axiom Foods, Inc. v. Acerchem Int'l, Inc., 874 F.3d 1064, 1068 (9th Cir. 2017) (original alterations omitted). The plaintiff has the burden on the first two prongs, after which "the burden . . . shifts to the defendant to 'present a compelling case' that the exercise of jurisdiction would not be reasonable." Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004).

While the parties initially disagreed about whether the purposeful availment or purposeful direction tests apply, see NASS MTD at 13; Opp'n to NASS MTD at 4, they ultimately agreed that the Court should apply the "Calder test" pursuant to Calder v. Jones, 465 U.S. 783 (1984), see Opp'n to NASS MTD at 4 (applying Calder); Reply re NASS MTD (dkt. 76) at 8–12 (applying Calder); see also Yahoo! Inc. v. LA Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006) (applying Calder test to case involving constitutional claims). The Calder test requires that a defendant have "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." Yahoo!, 433 F.3d at 1206.

O'Handley argues that NASS expressly aimed its censorship efforts at California, knowing that harm would occur here. See Opp'n to NASS MTD at 4–6. But the allegations do not support that position. The Complaint alleges broadly that NASS "spearheaded efforts to censor disfavored election speech" by "creat[ing] direct channels of communication between Secretaries of States' staff and social media companies." Compl. ¶¶ 26, 27. It focuses on three emails that NASS's Director of Communications presumably sent to all of its members' "Communications Directors." See id. Exs. 2–4. Those emails: (1) state that "Twitter asked her to let Secretary of States' offices know that it had created a separate dedicated way for election officials to 'flag concerns directly to Twitter,'" id. ¶ 28, Ex. 2 (10/1/20 email); (2) explain that "if your state is onboarded into the [Twitter] partner support portal, it provides a mechanism to report election issues and get them bumped to the head of the queue," id. ¶ 29, Ex. 3 (8/28/20 email); and (3) state that "If you see something on a platform, please report it. In addition, please pass this on to your local election officials as well. I would also appreciate a heads up so I know what is going on, this helps us create a more national narrative," id. ¶ 30, Ex. 4 (4/30/19 email).

NASS contends that those contacts are inadequate. NASS MTD at 14 (citing Asahi Metal Industries Co. v. Superior Court of California, 480 U.S. 102 (1987)). In Asahi, 480 U.S. at 112, the Supreme Court explained that it was not enough to put a product into the stream of commerce, knowing "that the stream of commerce may or will sweep the product into the forum state."

The manufacturer in that case had no offices, agents, employees, or property in California, and did not control the distribution system that carried its product into California. Id. at 108. It was not subject to personal jurisdiction in California because there was no "additional conduct" that would "indicate an intent or purpose to serve the market in the forum State, like designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a . . . sales agent in the forum State." Id. at 112; see also Rio Props., Inc. v. Rio Intern. Interlink, 284 F.3d 1007, 1019 (9th Cir. 2002) (passive website was inadequate for express aiming; "'something more' was required to indicate that the defendant purposefully directed its activity in a substantial way to the forum state."). NASS argues persuasively that, as in Asahi, it had no presence in California and no additional conduct demonstrating a focus on California. NASS MTD at 14.

Mavrix Photo, Inc. v. Brand Techs., Inc., 647 F.3d 1218 (9th Cir. 2011), to which O'Handley cites, see Opp'n to NASS MTD at 4–5, is an example of what "additional conduct" or "something more" might look like. In that case, Brand posted celebrity photos taken by Mavrix on its website without Mavrix's permission. Mavrix Photo, Inc., 647 F.3d at 1223. Even though Brand had no offices, property or staff in California, it had a number of other ties—profiting from third-party advertisements in California, including on its site a Ticket Center that sold tickets to events in California, having agreements with several California businesses, including a link-sharing agreement with a California-

based news site, and having "[a] substantial number of hits" on the website from California residents—that made specific jurisdiction appropriate. Id. at 1222, 1229, 1230; see also id. at 1229 ("Brand used Mavrix's copyrighted photos as part of its exploitation of the California market for its own commercial gain."). NASS does not have any comparable ties to California, and cannot be said to be exploiting California through its emails. See also PREP Tours, Inc. v. American Youth Soccer Organization, 913 F.3d 11, 23–24 (1st Cir. 2019) (nine emails and a number of telephone calls to single recipient in forum state did not show that the defendants were "contemplating the kind of ongoing and close-working relationship . . . that could establish the requisite substantial connection between the defendants and the forum.").

O'Handley would dispute that NASS's involvement in this case is limited to emails. He argues in his opposition brief that "NASS specifically coordinated with both Twitter and OEC, both located in California"[27] and "actually set the ball in motion, creating [the portal] in partnership with Twitter, and then repeatedly encouraging its membership to join the portal, giving its members guidance and direction on portal use, using the portal to itself request speech censorship on behalf of its members, and serving as a liaison between Twitter and its members." Opp'n to NASS MTD at 6. But there is no allegation in the

[27] O'Handley suggests that there is jurisdiction because Twitter and "all major social media platforms" are in California. See Opp'n to NASS MTD at 5. Under that theory, California would have jurisdiction over all cases involving social media.

Complaint that NASS created, or co-created, the Portal.[28] And despite O'Handley's assertion in opposing NASS's motion that NASS was involved in the creation of the Portal, see, e.g., id. at 1 ("NASS worked specifically with Twitter . . . to create [the Portal]"); id. at 2 ("Prior to OEC using the portal created and promulgated by NASS"), his arguments in opposing other motions reflect that only Twitter created the Portal, see Opp'n to Twitter MTD at 1 ("Twitter established the 'Partner Support Portal'"); Opp'n to State MTD at 3 ("By using a dedicated portal Twitter created"). Nor is it accurate to say that NASS repeatedly encouraged its members to join the Portal. See Compl. Ex. 2 ("If you do decide to join the [Portal] please cc' me for awareness. . . But alas, if you'd like to just report to the new CIS reporting structure that works too! Up to you!"), Ex. 3 ("If you're not on the list and would like to get on-boarded please email psponboarding@twitter.com"), Ex. 4 ("Twitter has an election partner portal which NASS has access to"). And the only allegation that NASS used "the portal to itself request speech censorship on behalf of its

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[28] There is a vague allegation in the Complaint that "NASS created direct channels of communication between Secretaries of States' staff and social media companies to facilitate the quick take-down of speech deemed 'misinformation.'" Compl. ¶ 27. The Court reads that allegation as a reference to NASS's emails alerting its members to the Portal, and to other social media companies' similar tools. The next paragraph alleges that Twitter created the Portal and that NASS's role was to alert its members to its existence. See id. ¶ 28 (". . . Twitter asked her to let Secretary of States' offices know that it had created a separate dedicated way for election officials to 'flag concerns directly to Twitter.'"); see also Compl. Ex. 2.

members" is the email that states that Twitter has a Portal and "You will need to email me . . . as much information as you have and I will submit it through the portal." Id. Ex. 4. That email says nothing about censorship.

Ultimately, the Court is not persuaded that NASS's emails to all of its members—rather than to the California Secretary of State in particular—informing them about the Portal demonstrate the kind of express aiming required under Calder. National organizations are not subject to jurisdiction in every state where their members live. See Szabo v. Med Info. Bureau, 127 Cal. App. 3d 51, 53 (1981) (collecting cases).[29] Presumably that holds true even if the organization emails all of its members.

O'Handley has failed to meet the Calder test. The Court need not reach the remainder of the specific jurisdiction requirements, and GRANTS the motion for lack of personal jurisdiction.

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[29] Amazon.com, Inc. v. National Association of College Stores, Inc., 826 F. Supp. 2d 1242 (W.D. Wash. 2011), on which O'Handley relies, see Opp'n to NASS MTD at 4–5, is distinguishable. Although that case involved a nonprofit trade association, the basis for jurisdiction was not that the association had a member in a particular state or even that it had communicated with that member. The trade association had sent a letter to Amazon raising a legal concern, then initiated a challenge against Amazon before the Better Business Bureau. Id. at 1246–47. There was jurisdiction because the trade association had "expressly aimed its actions at Washington by individually targeting Amazon, the Washington-based plaintiff." Id. at 1255. NASS did not "individually target[]" California. It sent its emails to all of its members.

