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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COLLEEN HUBER,
Plaintiff,
v.
JOSEPH BIDEN, et al.,
Defendants.

Case No. [21-cv-06580-EMC](#)

**ORDER GRANTING DEFENDANTS’
MOTIONS TO DISMISS FIRST
AMENDED COMPLAINT**

Docket Nos. 48, 49

Plaintiff Colleen Huber (“Plaintiff” or “Huber”) filed this action against Defendants Joseph Biden Jr., in his official capacity as President of the United States of America, Twitter, Inc. (“Twitter”), and Jack Dorsey, the former Chief Executive Officer of Twitter (collectively, “Defendants”) after Twitter suspended her account for violating its policy against disseminating harmful and misleading information related to COVID-19. Docket No. 1 (“Compl.”). Plaintiff alleges that the White House and Twitter engaged in joint action and conspired to suspend her Twitter account, in violation of her freedom of speech rights under the First Amendment and the equal protection guarantee of the Fifth Amendment. Docket No. 43 (“First Amended Complaint” or “FAC”) ¶¶ 87–105, 106–15.

Pending before the Court are the Defendants’ motions to dismiss Plaintiff’s First Amended Complaint. Docket Nos. 48 (“Gov’t Mot.”), 49 (“Twitter Mot.”). For the following reasons, Defendants’ motions to dismiss are **GRANTED**.

I. BACKGROUND

A. Factual History

In February of 2021, Plaintiff tweeted a quote from an Israeli news article on her personal

1 Twitter account. FAC ¶¶ 34–35. The tweet stated: “Infection disease team: [Pfizer’s
2 experimental shot causes] ‘mortality hundreds of times greater in young people compared to
3 mortality from coronavirus without the #vaccine, and dozens of times more in the elderly.’
4 [https://\[...\]](https://[...])” *Id.*

5 Shortly after, Twitter notified Plaintiff that it suspended her account for “violating [its]
6 policy on spreading misleading and potentially harmful information related to COVID-19”
7 (“Twitter COVID-19 Policy”). *Id.* ¶ 36. The Twitter COVID-19 Policy states that users “may not
8 use Twitter’s services to share false or misleading information about COVID-19 which may lead
9 to harm.” Docket No. 49-3 at 2. For example, “sharing content that may mislead people about the
10 nature of the COVID-19 virus; the efficacy and/or safety of preventative measures, treatments, or
11 other precautions to mitigate or treat the disease . . . or the prevalence of the virus or risk of
12 infection or death associated with COVID-19” violates the policy. *Id.* Further, Twitter’s Terms of
13 Service, which are part of the User Agreement, expressly provide that Twitter may “suspend or
14 terminate” users’ accounts, or “refuse to distribute” any user-generated content, for “any or no
15 reason,” including but not limited to if Twitter believes that users have “violated these Terms or
16 the Twitter Rules and Policies.” Docket No. 49-4 at 4, 7.¹

17 After attempting to appeal the suspension, Plaintiff received an email that her account had
18 been permanently suspended and that Twitter would not entertain any appeals. FAC ¶ 39.
19 Plaintiff alleges that these actions were in furtherance of a conspiracy between Defendants to
20 silence Twitter users from tweeting information that contradicted the political agenda of the Biden
21 administration, specifically as it related to COVID-19 vaccinations. *Id.* ¶¶ 43–44. Defendants
22 were allegedly in direct “engagement” with each other and the “objective of these direct
23 communications with Twitter and the other social media giants was not merely to have these
24 companies ‘clamp down’ on what the Biden administration considers bad speech, but also to tell
25

26 ¹ Twitter requests that the Court take judicial notice of its COVID-19 Policy and its Terms of
27 Service. Docket No. 50 (“RJN”). Plaintiff does not oppose. *See Opp.*, Proposed Order ¶ 4.
28 Because these policies are not in reasonable dispute and “can be accurately and readily determined
from sources whose accuracy cannot reasonably be questioned,” the Court **GRANTS** Twitter’s
request for judicial notice. *See Fed. R. Evid.* 201(b).

1 them exactly ‘how they can get rid of it quickly.’” Docket No. 56 (“Opp.”) at 6.

2 Plaintiff primarily bases this assertion on two news articles. FAC ¶¶ 42, 52. The first
 3 article, published by Reuters, states that unnamed White House officials reached out to social
 4 media companies including Twitter about “clamping down on COVID misinformation and getting
 5 their help to stop it from going viral.” Docket No. 48-1 (“Reuters Article”). It also suggests that
 6 federal officials “[t]alk[ed] to social media companies, including Twitter, about the importance of
 7 misinformation and disinformation” and “[e]ncouraged providers to prevent COVID-19
 8 misinformation from trending on [social media] platforms and becom[ing] a broader movement.”
 9 *Id.* (internal quotation marks omitted). According to the Reuters Article, federal officials also
 10 “[w]ant[ed] to stop anti-vaccine events like a February protest organized on Facebook” and
 11 “[r]egular[ly] communicat[ed] with Twitter on a number of critical issues including COVID-19
 12 misinformation.” *Id.* (internal quotation marks omitted). The second article, on which Plaintiff
 13 relies, is published by The Verge and reports that a Twitter spokesperson confirmed that Twitter
 14 was “working in partnership with the White House to elevate authoritative information in regard to
 15 COVID-19.” Docket No. 48-2 (“The Verge Article”).