2. Failure to State a Claim

NASS next argues that the Complaint fails to state a claim as to each cause of action. NASS MTD at 17–26. NASS asserts that the federal constitutional claims and California Constitution (Free Speech Clause) claim fail because NASS is not a state actor, id. at 17–25, and that the section 1985 claim fails because O'Handley fails to allege a conspiracy that would violate his constitutional rights, id. at 25–26; Reply re NASS MTD at 19–20.

a. State Action

As discussed above in connection with the other defendants, NASS is correct that the Complaint's federal constitutional claims require state action.[30] Moreover, as NASS points out, there is a "'presumption that private conduct does not constitute governmental action.'" NASS MTD at 20 (quoting Sutton v. Providence St. Joseph Med. Center, 192 F.3d 826, 835 (9th Cir. 1999)). O'Handley concedes this point as to the federal claims, but asserts that he has overcome the presumption here, because NASS and the State "'acted in concert in effecting a particular deprivation of constitutional rights.'" Opp'n to NASS MTD at 8–10 (quoting Tsao, 698 F.3d at 1140). He asserts that the Complaint satisfies both the joint action test and the nexus test, largely because of his conspiracy allegations. Id.

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[30] Again, the Court will not reach the California Constitution (Free Speech Clause) claim herein.

i. Conspiracy

O'Handley's conspiracy allegations do not demonstrate that NASS acted jointly with the State. See id. (citing Compl. ¶ 99). As discussed above, paragraph 99 of the Complaint is a conclusory three sentences about "Twitter's real reasons for suspending" O'Handley's account, and the only possible reference to NASS is the line that "[t]he trigger for Twitter's censorship of Mr. O'Handley was its coordination and conspiracy with other Defendants to silence the protected speech of many Americans." See Compl. ¶ 99. O'Handley argues that NASS's emails with OEC about reporting misinformation through the Twitter Portal prove that the defendants had a meeting of the minds. Opp'n to NASS MTD at 9–10 (citing Compl. Exs. 2, 3). But those emails from NASS to its members do not reflect a meeting of the minds to do anything; they show NASS passing along information, see Compl. Ex. 2 (members free to use Twitter Portal or alternative tool; "Up to you!"), and in one instance asking, "If you see [Mis/Disinformation] on a platform, please report it," id. Ex. 4. Even if they reflected a meeting of the minds to counteract election misinformation, that is not a meeting of the minds to violate constitutional rights. See Fonda, 707 F.2d at 438.

O'Handley's additional arguments about conspiracy fare no better. He again states that NASS "work[ed] with Twitter to create" the Portal, see Opp'n to NASS MTD at 9, an allegation absent from the Complaint. He contends that NASS "gave California's OEC guidance regarding how to report mis/disinformation directly,"

but cites only to an allegation in the Complaint that NASS emailed all of its members that it "wanted election officials to have NASS's email guidance regarding how to report 'mis/disinformation' directly to social media companies 'handy.'" See id. (citing Compl. ¶ 31, Ex. 4). And he adds that NASS asked its members to alert it to misinformation so that it could "create a more national narrative." Id. (citing Compl. ¶ 30, Ex. 4). But sharing information with Secretaries of State is not an act "unlikely to have been undertaken without an [illicit] agreement," see Mendocino Env'tl Ctr., 192 F.3d at 1301. It is NASS's explicit purpose. See Reynolds Decl. ¶¶ 3, 6 (NASS is a nonprofit professional organization whose function is to "serve[] as a medium for the exchange of information between states" and to "foster[] cooperation in the development of public policy.").

The conspiracy allegations are not plausible.

ii. Other Evidence of Joint Action/Nexus

O'Handley again contends that "[e]ven without evidence of conspiracy," he has met the joint action and nexus tests "[f]or the same reasons that NASS and OEC 'conspired.'" Id. at 5. Again, this argument is unavailing given the lack of plausible allegations that the two conspired. O'Handley cites to allegations that "NASS instructed OEC on how to report [misinformation] to Twitter," that OEC used the Portal, and that NASS later "awarded OEC for their censorship efforts," Opp'n to NASS MTD at 10 (citing Compl. ¶¶ 32, 61, 64, Ex. 4). O'Handley thus concludes that NASS "affirmed, authorized, encouraged and

facilitated the plan to have Secretaries of State, including OEC, report disfavored tweets directly to social media," and that OEC "'affirmed, authorized, encouraged, and facilitated' NASS's efforts by their use of the portal." Id. (referencing Polk v. Yee, 481 F. Supp. 3d 1060, 1068 (E.D. Cal. 2020)).

The court in Polk, 481 F. Supp 3d at 1066, recognized that one way of showing joint action is "where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party." That case involved a section 1983 suit against the California State Controller and the Union, alleging the deprivation of the First Amendment right to refrain from subsidizing Union speech through dues. Id. at 1063–64. The Union moved to dismiss, asserting a lack of state action. Id. at 1066. The court held that despite "a connection between the constitutional violation and the state action," the plaintiffs had failed to allege "that the Union acted in concert with the state to cause the [harm], especially given the state's lack of involvement in the drafting and executing of the Union agreements." Id. at 1067.

Here, there are no plausible allegations that NASS or the State affirmed any unconstitutional conduct by the other. The State's alleged agreement to use the Portal did not affirm unconstitutional conduct, as an organization emailing its members with information about how to report election misinformation is not unconstitutional. NASS's award to OEC, premised OEC's identification and removal of "misinformation," Compl. ¶ 65, Ex. 8, and "misleading social media

posts," id. ¶ 64—not "disfavored tweets," see Opp'n to NASS MTD at 10—also did not affirm unconstitutional conduct, as identifying and removing such material is not unconstitutional.

And, as in Polk, 481 F. Supp. 3d at 1067, there is a "lack of involvement" by the State here. NASS is a private organization that emailed its members information about how to report election misinformation. See Compl. ¶¶ 27–31, Exs. 2–4. Sharing information with the government does not amount to joint action. See Lockhead, 24 Fed. App'x at 806. The Complaint does not allege that the State told NASS to send its emails. It alleges only that the State made use of the information NASS sent, employing the Portal to report election misinformation. Compl. ¶ 32 (not actually stating that the State did so when flagging O'Handley's tweet). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives." Blum, 457 U.S at 1004–05. In addition, the circuit requires "substantial cooperation" or that the private entity's and government's actions be "inextricably intertwined." See Brunette, 294 F.3d at 1212. There are no plausible allegations that the two entities' actions were inextricably intertwined. See Brunette, 294 F.3d at 1212–13 (no joint action where each party acted independently and did not assist one another with their separate tasks). There are no plausible allegations that NASS substantially cooperated, or cooperated at all, in the State's review of social media posts and its determinations of which posts to flag as misinformation.

The Complaint therefore fails to satisfy the joint action test. For the same reasons, there are not plausible allegations to satisfy the nexus test. See Gorenc, 869 F.2d at 506; Villegas, 541 F.3d at 955. NASS, like Twitter and SKDK, was not a state actor. It cannot be liable under § 1983. The Court therefore DISMISSES the First Amendment, Equal Protection, and Due Process Claims against NASS.

b. 1985 Claim

As discussed above in connection with the other defendants, the Complaint fails to adequately allege a meeting of the minds to violate O'Handley's constitutional rights, and therefore fails to adequately allege a conspiracy. See Bray, 506 U.S. at 268 (conspiracy must be aimed at interfering with protected rights); Sanchez, 936 F.2d at 1039 ("mere allegation of conspiracy without factual specificity is insufficient."). The Court DISMISSES that claim against NASS as well.

Accordingly, the Court GRANTS NASS's motion to dismiss as to each of the claims against it, save and except for the California Constitution (Free Speech Clause) claim.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS the motions to dismiss. The Court dismisses all of the federal claims with prejudice, as it is convinced that, given the infirmities in the current complaint, O'Handley could not amend sufficiently to state a claim. See Cook, Perkiss & Liehe, Inc., 911 F.2d at 246–47 (amendment would be futile). The Court

dismisses the California Constitution (Free Speech Clause) claim without prejudice to O'Handley bringing that claim in state court. The Court does not reach Twitter's Anti-SLAPP Motion.

IT IS SO ORDERED.

Dated: January 10, 2022

/s/ Charles R. Breyer
CHARLES R. BREYER
United States District Judge

APPENDIX C

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

Case No. 21-cv-07063-CRB

[Filed January 10, 2022]

ROGAN O'HANDLEY, Plaintiff,	)
v.	)
ALEX PADILLA, et al., Defendants.	)

JUDGMENT

The Court hereby enters judgment for Defendants and against Plaintiff Rogan O'Handley, consistent with the Court's order granting Defendants' motions to dismiss. See Order (dkt. 86).[1]

IT IS SO ORDERED.

[1] The Court declined to exercise supplemental jurisdiction over the California Constitution (Free Speech clause) claim, and dismissed it without prejudice to Plaintiff bringing that claim in state court. See Order at 47.

Dated: January 10, 2022

/s/ Charles R. Breyer
CHARLES R. BREYER
United States District Judge

APPENDIX D

2020 California Code

Elections Code - ELEC

DIVISION 0.5 - PRELIMINARY PROVISIONS

CHAPTER 1 - General Provisions

Section 10.5.

Universal Citation: CA Elec Code § 10.5 (2020)

10.5.

(a) There is established within the Secretary of State the Office of Elections Cybersecurity.

(b) The primary missions of the Office of Elections Cybersecurity are both of the following:

(1) To coordinate efforts between the Secretary of State and local elections officials to reduce the likelihood and severity of cyber incidents that could interfere with the security or integrity of elections in the state.

(2) To monitor and counteract false or misleading information regarding the electoral process that is published online or on other platforms and that may suppress voter participation or cause confusion and disruption of the orderly and secure administration of elections.

(c) The Office of Elections Cybersecurity shall do all of the following:

(1) Coordinate with federal, state, and local agencies the sharing of information on threats to election cybersecurity, risk assessment, and threat mitigation in a timely manner and in a manner that protects sensitive information.

(2) In consultation with federal, state, and local agencies and private organizations, develop best practices for protecting against threats to election cybersecurity.

(3) In consultation with state and local agencies, develop and include best practices for cyber incident responses in emergency preparedness plans for elections.

(4) Identify resources, such as protective security tools, training, and other resources available to state and county elections officials.

(5) Advise the Secretary of State on issues related to election cybersecurity, and make recommendations for changes to state laws, regulations, and policies to further protect election infrastructure.

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

(7) Coordinate efforts within the Secretary of State to protect the security of Internet-connected

elections-related resources, including all of the following:

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

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

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

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

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

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

APPENDIX E

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed June 17, 2021]

ROGAN O'HANDLEY,	)
Plaintiff,	)
	)
v.	)

ALEX PADILLA, in his personal capacity; SKDKnickerbocker, LLC, a Delaware company; PAULA VALLE CASTAÑON, in her personal capacity; JENNA DRESNER, in her personal capacity; SAM MAHOOD, in his personal capacity; AKILAH JONES; in her personal capacity; SHIRLEY N. WEBER, in her official capacity as California Secretary of State; TWITTER, INC., a Delaware corporation; NATIONAL ASSOCIATION OF SECRETARIES OF STATE, a professional nonprofit organization; Defendants.	)

Case Number:

COMPLAINT FOR DECLARATORY JUDGMENT, DAMAGES, AND INJUNCTIVE RELIEF

DEMAND FOR JURY TRIAL

Plaintiff Rogan O'Handley, through his undersigned counsel, states the following claims for relief against Alex Padilla, in his personal capacity; SKDKnickerbocker, LLC, a Delaware corporation; Paula Valle Castañon, in her personal capacity; Jenna Dresner, in her personal capacity; Sam Mahood, in his personal capacity; Akilah Jones; in her personal capacity; Shirley N. Weber, in her official capacity as California Secretary of State; Twitter, Inc., a Delaware corporation; and the National Association of Secretaries of State, a professional nonprofit organization.

INTRODUCTION

1. Against a backdrop of alleged foreign interference in the 2016 election, various state election agencies, state election officials, national organizations, and social media companies mounted campaigns to combat election misinformation concerns on social media for the 2020 election. While many of these entities pursued a traditional path of educating the public with useful information, others went in a new direction, seeking aggressively to suppress speech they deemed to be "misleading," under the guise of fostering "election integrity." The State of California generally, and the Secretary of State's Office of Elections Cybersecurity in partnership with the other Defendants specifically, took the latter path.

2. California's initial foray into the brave new world of engineering better election outcomes, California Elections Code §10.5, created the Office of Elections Cybersecurity in 2018 to "educate voters" with "valid information" through empowering election officials (hereinafter "OEC"). This seemingly benign mandate quickly and predictably devolved into a political weapon for censorship of disfavored speech by an overtly partisan Secretary of State's office, more resembling an Orwellian "Ministry of Approved Information" than a constitutionally restrained state agency. The OEC deployed government force to bolster the personal political goals of Democrat office holders, most notably including then-Secretary of State Alex Padilla ("Padilla"). Padilla abused his office and the public trust in a myriad of ways, unprecedented even in a California where political corruption has become

part of the landscape, as predictable as the sun setting over the Pacific Ocean.

3. Plaintiff Rogan O'Handley ("Mr. O'Handley) was just one of many speakers targeted in California's tainted censorship process. Mr. O'Handley's speech infraction was his expression of the opinion that California, along with the rest of the nation, should audit its elections to protect against voter fraud. A Democratic political consultant—hired with taxpayer dollars in a closed-bid, closed-door boondoggle to which not even California's Democrat Controller could turn a blind eye—flagged Mr. O'Handley's inconvenient speech to the OEC as evidence of "election misinformation." The OEC, an office within the primary agency whose job performance would be scrutinized by an audit, then contacted Twitter through dedicated channels Defendants created to streamline censorship requests from government agencies. Twitter promptly complied with the OEC's request to censor Mr. O'Handley's problematic opinions from its platform, and ultimately banned his account, which had reached over 440,000 followers at its zenith, for violating Twitter's civic integrity policy.

4. The founding fathers fought and died for the right to criticize their government, and enshrined that foundational right as central in the pursuit of the new nation. Defendants' exercise of government force to censor political speech with which they disagree flies in the face of the ideals upon which our nation was founded, and violates numerous state and federal constitutional rights.

JURISDICTION

5. This Court has federal question jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 because Plaintiff's claims arise under the First and Fourteenth Amendments to the U.S. Constitution. Further, the Court has jurisdiction pursuant to 28 U.S.C. § 1343 because Plaintiff seeks relief under 42 U.S.C. § 1983.

6. This action is an actual controversy, and under 28 U.S.C. §§ 2201 and 2202, this Court has authority to grant declaratory relief, and other relief, including temporary, preliminary, and permanent injunctive relief, pursuant to Rule 65 of the Federal Rules of Civil Procedure, and may declare the rights of Plaintiff.

7. This Court has supplemental jurisdiction over state law claims presented in this matter pursuant to 28 U.S.C. § 1367, because the claims are so related to the federal constitutional claims in this action such that they do not raise novel or complex issues of state law and do not substantially predominate over the federal claims. There are, further, no exceptional circumstances compelling declining state law claims.

8. Venue is proper in the Central District of California under 28 U.S.C. § 1391(b)(1) because a plurality of Defendants maintain residence or offices in Los Angeles County, and most Defendants are residents of California (within the meaning of 28 U.S.C. § 1391(c)). Venue is also proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the acts or omissions giving rise to the claim occurred in this judicial district.

PARTIES

9. Plaintiff Rogan O'Handley resides in St. Petersburg, Florida. He is an attorney licensed to practice in the state of California, social media influencer with over 3 million combined followers across various social media platforms, civil rights activist, political commentator, and journalist.

10. Defendant Alex Padilla ("Padilla"), sued in his personal capacity, was California Secretary of State at the time of the injury to Plaintiff, authorized the disputed contract with Defendant SKDK, and oversaw the efforts to take down disfavored speech. Upon information and belief, Defendant Padilla is a resident of Los Angeles County.

11. Defendant SKDKnickerbocker LLC ("SKDK") is a public affairs and consulting firm known for working with Democrat politicians and political hopefuls, and for progressive political causes. SKDK is a Delaware company that maintains a California office at 3105 S. La Cienega Blvd., Los Angeles, CA 90016.