16 B. Procedural History

17 On May 28, 2021, Plaintiff originally filed a complaint individually and on behalf of all
 18 other persons similarly situated. *See* Compl. On October 12, 2021, both Defendants filed motions
 19 to dismiss. Docket Nos. 38–39. Plaintiff then filed her First Amended Complaint on October 25,
 20 2021, alleging two claims for relief: (1) her First Amendment right to freedom of speech; and (2)
 21 her Fifth Amendment right of equal protection. *See* FAC. Two days later, the original motions to
 22 dismiss were terminated. *Id.* On November 8, 2021, Defendants filed the present motions to
 23 dismiss. *See* Gov’t Mot.; Twitter Mot. The hearing took place on February 4, 2022.

24 **II. LEGAL STANDARD**

25 A. Rule 12(b)(6)

26 Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include “a short and plain
 27 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A
 28 complaint that fails to meet this standard may be dismissed pursuant to Rule 12(b)(6). *See* Fed. R.

1 Civ. P. 12(b)(6).

2 To overcome a Rule 12(b)(6) motion to dismiss after the Supreme Court's decisions in
3 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007),
4 a plaintiff's "factual allegations [in the complaint] must . . . suggest that the claim has at least a
5 plausible chance of success." *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014) (internal
6 quotation marks omitted). The court "accept[s] factual allegations in the complaint as true and
7 construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St.*
8 *Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But "allegations in a
9 complaint . . . may not simply recite the elements of a cause of action [and] must contain sufficient
10 allegations of underlying facts to give fair notice and to enable the opposing party to defend itself
11 effectively." *Levitt*, 765 F.3d at 1135 (quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir.
12 2011)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the
13 court to draw the reasonable inference that the defendant is liable for the misconduct alleged."
14 *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it
15 asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting
16 *Twombly*, 550 U.S. at 556).

17 If the court dismisses a complaint, it "should grant leave to amend even if no request to
18 amend the pleading was made, unless it determines that the pleading could not possibly be cured
19 by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

20 B. Rule 12(b)(1)

21 Federal Rule of Civil Procedure 12(b)(1) allows a party to move to dismiss a claim for lack
22 of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Lack of Article III standing "requires
23 dismissal for lack of subject matter jurisdiction" under Rule 12(b)(1). *Maya v. Centex Corp.*, 658
24 F.3d 1060, 1067 (9th Cir. 2011). The "irreducible constitutional minimum" of standing requires
25 that a plaintiff show that they "(1) suffered an injury in fact, (2) that is fairly traceable to the
26 challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial
27 decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). As the party invoking federal
28 jurisdiction, the plaintiff "bears the burden of establishing these elements." *Id.* at 1547.

III. DISCUSSION

A. Plaintiff’s First Amendment Freedom of Speech Claim

The parties dispute whether Plaintiff alleges a plausible First Amendment violation. Plaintiff alleges that Twitter conspired with President Biden and other federal government officials in the Biden Administration to engage in viewpoint discrimination and violate her First Amendment rights. FAC ¶ 3. Specifically, she alleges that Defendants suspended her Twitter account in furtherance of their “agreement to silence the speech of speakers on Twitter” who disagreed with the political agenda of the Biden administration. *Id.* ¶ 43.

“The Free Speech Clause of the First Amendment prohibits only governmental, not private, abridgment of speech.” *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1924 (2019). In this case, Plaintiff concedes that Twitter is a private entity. FAC ¶ 11. The Ninth Circuit has also recently reaffirmed that “a private entity hosting speech on the Internet is not a state actor.” *Prager Univ. v. Google LLC*, 951 F.3d 991, 997 (9th Cir. 2020). Thus, the First and Fifth Amendments are not implicated unless there is a sufficient factual predicate establishing that Twitter is a state actor.

The “state action inquiry boils down to this: is the challenged conduct that caused the alleged constitutional deprivation fairly attributable to the state?” *Belgau v. Inslee*, 975 F.3d 940, 946 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2795 (2021) (internal quotation marks omitted); *see also Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (“constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains”). A “private party cannot be treated like a state actor where the government’s involvement was only to provide ‘mere approval or acquiesce,’ ‘subtle encouragement,’ or ‘permission of a private choice.’” *Belgau v. Inslee*, 975 F.3d 940, 947 (9th Cir. 2020) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52–54 (1999)).