12. Defendant Paula Valle Castañon ("Ms. Castañon"), upon information and belief previously going by the name of Paula Valle, sued in her personal capacity, at the time of Plaintiff's injury served as the Deputy Secretary of State, Chief Communications Officer for Alex Padilla, California Secretary of State. Ms. Castañon led the communications division of the Office of the Secretary of State. Upon information and belief, Ms. Castañon is a resident of Los Angeles County.

13. Defendant Jenna Dresner ("Ms. Dresner"), sued in her personal capacity, is Senior Public Information Officer for the OEC. Upon information and belief, Ms. Dresner is a resident of Los Angeles County.

14. Defendant Sam Mahood ("Mr. Mahood"), sued in his personal capacity, was Press Secretary for California Secretary of State Alex Padilla, and one of the OEC employees responsible for receiving reports of alleged election misinformation from Defendant SKDK and requesting social media platforms censor speech with which the OEC disagreed during the 2020 election. When Mr. Padilla was elevated to become United States Senator from California, Sam Mahood followed Mr. Padilla to become his Special Projects and Communications Advisor. Upon information and belief, Mr. Mahood is a resident of Sacramento County.

15. Defendant Akilah Jones ("Ms. Jones"), sued in her personal capacity, was OEC's Social Media Coordinator responsible for receiving reports of election misinformation from Defendant SKDK and requesting social media platforms censor speech with which the OEC disagreed during the 2020 election. Upon information and belief, Ms. Jones is a resident of Sacramento County.

16. Defendant Shirley N. Weber, sued in her official capacity as California Secretary of State, is the state official responsible for implementing California Elections Code §10.5. and has oversight over the actions of the OEC. She maintains an office in Sacramento County.

17. Defendant Twitter is a microblogging and social networking service with roughly 330 million monthly active users. Twitter is incorporated in Delaware and maintains its principal place of business at 1355 Market Street, Suite 900, San Francisco, CA 94103.

18. Defendant National Association of Secretaries of State is a professional organization for state Secretaries of State, headquartered at 444 North Capitol Street NW, Suite 401, Washington, D.C., 20001. The National Association of Secretaries of State does business in California, and the California Secretary of State is an association member.

FACTS

19. In 2018, the California legislature passed, and then-Governor Brown signed, AB 3075, which created the OEC within the California Secretary of State's office.

20. Codified at California Elections Code §10.5, one of the "primary missions" of the OEC is "[t]o monitor and counteract false or misleading information regarding the electoral process that is published online or on other platforms and that may suppress voter participation or cause confusion and disruption of the orderly and secure administration of elections." Cal.Elec.Code § 10.5(b)(2).

21. California Elections Code § 10.5 further states the OEC shall, "[a]ssess the false or misleading information regarding the electoral process described in paragraph (2) of subdivision (b), mitigate the false or misleading information, and educate voters, especially

new and unregistered voters, with valid information from elections officials such as a county elections officials or the Secretary of State." Cal.Elec.Code § 10.5(c)(8).

22. The OEC, under the direction of then-Secretary of State Padilla, seized on the statutory phrase "mitigate [] false or misleading information," as a license to quash politically-disfavored or inconvenient speech.

23. Padilla's censorship program targeted speech implicating his administration of elections in his capacity as Secretary of State.

24. In a written response to CalMatters reporter Freddy Brewster's November 2020 inquiry regarding how OEC handled "voter misinformation," the OEC explained: "[O]ur priority is working closely with social media companies to be proactive so when there's a source of misinformation, we can contain it." A true and correct copy of OEC's comments, as obtained through a public record request, is attached to this complaint as Exhibit 1.

25. The OEC further explained the close working relationship with private social media companies thus:

> We have working relationships and dedicated reporting pathways at each major social media company. When we receive a report of misinformation on a source where we don't have a pre existing pathway to report, we find one. We've found that many social media companies are taking responsibility on themselves to do this work as well. **We work[] closely and**

> **proactively with social media companies to** keep misinformation from spreading, **take down sources of misinformation as needed,** and promote our accurate, official election information at every opportunity.

See Exhibit 1 (emphasis added).

26. The National Association of Secretaries of State ("NASS") spearheaded efforts to censor disfavored election speech.

27. NASS created direct channels of communication between Secretaries of States' staff and social media companies to facilitate the quick take-down of speech deemed "misinformation."

28. For instance, NASS Director of Communications Maria Benson stated in email that Twitter asked her to let Secretaries of States' offices know that it had created a separate dedicated way for election officials to "flag concerns directly to Twitter." A true and correct copy of Maria Benson's October 1, 2020, email, as obtained through a public records request, is attached to this complaint as Exhibit 2.

29. NASS's dedicated reporting channel to Twitter, according to Maria Benson, would get Secretaries of States' employees' censorship requests "bumped to the head of the queue." A true and correct copy of Maria Benson's August 8, 2020, email, as obtained through a public record request, is attached to this complaint as Exhibit 3.

30. NASS asked its members to give it a "heads up" when officials saw mis-or disinformation on social

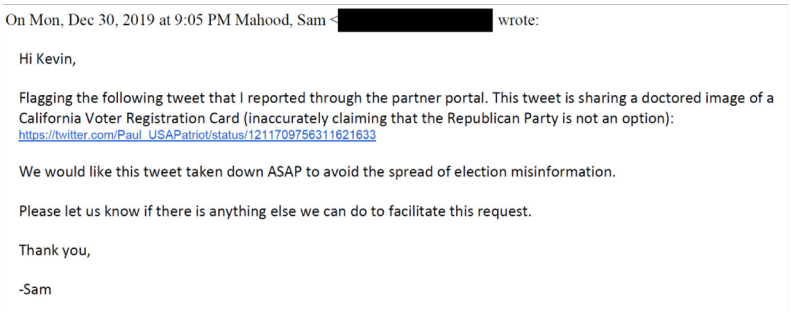
platforms to help NASS "create a more national narrative." A true and correct copy of Maria Benson's August 8, 2020, email, as obtained through a public record request, is attached to this complaint as Exhibit 4.

31. NASS wanted election officials to have NASS's email guidance regarding how to report "mis/disinformation" directly to social media companies "handy" directly prior to election day as election officials "prepare[d] for battle." A true and correct copy of Maria Benson's November 2, 2020, email, as obtained through a public record request, is attached to this complaint as Exhibit 4.

32. The California Secretary of State's office participated in Twitter's dedicated "Partner Support Portal."

33. Presumably, the California Secretary of State's office's participation in Twitter's "Partner Support Portal" did ensure the Secretary of State's requests to take down speech were a high priority for Twitter.

34. As an example, on December 30, 2019, Mr. Mahood emailed Twitter's Kevin Kane the following regarding another Twitter user (not Mr. O'Handley):



On Mon, Dec 30, 2019 at 9:05 PM Mahood, Sam <[redacted]> wrote:

Hi Kevin,

Flagging the following tweet that I reported through the partner portal. This tweet is sharing a doctored image of a California Voter Registration Card (inaccurately claiming that the Republican Party is not an option):
https://twitter.com/Paul_USAPatriot/status/1211709756311621633

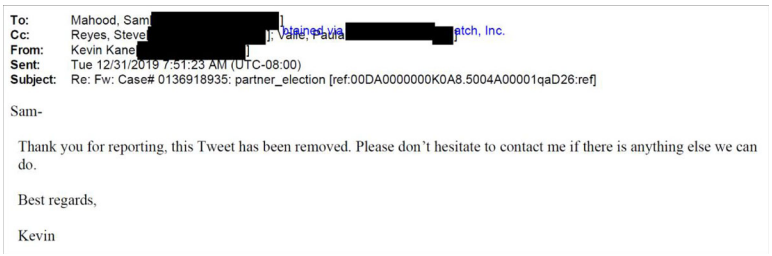
We would like this tweet taken down ASAP to avoid the spread of election misinformation.

Please let us know if there is anything else we can do to facilitate this request.

Thank you,

-Sam

35. Kevin Kane responded to Sam Mahood's request to take down the tweet before 8:00 am the next morning, which happened to be New Year's Eve, stating:



To: Mahood, Sam[redacted]
Cc: Reyes, Steve[redacted]; Valle, Paula[redacted]
From: Kevin Kane[redacted]
Sent: Tue 12/31/2019 7:51:23 AM (UTC-08:00)
Subject: Re: Fw: Case# 0136918935: partner_election [ref:00DA0000000K0A8.5004A00001qaD26:ref]

Sam-

Thank you for reporting, this Tweet has been removed. Please don't hesitate to contact me if there is anything else we can do.

Best regards,

Kevin

See Exhibit 5.

36. At the same time OEC officials and NASS were working externally to streamline their speech takedown processes with social media companies, the OEC also decided to broaden and outsource its efforts to search out "objectionable" speech to censor.

37. On July 17, 2020, Padilla's office sent an email to fifteen political consultants and political affairs professionals, many of whom worked on the campaigns of prominent Democrats, offering them the opportunity to participate in an invitation-only,

expedited bidding process outside California's Public Contract Code's mandated transparent competitive bid process. The winning bid would facilitate the office's $35-million-dollar "Vote Safe California" initiative.

38. The purpose of the Public Contract Code's mandated transparent competitive bid process is to protect taxpayers against cronyism and partisanship.

39. Mr. Padilla sidestepped the Public Contract Code's statutory bidding requirements by claiming he had "emergency authority" to create the contract.

40. Padilla received seven bids from the OEC's hand-picked list of political consultants/allies.

41. Padilla's staff, in a closed-door review process, anointed the winner of the $35-million-dollar contract.

42. Padilla awarded the $35-million-dollar contract to Defendant SKDKnickerbocker ("SKDK"), a political consulting firm heavily involved in then-candidate Joe Biden's presidential campaign.

43. As described by Reuters.com, "SKDK is closely associated with the Democratic Party, having worked on six presidential campaigns and numerous congressional races." See Joel Schechtman, Raphael Satter, Christopher Bing, Joseph Menn, Exclusive: Microsoft believes Russians that hacked Clinton targeted Biden campaign firm – sources, REUTERS (Sept. 10, 2020, 12:30 am), https://www.reuters.com/article/us-usa-election-cyber-biden-exclusive/ exclusive-russian- state-hackers-suspected-in-targeting-biden-campaign-firm-sources-idUSKBN2610I4.

44. Padilla's contract award to SKDK raised bipartisan ire, for different reasons.

45. Congressional and State Republicans questioned the appropriateness of SKDK, which publicly boasted its involvement and support for one of the presidential candidates on the ballot, spending taxpayer dollars to create and administer a "non-partisan" voter information campaign at the behest of a partisan Democrat public official.

46. Additionally, at the time of the award, Padilla was reportedly already under consideration to fill then Vice-Presidential candidate Kamala Harris's California Senate seat, should Biden/Harris win the presidential Election. See Bee Editorial Board, If Gavin Newsom picks Alex Padilla for the U.S. Senate, who owns his $34 million mess?, (December 17, 2020) https://www.sacbee.com/opinion/editorials/article247894900.html.

47. Padilla's considerable investment of taxpayer dollars to a Biden-ticket associated firm, when he presumably stood to personally benefit from that ticket's elevation to higher office, smacked of a conflict of interest. *Id.*

48. Further, Fabian Núñez, former Assembly Democratic speaker and partner at losing bidder Mercury Public Affairs, also raised significant questions regarding the contract award. Emily Hoeven, Will state stick 'Team Biden' firm with $35 million tab after Yee balks at Padilla vote contract?, CALMATTERS.ORG (November 23, 2020),

https://calmatters.org/politics/2020/11/biden-firm-california-vote-contract-padilla-yee/.

49. Núñez filed a formal protest with the Secretary of State stating SKDK's proposal contained "material violations" that led to SKDK having a "significant and profound unfair advantage in winning the work." *Id.*

50. Núñez requested the Secretary of State administer "[a] fair bidding process in which all responsible bidders are evaluated by the exact same rules [as] the public and all bidders expect." *Id.*

51. Padilla's office rejected Núñez's protest on Sept. 1, stating that "common procedures or practices applicable to competitive bid agreements … do not apply for the process used for an emergency contract." *Id.*

52. In addition to a suspect process, Padilla awarded this contract despite having no budgetary authority for it.

53. Padilla's lack of budgetary authority to award the contract led California State Controller Betty Yee to reject paying SKDK in a public and drawn-out battle over the state's budgetary authority. Associated Press, California lawmakers ok payment for voter outreach campaign, FOX 40 (February 23, 2021, 9:21 AM) https://fox40.com/news/california-connection/california-lawmakers-ok-payment-for-voter-outreach-campaign/.

54. SKDK did not receive payment until February 2021, after Padilla's elevation to be California's next Senator. *Id.*

55. In February 2021, by a party line vote, the California legislature agreed to pay Padilla's past due bills to SKDK. *Id.*

56. While the controversy over the contract raged, SKDK rapidly went to work as a hatchet for hire to target Padilla's political enemies, relabeling even innocuous speech that criticized Padilla's handling of election administration as "false" and "dangerous" attempts at voter suppression and voter fraud.

57. Using state funds, SKDK created political hit lists of disfavored speech, which Defendants called a "Misinformation Daily Briefing."

58. These "Misinformation Daily Briefings" were sent via email to Defendants Paula Valle Castañon, Jenna Dresner, Sam Mahood, and Akilah Jones at the California Secretary of State's communications office. A true and correct copy of one such "Misinformation Daily Briefing" from November 13, 2020, is attached to this complaint as Exhibit 6.

59. The OEC curated the "misinformation" contained in the misinformation daily briefings for submission to social media companies.

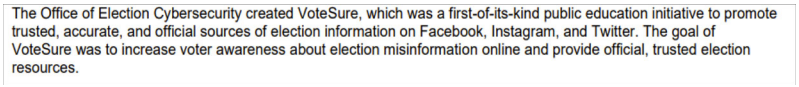
60. The OEC reported "misinformation" to social media companies directly.

61. The OEC also reported "misinformation" to social media companies through NASS.

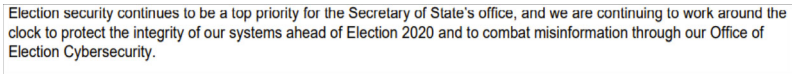
62. Alex Padilla was proud of the OEC's speech-censoring activities and track record, as was NASS.

63. NASS has an annual award called the Innovation, Dedication, Excellence & Achievement in Service ("IDEAS") award, recognizing "significant state contributions to the mission of NASS."

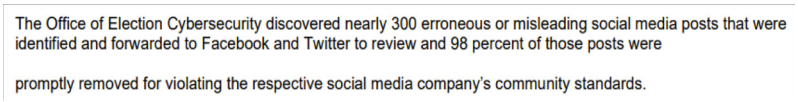
64. The California Secretary of State's office won NASS's 2020 award for the OEC's work. Specifically noted in OEC's IDEAS award application was the following:


The Office of Election Cybersecurity created VoteSure, which was a first-of-its-kind public education initiative to promote trusted, accurate, and official sources of election information on Facebook, Instagram, and Twitter. The goal of VoteSure was to increase voter awareness about election misinformation online and provide official, trusted election resources.

. . .


Election security continues to be a top priority for the Secretary of State's office, and we are continuing to work around the clock to protect the integrity of our systems ahead of Election 2020 and to combat misinformation through our Office of Election Cybersecurity.

. . .


The Office of Election Cybersecurity discovered nearly 300 erroneous or misleading social media posts that were identified and forwarded to Facebook and Twitter to review and 98 percent of those posts were

promptly removed for violating the respective social media company's community standards.

65. Alex Padilla also stated his support for the OEC's speech-censoring activities in response to receiving the award, touting the initiative's "proactive social media monitoring":


We worked in partnership with social media platforms to develop more efficient reporting procedures for potential misinformation. Misinformation identified by our office or voters was promptly reviewed and, in most cases, removed by the social media platforms.

A true and correct copy of the OEC's NASS 2020 IDEAs award submission and NASS's press release announcing presentation of the award are attached as Exhibits 7 and 8.

66. Defendants' carefully crafted propaganda campaign, or as they called it, "national narrative," suppressed the protected speech of citizens who might seek greater government accountability or ask questions regarding election processes.

67. This self-serving "national narrative," conveniently, also bolstered and protected certain Defendants' political fortunes.