“The Supreme Court has articulated four tests for determining whether a private [party’s] actions amount to state action.” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012) (internal quotation marks omitted). The four tests include: (1) the public function test; (2) the state compulsion test; (3) the governmental nexus test; and (4) the joint action test. *Id.*

1 Here, the joint action test is the only test at issue because Plaintiff does not discuss or rely
2 on the others. Opp. at 7. The joint action test asks, “whether state officials and private parties
3 have acted in concert in effecting a particular deprivation of constitutional rights.” *Tsao*, 698 F.3d
4 at 1140 (internal quotation marks omitted). This requirement can be satisfied by either “[1]
5 proving the existence of a conspiracy or [2] by showing that the private party was a willful
6 participant in joint action with the State or its agents.” *Id.* (internal quotation marks omitted).

7 1. Plaintiff Fails to Plausibly Allege the Existence of a Conspiracy

8 Plaintiff bases her claim solely on the first prong: the existence of a conspiracy. Opp. at
9 17–18. To prove the existence of a conspiracy between a private actor and the government, “an
10 agreement or meeting of the minds to violate constitutional rights must be shown.” *Fonda v.*
11 *Gray*, 707 F.2d 435, 438 (9th Cir. 1983) (internal quotation marks omitted). Each participant in
12 the conspiracy “need not know the exact details of the plan, but each participant must at least share
13 the common objective of the conspiracy.” *Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir. 2002).
14 Further, “[t]o be liable as a co-conspirator, a private defendant must share with the public entity
15 the goal of violating a plaintiff’s constitutional right.” *Id.* “Proof of a conspiracy can be provided
16 by either direct or circumstantial evidence.” *United States v. Loveland*, 825 F.3d 555, 561 (9th
17 Cir. 2016).

18 Plaintiff alleges that Defendants had a partnership to censor speech critical of COVID-19
19 vaccinations and to promote the Biden Administration’s policy in favor of vaccination. Opp. at
20 11; FAC ¶ 54. Specifically, she contends they came to “an agreement, meeting of the minds,
21 and/or common understanding to violate the constitutional rights of Plaintiff and the constitutional
22 rights of others who are similarly situated.” FAC ¶ 59. Twitter allegedly suspended Plaintiff’s
23 account in furtherance of this conspiracy. *Id.* ¶ 38. Plaintiff also contends that Defendants
24 mutually benefit from this conspiracy, because it “promotes and benefits the Biden
25 administration’s political agenda” and “financially benefits Twitter [and] Dorsey, as Twitter
26 receives favorable treatment by and publicity from the Biden administration.”² *Id.* ¶ 47.

27 _____
28 ² Plaintiff initially named Jack Dorsey, Twitter CEO, as a defendant in the FAC, but now does not
oppose Twitter’s motion to dismiss Dorsey from the lawsuit. Opp. at 32 n.12. However, Plaintiff

1 Defendants deny that they formed a partnership to conspire against Plaintiff. The Ninth Circuit
 2 has explained that “[w]hether defendants were involved in an unlawful conspiracy is generally a
 3 factual issue and should be resolved by the jury, so long as there is a possibility that the jury can
 4 infer from the circumstances (that the alleged conspirators) had a ‘meeting of the minds’ and thus
 5 reached an understanding[] to achieve the conspiracy’s objectives.” *Mendocino Env’t Ctr. v.*
 6 *Mendocino Cty.*, 192 F.3d 1283, 1301–02 (9th Cir. 1999) (internal quotation marks omitted).

7 In *Mendocino Env’t Ctr.*, 192 F.3d 1283 (9th Cir. 1999), the Ninth Circuit held that the
 8 plaintiffs, environmental organization activists, presented sufficient circumstantial evidence that
 9 the police department entered into a conspiracy with the FBI to inhibit the plaintiffs’ First
 10 Amendment activities for their claim to survive a summary judgment motion. *Id.* at 1302. The
 11 plaintiffs were arrested after a bomb went off in their car. *Id.* at 1292. The FBI “apparently took
 12 the lead in investigating the physical evidence,” but the police officers were at the scene and
 13 examined the evidence. *Id.* Despite being at the crime scene, the police relied on FBI agents’
 14 conclusions that the bomb was located behind the driver’s seat and an FBI agent’s statement that
 15 nails used in the bomb were “identical” to nails found in a bag in the plaintiff’s car to obtain the
 16 search warrant. *Id.* at 1289. The court listed five different pieces of circumstantial evidence that
 17 the police department and the FBI, together, intended to inhibit plaintiffs’ First Amendment
 18 activities, and that they entered a conspiracy to further such goal. *Id.* Specifically, “the fact that
 19 the [police] had themselves viewed the crime scene and the physical evidence raises a question as
 20 to whether they would have relied upon the FBI agents’ questionable characterization of the
 21 evidence absent an improper motive or conspiracy.” *Id.* Further, the court noted that “some of the
 22 misinformation included in, and some of the material omissions from the search warrant affidavits
 23 were directly attributable to the [police], which permits the inference of an improper motive for
 24 such conduct.” *Id.* The police department also publicized inaccurate info to the media, which was
 25

26 requests that the Court exercise its discretion and dismiss Dorsey without prejudice so that if she
 27 learns of additional facts during discovery that implicate Dorsey personally in the matters alleged,
 28 she will have the option to rename him as a defendant. *Id.* Because this Court dismisses
 Plaintiff’s FAC in its entirety with prejudice, this Court **DISMISSES** Dorsey as a defendant with
 prejudice.

1 “consistent with a desire to create a negative impression.” *Id.* It had a police division that
 2 monitored the plaintiffs and cooperated with the FBI prior to the bombing incident, and the police
 3 had stated in their search warrant affidavit that they believed appellees to be “members of a violent
 4 terrorist group.” *Id.*

5 Unlike the defendants in *Mendocino Env’t Ctr.*, Plaintiff does not allege that President and
 6 Twitter worked hand-in-hand to suspend her Twitter account. She does not even allege that
 7 Twitter would not have suspended her Twitter account absent an improper motive or conspiracy.
 8 And she does not allege that Twitter failed to exercise independent judgment when it suspended
 9 her account. *See United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1541 (9th
 10 Cir. 1989) (noting that evidence that police failed to exercise independent judgment will support
 11 an inference of conspiracy with a private party).

12 The conclusion that Twitter did not suspend Plaintiff’s account because of an alleged
 13 conspiracy with the White House, is corroborated by the fact that Plaintiff violated Twitter’s
 14 Terms and Service and Twitter has provided a good and sufficient basis to suspend her account.
 15 Plaintiff does not dispute that she, like all Twitter users, is subject to Twitter’s User Agreement as
 16 a condition of using her account. Twitter’s User Agreement includes its Terms of Service, which
 17 expressly state that Twitter may “suspend or terminate” users’ accounts, or “refuse to distribute”
 18 any user-generated content, for “any or no reason,” including but not limited to if Twitter believes
 19 that users have “violated these Terms or the Twitter Rules and Policies.” Docket No. 49-4 at 4, 7.
 20 Twitter suspended Plaintiff’s account for violating its express Terms of Service, namely its
 21 COVID-19 Policy, which provides that users may not share or post content “that may mislead
 22 people about . . . the efficacy and/or safety of preventative measures, treatments, or other
 23 precautions to mitigate or treat the disease” Docket No. 49-3 at 2; FAC ¶¶ 34, 36. In short,
 24 Twitter had clear independent grounds for suspending Plaintiff’s account. It took no action out of
 25 the ordinary or in contravention of its clear established authority which have would suggested
 26 influence or facilitation by President Biden. There is no showing here that the action taken by
 27 Twitter on Plaintiff’s account was not an independent one. *See The Informed Consent Action*
 28 *Network (“ICAN”) v. YouTube LLC*, No. 20-CV-09456-JST, 2022 WL 278386, at *6 (N.D. Cal.

1 Jan. 31, 2022) (internal quotation marks omitted) (alterations omitted) (finding that the plaintiffs
2 failed to allege that “governmental direction . . . dictate[d] . . . the standard for decision[,]” and
3 that the “independent professional judgments” defeated the “requisite nexus to the government” to
4 establish joint action).

5 In a similar case, Judge Breyer held that there was no evidence of joint action between
6 Twitter and the government to suspend accounts that posted false or misleading information about
7 elections, in part because “Twitter’s Terms of Service gave it unlimited authority to remove or
8 discipline accounts . . . and Twitter referenced its own policies when it exercised that authority.”
9 *O’Handley v. Padilla*, No. 21-CV-07063-CRB, 2022 WL 93625, at *11 (N.D. Cal. Jan. 10, 2022).
10 Judge Breyer found that “[r]egardless of the percentage of flagged tweets that Twitter ultimately
11 removed, there is ample evidence that it was Twitter who decided whether to remove them.” *Id.*;
12 *see also Doe v. Google* No. 20-CV-07502-BLF, 2021 WL4864418, at *5 (N.D. Cal. Oct.19, 2021)
13 (rejecting a claim of state action under the joint action theory because there were “no allegations
14 that Defendants invoked state or federal procedure to bring about the suspension of Plaintiffs’
15 accounts”).

16 Plaintiff also does not allege that the Biden Administration dictated to Twitter any specific
17 prescription of any particular course of action. Not only did Twitter have the independent reason
18 and authority to suspend Plaintiff’s account pursuant to its terms of service—which predated the
19 government’s statements about COVID-19 disinformation—Plaintiff presents no facts that
20 indicate Twitter had any real incentive to conspire to violate Plaintiff’s rights. Nor does she allege
21 that Twitter had any malice towards Plaintiff.