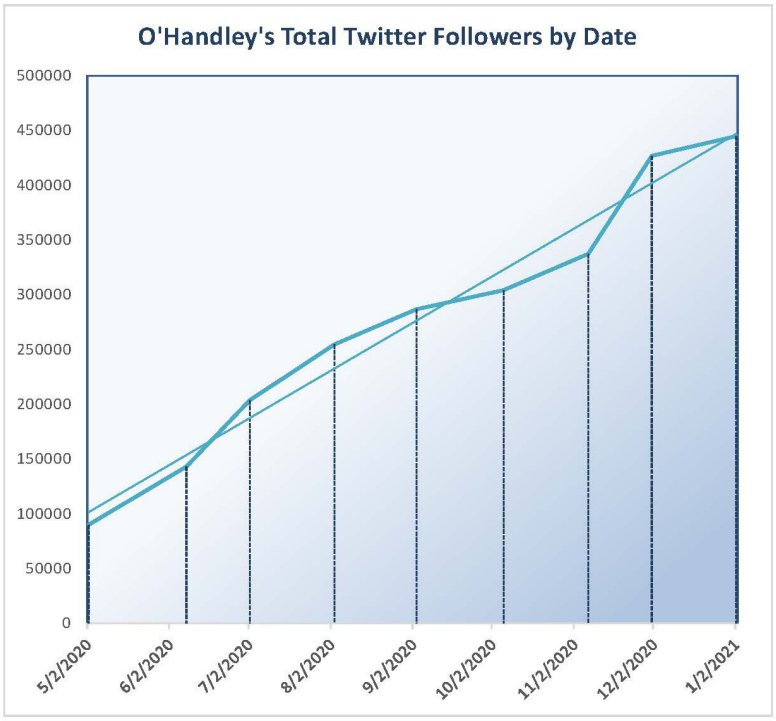
68. The "national narrative" advanced by the California censorship scheme included supporting the victory of SKDK's client Joe Biden, the elevation of California Senator Kamala Harris to the Vice Presidency, and creating an opening for Padilla himself to be elevated to the position of United States Senator from California. Padilla's "one simple trick" of awarding an ultra vires censorship contract to a political ally, created a Rube-Goldberg-like contraption catapulting him to Washington, D.C.

69. Mr. O'Handley, under the social media handle "DC_Draino," was one of the many speakers targeted by Defendants for his speech about the election, supposedly too dangerous for a gullible public to be allowed to read.

70. Mr. O'Handley has a law degree from the University of Chicago Law School and is licensed to practice law in the state of California. After six-plus years practicing corporate and entertainment law,

Mr. O'Handley left private practice in order to better utilize his legal education in defense of liberty and constitutional ideals. His primary efforts focus on social media postings, public speaking at colleges and political conferences, and being a political commentator. As one measure of his influence, he has had over 75 national news network appearances in the last year and half. Mr. O'Handley's combined social media following across all his accounts currently reaches over 3 million people. He was invited to the White House social media summit in 2019, which focused, ironically, on the censorship of conservative voices on social media.

71. By the end of November 2020, Mr. O'Handley had approximately 420,000 Twitter followers. Just six months prior in May 2020, Mr. O'Handley had approximately 89,000 Twitter followers, meaning Mr. O'Handley had over a 371% increase in followers in the lead up to the 2020 election and in the following weeks as votes were counted and state legislatures certified the electoral college.


O'Handley's Total Twitter Followers by Date
500000
450000
400000
350000
300000
250000
200000
150000
100000
50000
0
5/2/2020
6/2/2020
7/2/2020
8/2/2020
9/2/2020
10/2/2020
11/2/2020
12/2/2020
1/2/2021

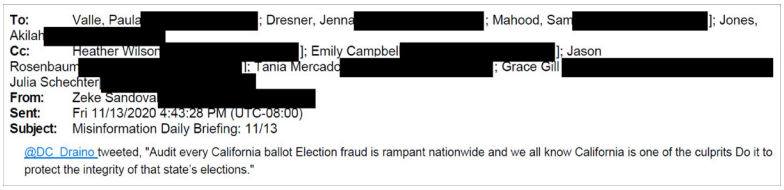
72. Mr. O'Handley authored a November 12, 2020, Twitter post stating:

(Hereinafter, the "Post").

73. Mr. O'Handley's Post expressed an opinion widely held by California voters. An October 2020 poll by Berkeley's Institute of Government Studies released found that four in ten Californians "express[ed] skepticism that [the 2020] presidential election [would] be conducted in a way that's fair and open."

74. Despite the Post's expression of Mr. O'Handley's personal opinion regarding the need for

greater accountability in election processes—core political speech directly questioning Padilla's administration of and fitness for his political office—SKDK labeled the Post as "misinformation," and flagged the Post for the OEC to potentially target with its broad government powers:



To: Valle, Paula [redacted]; Dresner, Jenna [redacted]; Mahood, Sam [redacted]; Jones, Akilah [redacted]
Cc: Heather Wilson [redacted]; Emily Campbell [redacted]; Jason Rosenbaum [redacted]; Tania Mercado [redacted]; Grace Gill [redacted] Julia Schechter [redacted]
From: Zeke Sandoval [redacted]
Sent: Fri 11/13/2020 4:43:28 PM (UTC-08:00)
Subject: Misinformation Daily Briefing: 11/13

@DC_Draino tweeted, "Audit every California ballot Election fraud is rampant nationwide and we all know California is one of the culprits Do it to protect the integrity of that state's elections."

75. The OEC, following the recommendation of the Democrat operatives at SKDK, flagged the Post as "Case# 0180994675" under the indicator of "voter fraud," and color coded it as an "orange" level threat in internal OEC documents. Upon information and belief, an orange threat level indicates moderately problematic speech between yellow and red.

76. On November 17, 2020, at 12:31 PM, a Secretary of State agent or staff member sent Twitter the following message regarding Mr. O'Handley's Post:

Case# 0180994675: partner_election [ref:00DA0000000K0A8.5004w0000225CNh:ref]	11/17/20	12:31 PM	Hi, We wanted to flag this Twitter post: https://twitter.com/DC_Draino/status/1327073866578096129 From user @DC_Draino. In this post user claims California of being a culprit of voter fraud, and ignores the fact that we do audit votes. This is a blatant disregard to how our voting process works and creates disinformation and distrust among the general public.

77. Shortly after Padilla's agent or staff member "flagged" Mr. O'Handley's post to Twitter, Twitter subsequently appended commentary asserting that Mr. O'Handley's claim about election fraud was disputed. A true and correct copy of OEC's comments, as

obtained through public record request, is attached to this complaint as Exhibit 9.

78. Twitter then added a "strike" to Mr. O'Handley's account.

79. Twitter utilizes a strike system, whereby users incurring "strikes" face progressive penalties, culminating in removal from Twitter altogether after five strikes.

80. The OEC tracked Twitter's actions on internal spreadsheets and noted that Twitter had acted upon the request to censor Mr. O'Handley's speech.

81. Prior to OEC requesting Twitter censor the Post, Twitter had never before suspended Mr. O'Handley's account or given him any strikes. He suddenly became a target of Twitter's speech police, at the behest of Defendants.

82. Between November 2020 and January 2021, Mr. O'Handley's Twitter following continued to grow. By January 2021, Mr. O'Handley had over 444,000 Twitter followers.

83. During this time period, Mr. O'Handley was far from the only speaker on Twitter suggesting the need for an audit or the existence of voter fraud in the aftermath of the 2020 election. Countless individuals suggesting the need for audits, including both Democrat and Republican voices upset at perceived problems. Numerous commentators, appearing to support Democrats, voiced their opinion of a need to audit results in conservative areas where Republicans fared better in down ballot races than expected. Yet,

Defendants focused their speech censorship efforts on conservative requests for transparency in election processes rather than the same calls from self-identified political liberals.