22 Instead, Plaintiff merely presents conclusory and generalized statements to allege a
23 conspiracy between Defendants. She relies solely on the Reuters Article and The Verge Article to
24 prove that there was a “direct engagement between the Biden administration and the social media
25 giants” to partner together to “‘clamp[] down’ on disfavored speech” and figure out “‘how to get
26 rid of it quickly’ as part of [their] ‘wartime effort.’” Opp. at 8. But the general statements
27 described in these articles do not establish with any specificity an agreement between the
28 Defendants to violate Plaintiff’s rights. Although Plaintiff argues that encouragement becomes

1 conspiracy when the government tells the private actor not only what the government wants them
2 to do, but also shows them how to do it, there are no such detailed step-by-step directives as to the
3 closure of Plaintiff's Twitter account alleged here. Plaintiff's conclusory allegations are not
4 enough to show conspiracy. *See Burns v. Cty. of King*, 883 F.2d 819, 821 (9th Cir. 1989)
5 (pointing out that a plaintiff must state specific facts to support the existence of a claimed
6 conspiracy). "[G]eneralized statements about working together to counteract the dissemination of
7 election misinformation" do "not support an inference of an illegal conspiracy." *O'Handley*, 2022
8 WL 93625, at *11 (internal citation omitted). The fact that a government official sent a message
9 to Twitter, flagging a O'Handley tweet "might demonstrate a meeting of minds to promptly
10 address election misinformation, but not a meeting of the minds to 'violate constitutional rights,'
11 let alone O'Handley's constitutional rights." *Id.* (alterations omitted).

12 Similarly, in *Federal Agency of News LLC v. Facebook, Inc.*, the court addressed the
13 conspiracy prong of the joint action test and found that the plaintiff's "single conclusory allegation
14 that Facebook's work with the U.S. government concerning Russian interference in U.S. elections
15 [was] a 'conspiracy to deny [plaintiff] its free speech rights guaranteed under the U.S.
16 Constitution'" was not enough to overcome a motion to dismiss. 432 F. Supp. 3d 1107, 1126
17 (N.D. Cal. 2020). The court recognized that "[t]o properly plead joint action, a plaintiff must
18 allege that the state was involved with the activity that caused the injury giving rise to the action."
19 *Id.* at 1125 (internal quotation marks omitted). It held that "there was no joint action because
20 Plaintiffs fail[ed] to allege specific facts establishing the existence of an agreement or a 'meeting
21 of the minds' between Facebook and the government relating to Facebook's deletion of
22 [plaintiff's] Facebook page or restriction of [plaintiff's] access to its Facebook account." *Id.* at
23 1126.

24 Like the plaintiffs in *O'Handley* and *Federal Agency of News*, Plaintiff does not allege that
25 the government was directly involved in the suspension of her Twitter account. Indeed, unlike
26 *O'Handley* where a member of the government allegedly flagged one of O'Handley's tweets for
27 Twitter's review, Plaintiff does not allege that the government was involved in the process of
28 flagging her Tweets or in deciding her (or anyone's) Twitter accounts should be suspended. At

1 best, Plaintiff's allegations may suggest a shared general interest in reducing online COVID-19
2 misinformation, but that shared interest does not support a finding of a conspiracy between the
3 government and Twitter to violate Plaintiff's First Amendment rights.

4 Even if it could be inferred that Twitter acquiesced in the government's implied suggestion
5 to shut down sources of disinformation about COVID-19, "mere acquiescence" is not enough to
6 prove a conspiracy. *Fonda*, 707 F.2d at 438. In *Fonda*, the Ninth Circuit recognized that the
7 "mere acquiescence of the bank employees to the investigation request of the FBI to view Fonda's
8 bank records is, without more, insufficient to prove a conspiracy." *Id.* Further, the court held that
9 a "necessary element of the conspiracy claim" which was a "meeting of the minds between the
10 banks and the FBI to knowingly attempt to accomplish an alleged wrongful purpose" was absent.
11 *Id.* at 439 (emphasis added). There is no allegation of a meeting of the minds between President
12 Biden, Twitter, and Jack Dorsey to "accomplish an alleged wrongful purpose."

13 Plaintiff's theory, if accepted on this read of the FAC, would raise serious policy concerns.
14 Holding that mere acquiescence by private entities to the government's encouragement of broad
15 policy is sufficient to establish state action would thereby effectively conscript private actors into
16 service as governmental agents subject to the constraints and obligations of the Constitution. It
17 would substantially obfuscate the line between public and private action under the Constitution.
18 *See Ennis v. City of Daly City*, No. C-09-05318-MHP, 2011 WL 672655, at *5 (N.D. Cal. Feb. 16,
19 2011) (if general allegations of joint action or conspiracy were enough to establish state action,
20 "then any individual might be liable as a joint actor or conspirator with state defendants anytime
21 state defendants act in a manner arguably beneficial to that individual or anytime an individual
22 enlisted the aid of the police.").

23 A broad reading of state action in this context would raise potential First Amendment
24 concerns. It is well-established that the First Amendment protects the "exercise of [a publisher's]
25 editorial control and judgment." *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).
26 For example, courts have recognized that "[s]ocial media platforms have a First Amendment right
27 to moderate content disseminated on their platforms." *Netchoice, LLC v. Paxton*, No.
28 21-CV-840-RP, 2021 WL 5755120, at *7-8 (W.D. Tex. Dec. 1, 2021), *appeal docketed*, No.

1 21-51178 (5th Cir. Dec. 7, 2021). In fact, a court in this district has recently held that “Twitter has
 2 important First Amendment rights that would be jeopardized by a Court order telling Twitter what
 3 content-moderation policies to adopt and how to enforce those policies.” *O’Handley*, 2022 WL
 4 93625, at *15. Constraining Twitter to First Amendment standards in the exercise of its editorial
 5 rights thus itself raises countervailing First Amendment concerns. Accordingly, finding a private
 6 entity is a state actor through a claim of conspiracy must require more than a broad brush claim of
 7 shared interests. As the cases correctly hold, conclusory allegations are not enough; the
 8 conspiracy must be based on a specific agreement (and action taken pursuant thereof) to take
 9 action violative of the rights of the claimant.

10 2. Plaintiff Fails to Allege the Interdependence Necessary to Show Joint Action

11 There is another way to establish state action—willful participation in joint action with the
 12 state. “The joint action inquiry focuses on whether the state has so far insinuated itself into a
 13 position of interdependence with [the private entity] that it must be recognized as a joint
 14 participant in the challenged activity.” *Gorenc v. Salt River Project Agr. Imp. & Power Dist.*, 869
 15 F.2d 503, 507 (9th Cir. 1989) (internal quotation marks omitted). Joint action requires a
 16 “substantial degree of cooperative action.” *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir.
 17 1989). *Collins* found the theory inapplicable in circumstances similar to those here. In *Children’s*
 18 *Health Defense v. Facebook, Inc.*, the court held that “general statements by the CDC and
 19 Zuckerberg about ‘working together’ to reduce the spread of health or vaccine misinformation, or
 20 to promote universal vaccination do not show that the government was a ‘joint participant in the
 21 challenged activity.’” No. 20-CV-05787-SI, 2021 WL 2662064, at *6 (N.D. Cal. Jun. 29, 2021),
 22 *appeal docketed*, No. 21-16210 (9th Cir. July 21, 2021). There, Children’s Health Defense
 23 (“CHD”) sued Facebook, alleging that “Facebook willfully participated in joint action with Rep.
 24 Schiff, CDC and CDC Foundation, and/or WHO officials or their agents to enforce CDC and
 25 WHO policies through Facebook’s signature algorithms and machine learning to define, identify,
 26 label as ‘false news’ and/or censor Plaintiff’s speech with respect to vaccine-related speech.”

27 In support of its argument, CHD provided a letter from Representative Schiff to Facebook
 28 CEO, Mark Zuckerberg, identifying himself as “a Member of Congress who is deeply concerned

1 about declining vaccination rates around the nation.” *Id.* at *2 (internal quotation marks omitted).
2 In the letter, Representative Schiff “urge[d] that Facebook implement specific algorithms to
3 identify, censor and remove all so-called vaccine misinformation.” *Id.* (internal quotation marks
4 omitted). Zuckerberg had also allegedly “stated publicly that Facebook is working with both the
5 CDC and the WHO . . . to remove clear misinformation about health-related issues that could
6 cause an imminent risk of harm.” *Id.* at *11 (internal quotation marks omitted). Notwithstanding
7 these claims, the court ultimately held that general statements made by Facebook, the CDC, or
8 other entities within the federal government about working together to remove misinformation did
9 not show that Facebook had worked in concert with the CDC to censor CHD’s speech or violate
10 CHD’s constitutional rights. *Id.* at *11.

11 Recently, the court in *ICAN* did not find joint action for similar reasons. 2022 WL 278386,
12 at *1. In *ICAN*, YouTube terminated ICAN’s account after removing several of their videos for
13 violating YouTube’s policy against spreading medical misinformation pertaining to COVID-19.
14 *Id.* Facebook acted similarly and unpublished ICAN’s page after removing several videos. *Id.*
15 ICAN made two arguments in support of its joint action theory: (1) “that the FAC plausibly
16 alleges joint action based on the statements made by Defendants and members of Congress,
17 namely Congressman Schiff’s commitment to monitoring the effectiveness of the changes in
18 policies made by Defendants, and Defendants’ reciprocal commit[ment] to working with
19 [m]embers of Congress[;]” and (2) “that the FAC alleges that Defendants censored ICAN in
20 accordance with rule[s] of decision supplied by the Government.” *Id.* (internal quotation marks
21 and citations omitted). Of relevance, the court reasoned that “neither Defendants’ public
22 statements indicating their intent to work with Congress, nor the statements by members of
23 Congress urging Defendants to take action, nor the media reports of unspecified collaboration
24 between Defendants and Schiff are sufficient to show that the Government was a joint participant
25 in the challenged activity.” *Id.* at *4 (internal quotation marks and citation omitted).

26 Like the statements put forth by the plaintiffs in *ICAN*, the articles offered by Plaintiff in
27 this case are not sufficient to show that the Government was a joint participant in the challenged
28 activity. The courts in *ICAN* and *Children’s Health Defense* recognized that the comment of one

1 legislator could not be imputed to the entire federal government. Similarly, here, the alleged
 2 comments made by unnamed White House officials cannot be imputed to the President.
 3 Moreover, as discussed above, statements about working together with the government to prevent
 4 the spread of misinformation do not equate to working in concert to violate constitutional rights.
 5 Plaintiff has therefore failed to allege joint action by way of conspiracy or by way of willful
 6 participation.