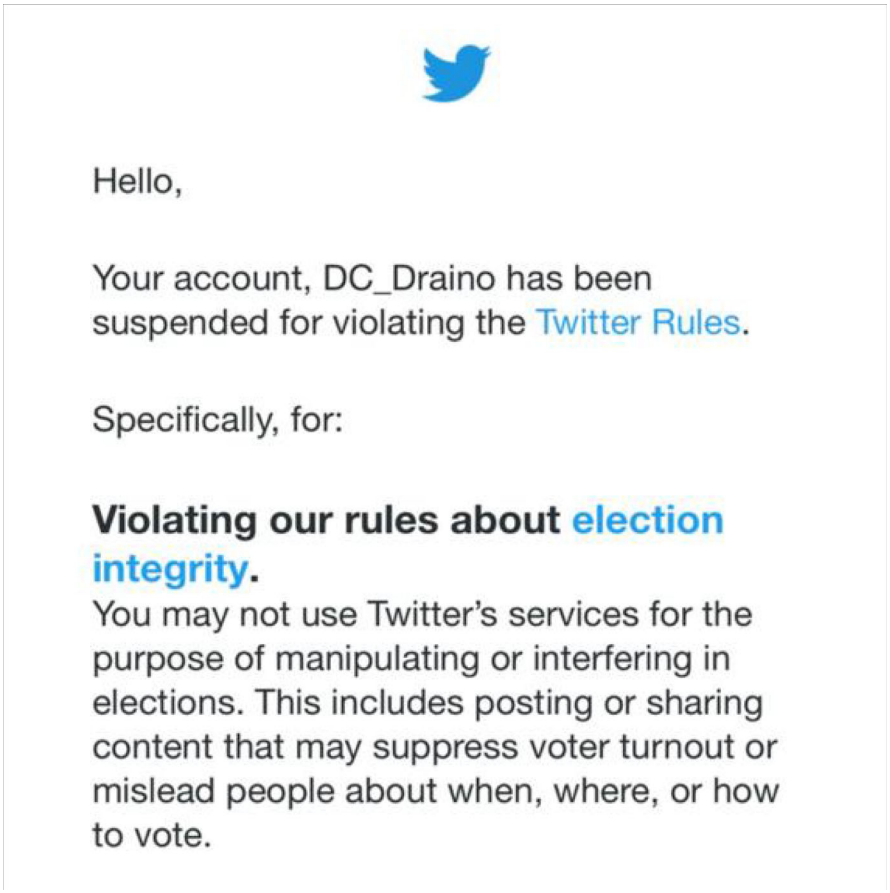
84. On January 18, 2021, Mr. O'Handley posted the following tweet, for which Twitter gave Mr. O'Handley a strike.

85. On January 21, 2021, Mr. O'Handley posted another Tweet, for which Twitter gave Mr. O'Handley a strike.

86. On January 22, 2021, Mr. O'Handley suggested via Tweet that the government consider facilitating a 9/11-style commission to study the 2020 election, stating it is an "emergency" issue when half the country stops believing in the integrity of the vote. Twitter again gave Mr. O'Handley a strike and locked his account for seven days, stating the Tweet included a claim of election fraud which was disputed.

87. On February 22, 2021, Mr. O'Handley Tweeted the following:

88. In response, Twitter permanently suspended Mr. O'Handley's account stating:



Hello,

Your account, DC_Draino has been suspended for violating the Twitter Rules.

Specifically, for:

Violating our rules about election integrity.
You may not use Twitter's services for the purpose of manipulating or interfering in elections. This includes posting or sharing content that may suppress voter turnout or mislead people about when, where, or how to vote.

89. Twitter never elaborated on how Mr. O'Handley's five-word Tweet and photograph of the U.S. Capitol (incidentally, Mr. Padilla's new workplace)—which was posted well after the 2020 election had been certified and a new President installed in office—manipulated or interfered with an election, suppressed voter turnout, or misled people about when, where, or how to vote. Indeed, at the time of the post, the next national general election was nearly two years away.

90. Twitter serves as the primary social channel for political commentary and news in American society at present.

91. As a rising political commentator, Twitter's ban has had a direct and detrimental impact on Mr. O'Handley's ability to make a living in his chosen profession.

92. In January 2021, O'Handley had well over 440,000 followers on Twitter.

93. O'Handley's reach, which was growing exponentially at the time of his permanent ban, had garnered him paid media contract offers, numerous media appearances, paid speaking opportunities, valuable professional networking, endorsements, and advertising dollars.

94. Mr. O'Handley lost his platform to communicate with his followers, irreparably damaging his business, which depends on the reach of his audience for revenue.

95. Asking to audit an election to protect the integrity of elections is not "voter fraud." It is a regular practice of election administration.

96. Suggesting the country consider a non-partisan commission to study the election in an attempt to restore the country's trust in the integrity of the voting process is not a factual claim, and certainly not one that includes a risk of violence.

97. The statement "Most votes in American history" is a true fact about the 2020 presidential election.

98. Truthful speech and opinion about elections and elected officials has been protected by the First Amendment since our nation's founding. The right to criticize the government is the basis upon which this country was founded. Yet Defendants targeted Mr. O'Handley's speech for censorship because of his criticism of the government, a direct affront to our constitutional ideals.

99. Upon information and belief, discovery will show Twitter's stated reasons for suspending Mr. O'Handley were pretextual. Twitter's real reasons for suspending Mr. O'Handley do not stem from a violation of Twitter's terms of service, but from the content of his speech raising concerns about election administration and integrity, specifically concerns related to the work of then-California Secretary of State Alex Padilla. The trigger for Twitter's censorship of Mr. O'Handley was its coordination and conspiracy with other Defendants to silence the protected speech of many Americans.

100. Defendants' government censorship of speech seeking to hold elected officials accountable for the exercise of their office is anathema to the Constitution. It strikes directly at the heart of the First Amendment.

CLAIMS

First Claim for Relief

First Amendment – Free Speech
(42 U.S.C. § 1983)

(By Plaintiff Against All Defendants)

101. Mr. O'Handley incorporates by reference and re-alleges herein all Paragraphs above.

102. California Election Code § 10.5, as-applied by Defendants, violates the Free Speech clause of the First Amendment.

103. Defendants also used California Election Code § 10.5 to retaliate against Mr. O'Handley for his speech.

104. Political speech is core First Amendment speech, critical to the functioning of our republic.

105. Political speech rests on the highest rung of the hierarchy of First Amendment values.

106. Defendants weaponized California Election Code § 10.5 and the OEC to censor Plaintiff's political speech.

107. State action designed to retaliate against and chill political expression strikes at the heart of the First Amendment.

108. Defendants' actions directly abridged Mr. O'Handley's protected political speech.

109. Defendants jointly acted in concert to abridge Mr. O'Handley's freedom of speech and deprive Mr. O'Handley of his First Amendment rights.

110. Defendants Twitter, SKDK, and NASS willfully and cooperatively participated in the government Defendants' efforts to censor Mr. O'Handley's political speech.

111. Defendants Alex Padilla, Paula Valle Castañon, Jenna Dresner, Sam Mahood, Akilah Jones deprived Mr. O'Handley of his First Amendment free speech rights acting under color of state law, and Mr. O'Handley's free speech rights were clearly established at the time of Defendants' speech chilling actions.

112. Defendants Alex Padilla, Paula Valle Castañon, Jenna Dresner, Sam Mahood, Akilah Jones, acting in their official capacities, took action, jointly with SKDK, Twitter, and NASS, against Mr. O'Handley with the intent to retaliate against, obstruct, or chill Mr. O'Handley's First Amendment rights.

113. Mr. O'Handley engaged in constitutionally protected activity through his speech questioning the conduct of elections and the actions of elected officials.

114. Defendants targeted and censored Mr. O'Handley's speech.

115. Defendants' actions would chill a person of ordinary firmness from continuing to engage in protected activity.

116. The protected activity, Mr. O'Handley's speech which Defendants found objectionable, was a substantial motivating factor in Defendants' decision to censor Mr. O'Handley's speech.

117. Defendants' speech-chilling actions specifically and objectively infringed Mr. O'Handley's speech rights under the United States Constitution.

118. There was a clear nexus between Defendants' actions and the intent to chill Mr. O'Handley's speech.

119. Mr. O'Handley suffered economic and reputational injuries, among others, as a result.

120. Defendants' restriction of Mr. O'Handley's speech was content-based.

121. Defendants had no compelling state interest for that content-based restriction.

122. Defendants' blanket speech restriction was not narrowly tailored.

123. Mr. O'Handley has no adequate remedy at law and will suffer serious and irreparable harm to his constitutional rights unless Defendants are enjoined from violating his constitutional rights.

124. Pursuant to 42 U.S.C. §§ 1983 and 1988, Mr. O'Handley is entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief.

125. Mr. O'Handley finds it necessary to engage the services of private counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

Second Claim for Relief

California Constitution art. I § 2 – Free Speech

(By Mr. O'Handley Against All Defendants)

126. Mr. O'Handley incorporates by reference and re-alleges herein all Paragraphs above.

127. In California "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const. Art. 1, §2.

128. The California Constitution is more protective, definitive and inclusive of rights to expression and speech than the First Amendment to the United States Constitution.