7 3. Section 230 of the Communications Decency Act

8 a. Section 230 Cannot Be an Independent Basis for Plaintiff's First
 9 Amendment Claim

10 Plaintiff contends that Section 230 of the Communications Decency Act (“CDA”) violates
 11 the First Amendment. Section 230 provides immunity to providers of interactive computer
 12 services, such as Twitter, for suppressing certain kinds of speech. *See* 47 U.S.C. § 230. It recites,
 13 “No provider or user of an interactive computer service shall be held liable on account of . . . any
 14 action voluntarily taken in good faith to restrict access to or availability of material that the
 15 provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or
 16 otherwise objectionable, whether or not such material is constitutionally protected.” *Id.*
 17 § 230(c)(2)(A).

18 Plaintiff alleges that the California Unruh Civil Rights Act (“Unruh Act”) protects her
 19 freedom of speech and because Section 230 preempts the Unruh Act, Congress’s enactment of
 20 Section 230 constitutes governmental action that violates the First Amendment. *Opp.* at 17. This
 21 novel argument stems from a footnote in Justice Thomas’s concurrence in *Biden v. Knight First*
 22 *Amendment Institute At Columbia University*, where he acknowledged that “some commentators
 23 have suggested that immunity provisions like § 230 could potentially violate the First Amendment
 24 to the extent those provisions pre-empt state laws that protect speech from private censorship.”
 25 *Knight*, 141 S. Ct. 1220, 1227 n.5 (2021) (Thomas, J., concurring) (citing Eugene Volokh, *Might*
 26 *Federal Preemption of Speech-Protective State Laws Violate the First Amendment?* THE VOLOKH
 27 CONSPIRACY, REASON (Jan. 23, 2021), <https://reason.com/volokh/2021/01/23/might-federal->
 28

1 [preemption-of-speech-protective-state-laws-violate-the-first-amendment/](#)).³ “According to that
2 argument, when a State creates a private right and a federal statute pre-empts that state law, ‘the
3 federal statute is the source of the power and authority by which any private rights are lost or
4 sacrificed.’” *Id.* (quoting *Railway Employees v. Hanson*, 351 U.S. 225, 232 (1956)). This theory
5 would undermine a digital platform’s immunity under Section 230; an immunity which
6 “eliminates the biggest deterrent—a private lawsuit—against caving to an unconstitutional
7 government threat.” *Id.*

8 The Volokh article that Justice Thomas relied upon discusses *Railway Employees v.*
9 *Hanson* and *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, as the
10 bases of its theory.⁴ In *Hanson*, the Supreme Court held that Congress’s enactment of a federal
11 law, which preempted state laws protecting the freedom to associate, constituted government
12 action subject to First Amendment scrutiny. *Hanson*, 351 U.S. at 232. There, employees of a
13 railroad company who did not want to join a labor organization, challenged a union shop
14 agreement that required all employees of the railroad, as a condition of their employment, to
15 become members of a specified union. *Id.* at 227. The plaintiffs asserted that the union shop
16 agreement violated the “right to work” provision of the Nebraska Constitution, which stated that
17 no person shall be denied employment because of his or her refusal to join a labor organization.
18 *Id.* at 228. The defendant contended that the Nebraska Constitution and laws did not control
19 because the federal Railway Labor Act authorized the union shop agreement. *Id.* The Railway
20 Labor Act authorized a carrier or labor organization to require all employees to become a member
21 of the labor organization, notwithstanding the law of any state. *Id.* at 228–29.

22
23
24 ³ In *Knight First Amendment Institute at Columbia University v. Trump*, 928 F.3d 226, 230 (2d
25 Cir. 2019), the Second Circuit held that then-President Donald Trump’s decision to block certain
26 users from interacting with his Twitter account violated the First Amendment. After Trump lost
27 the presidential election in 2020, the Supreme Court vacated the Second Circuit’s judgment and
28 remanded the case with instructions to dismiss as moot. *Knight*, 141 S. Ct. at 1220.

⁴ Volokh, however, concludes that his analysis may be mistaken for a number of reasons,
including that perhaps *Hanson* and *Denver Area* “are themselves mistaken in applying First
Amendment scrutiny” or that there are other precedents that “pull sufficiently in the opposite
direction.” Eugene Volokh, *Might Federal Preemption of Speech-Protective State Laws Violate
the First Amendment?* THE VOLOKH CONSPIRACY, REASON ¶ 5 (Jan. 23, 2021).