129. California courts look to whether individuals have been invited to a forum, and if so, the California Constitution protects speech and petitioning even in instances when the venue in which the speech happens is privately owned so long as the speech does not interfere with normal business operations.

130. Courts ask whether the venue is an essential and invaluable forum for the rights of free speech and petition. If so, private property owners will not be permitted to prohibit expressive activity that would impinge on constitutional rights.

131. Twitter regularly invites new users to utilize its speech forum.

132. Mr. O'Handley's speech did not interfere with Twitter's normal business operations.

133. Twitter is an essential and invaluable forum for the rights of free speech and petition.

134. Twitter, therefore, may not prohibit expressive activity which impinges on constitutional rights.

135. Quashing Mr. O'Handley's speech criticizing election processes and elected officials violates Mr. O'Handley's liberty of speech rights under the California Constitution.

136. Mr. O'Handley has no adequate remedy at law and will suffer serious and irreparable harm to his constitutional rights unless Defendants are enjoined.

137. Mr. O'Handley finds it necessary to engage the services of private counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorney fees and costs pursuant to California Code of Civil Procedure Section 1021.5.

Third Claim for Relief

Fourteenth Amendment - Equal Protection Discrimination (42 U.S.C. § 1983)

(By Mr. O'Handley Against All Defendants)

138. Mr. O'Handley incorporates by reference and re-alleges herein all Paragraphs above.

139. Defendants acted to censor Mr. O'Handley's speech with discriminatory intent based on the content of his speech.

140. Defendants' actions bear no rational relation to a legitimate end as Defendants' conduct here was malicious, irrational, or plainly arbitrary.

141. Even if Defendants did have a rational basis for their acts, their alleged rational basis was a pretext for an impermissible motive.

142. Defendants discriminatorily enforced the statute against Mr. O'Handley based on his viewpoint.

143. Defendants' enforcement had a discriminatory effect.

144. Defendants were motivated by a discriminatory purpose.

145. Similarly situated individuals were not censored for their speech.

146. Mr. O'Handley has no adequate remedy at law and will suffer serious and irreparable harm to his constitutional rights unless Defendants are enjoined from violating his constitutional rights.

147. Pursuant to 42 U.S.C. §§ 1983 and 1988, Mr. O'Handley is entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief.

148. Mr. O'Handley finds it necessary to engage the services of private counsel to vindicate their rights

under the law. Plaintiffs are therefore entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

Fourth Claim for Relief

Fourteenth Amendment - Due Process Clause (42 U.S.C. § 1983)

(By Mr. O'Handley Against Defendants California Secretary of State Shirley N. Weber in her official capacity, SKDK, Twitter, Alex Padilla, Paula Valle Castañon, Jenna Dresner, Sam Mahood, and Akilah Jones)

149. Mr. O'Handley incorporates by reference and re-alleges herein all Paragraphs above.

150. Mr. O'Handley had a property interest in pursuing his occupation as a Twitter influencer and commentator.

151. Mr. O'Handley also had a recognized protected interest in his business goodwill.

152. The California Secretary of State, SKDK, Alex Padilla, Paula Valle Castañon, Jenna Dresner, Sam Mahood, and Akilah Jones set in motion a series of acts which they knew or reasonably should have known would cause Twitter to inflict the constitutional injury of depriving Plaintiff of his occupation and taking the business goodwill he had garnered through his Twitter account.

153. OES actions intentionally solicited Twitter to suspend Mr. O'Handley's account.

154. Some kind of hearing is required before depriving Mr. O'Handley either of his occupation or his property interest in his business goodwill.

155. Mr. O'Handley was not given the opportunity to be heard at a meaningful time and in a meaningful manner.

156. Mr. O'Handley has no adequate remedy at law and will suffer serious and irreparable harm to his constitutional rights unless Defendants are enjoined from violating his constitutional rights.

157. Pursuant to 42 U.S.C. §§ 1983 and 1988, Mr. O'Handley is entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief.

158. Mr. O'Handley founds it necessary to engage the services of private counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

Fifth Claim for Relief

Fourteenth Amendment – Void for Vagueness (42 U.S.C. § 1983)

(By Mr. O'Handley Against Defendant California Secretary of State Shirley N. Weber in her official capacity and Defendants Alex Padilla, Paula Valle Castañon, Jenna Dresner, Sam Mahood, and Akilah Jones in their personal capacities)

159. Mr. O'Handley incorporates by reference and re-alleges herein all Paragraphs above.

160. Defendants' enforcement of California Elections Code §10.5 violates the Due Process Clause of the Fourteenth Amendment as-applied to Mr. O'Handley.

161. Mr. O'Handley should not have been punished for behavior he could not have known allegedly violated the law.

162. California Elections Code §10.5 is impermissibly vague because it fails to provide a reasonable opportunity to know what conduct is prohibited or is so indefinite as to allow arbitrary and discriminatory enforcement.

163. This statute is capable of, and did in fact, reach expression sheltered by the First Amendment, therefore requiring greater specificity.

164. Mr. O'Handley has no adequate remedy at law and will suffer serious and irreparable harm to his constitutional rights unless Defendants are enjoined from violating his constitutional rights.

165. Pursuant to 42 U.S.C. §§ 1983 and 1988, Mr. O'Handley is entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief.

166. Mr. O'Handley finds it necessary to engage the services of private counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

Sixth Claim for Relief

Civil Conspiracy to Interfere with Civil Rights (42 U.S.C. § 1985)

(By Mr. O'Handley Against All Defendants)

167. Mr. O'Handley incorporates by reference and re-alleges herein all Paragraphs above.

168. Defendants had a meeting of the minds to violate the constitutional rights of individuals who questioned election processes and outcomes — or in Defendants' words, spread "misinformation."

169. Defendants, through agreements and processes they jointly created to seek out and swiftly censor speech with which they disagreed, intended to accomplish the unlawful objective of abridging these individuals' freedom of speech.

170. SKDK, Twitter, and NASS joined with the state agents to jointly deprive Mr. O'Handley of his rights.

171. Each conspiracy participant shared the common objective of the conspiracy, to censor speech which they found objectionable or "misleading."

172. As a result of their agreement, Defendants actually deprived Mr. O'Handley of his First and Fourteenth Amendment rights, as described herein.

173. Mr. O'Handley suffered economic and reputational injuries, among others, as a result.

174. Mr. O'Handley has no adequate remedy at law and will suffer serious and irreparable harm to his

constitutional rights unless Defendants are enjoined from violating his constitutional rights.

175. Pursuant to 42 U.S.C. §§ 1983, 1985, and 1988, Mr. O'Handley is entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief.

176. Mr. O'Handley finds it necessary to engage the services of private counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

PRAYER FOR RELIEF

WHEREFORE, Mr. O'Handley prays this Court grant the relief requested herein, specifically that the Court render the following judgment in Mr. O'Handley's favor and against Defendants:

i. Declaratory Judgment: For entry of a Declaratory Judgment that California Election Code § 10.5, as applied to Mr. O'Handley, violates Mr. O'Handley's state and federal constitutional rights to free speech, equal protection, and due process;

ii. Injunctive Relief: For entry of a Permanent Injunction stating that the Secretary of State and the OEC may not censor speech, work to take down the speech of private speakers, selectively enforce speech restrictions, or discriminate against those who seek to hold the current office holder accountable for perceived defects in election administration;

iii. Damages: general, nominal, statutory (pursuant to Cal. Civ. Code § 52) and exemplary damages, in an amount to be determined at trial;

iv. Attorneys' fees and costs: awarded pursuant to 42 U.S.C. § 1988; California Code of Civil Procedure Section 1021.5; Cal. Civ. Code § 52; and

v. Pursuant to 42 U.S.C. §§ 1983, 1985, and 1988, Plaintiff is entitled to declaratory relief; temporary, preliminary, and permanent injunctive relief invalidating and restraining Defendants' enforcement of California Election Code § 10.5; damages from the businesses and persons sued in their personal capacities; and attorneys' fees.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands trial by jury in this action of all issues so triable.

DHILLON LAW GROUP INC.

Date: June 17, 2021

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