1 The plaintiffs responded that the Railway Labor Act violated their First Amendment rights
2 but the defendant argued that the Railway Labor Act did not impair any rights because it did not
3 compel employees to enter into union shop agreements. *Hanson v. Union Pac. R. Co.*, 160 Neb.
4 669, 698 (1955), *rev'd sub nom. Ry. Emp. Dep't v. Hanson*, 351 U.S. 225 (1956). Any impairment
5 of rights stemmed from private union shop agreements, not government action, in the defendant's
6 view. *Id.* The Supreme Court of Nebraska rejected this argument. It held that there was
7 government action that must be evaluated under the First Amendment because in the Railway
8 Labor Act, Congress expressly struck down the laws of 17 states that prohibited union shop
9 agreements. *Id.* "Such action on the part of Congress is a necessary part of every union shop
10 contract entered into on the railroads as far as these 17 states are concerned for without it such
11 contracts could not be enforced therein." *Id.* The Supreme Court of Nebraska held that the union
12 shop agreement violated the First Amendment because it deprived the employees of their freedom
13 of association and therefore there was no valid federal law that preempted the "right to work"
14 provision of the Nebraska Constitution. *Id.* at 699–70. The U.S. Supreme Court agreed that there
15 were justiciable questions under the First Amendment because the Railway Labor Act "sought to
16 strike down inconsistent laws in 17 States." *Hanson*, 351 U.S. at 231. The Supreme Court
17 concluded that government action impaired the plaintiffs' rights because the Railway Labor Act
18 was "the source of the power and authority by which any private rights are lost or sacrificed" and
19 the "enactment of the federal statute authorizing union shop agreements [was] the governmental
20 action on which the Constitution operates." *Id.* at 232. The Supreme Court, however, reversed the
21 Nebraska Supreme Court's decision and held that the Railway Labor Act was consistent with the
22 First Amendment. *Id.* at 238.

23 Relying on *Hanson*, the Volokh article theorized that Section 230, which allows certain
24 companies to restrict speech, could potentially violate the First Amendment to the extent its
25 provisions pre-empt state laws that protect speech from private censorship. The Supreme Court,
26 however, has recently noted that the proposition in *Hanson*—a federal law that is permissive but
27 not mandatory is sufficient to establish governmental action—"is even more questionable today."
28 *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2479 n.24 (2018).

1 The Supreme Court has not resolved this question. *Id.*

2 In *Denver Area*, the Supreme Court addressed First Amendment challenges to three
3 provisions of the Cable Television Consumer Protection and Competition Act of 1992, which
4 empowered cable operators to “regulate the broadcasting of ‘patently offensive’ sex-related
5 material on cable television.” *Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*,
6 518 U.S. 727, 732 (1996). The first provision permitted cable operators to decide whether or not
7 to broadcast such material on leased channels, the second provision required leased channel
8 operators to segregate and block the programming, and the third provision permitted cable
9 operators to regulate such material on public access channels. *Id.* at 733. Before the enactment of
10 these provisions, federal law prohibited these channels from exercising any control over program
11 content. *Id.* at 781–82. In a splintered plurality opinion, the Supreme Court upheld the first
12 provision but struck down the second and third provisions under the First Amendment because
13 they were not narrowly tailored to achieve the compelling interest of protecting children. *Id.*
14 Importantly, for the purposes of this case, the Ninth Circuit clarified that “if any controlling state
15 action analysis emerged from *Denver Area*,” it is that “state action exists when ‘Congress singles
16 out one sort of speech for vulnerability to private censorship in a context where content-based
17 discrimination is not otherwise permitted.’” *Roberts v. AT&T Mobility LLC*, 877 F.3d 833,
18 840–41 (9th Cir. 2017) (quoting *Denver Area*, 518 U.S. at 782). That said, as the Ninth Circuit
19 acknowledged, “[i]n the 21 years since it was published, the Supreme Court has never cited
20 *Denver Area* in addressing state action.” *Id.* at 840.

21 Plaintiff’s argument fails for two reasons. First, Section 230 does not single out one kind
22 of speech as suitable for private censorship; it protects generally editorial discretion over a wide
23 range of matters. It is therefore distinguishable from *Denver Area*. As the court held in *Divino*
24 *Grp. LLC v. Google LLC*, No. 19-CV-04749-VKD, 2021 WL 51715, at *7 (N.D. Cal. Jan. 6,
25 2021), “unlike the statute at issue in *Denver Area*, which permitted cable system operators to ban
26 specific content, Section 230 of the CDA does not single out particular types of speech as suitable
27 for private censorship.” Second, the viability of the state action holding of *Hanson* is
28 questionable. *See Janus*, 138 S. Ct. at 2479 n.24. Moreover, this case is distinguishable from

1 *Hanson*. As explained above, in *Hanson*, the Supreme Court held that the enactment of the
2 Railway Labor Act, which preempted the state laws protecting the freedom to associate,
3 constituted government action subject to First Amendment scrutiny. *Hanson*, 351 U.S. at 232.
4 Here, Plaintiff alleges that her freedom of speech is protected by the Unruh Act and because
5 Section 230 allows certain companies to restrict speech, it preempts the Unruh Act and violates the
6 First Amendment. Opp. at 15.

7 But the premise of Plaintiff’s argument is false—the Unruh Act does not protect speech.
8 The Unruh Act only prohibits “business establishments of every kind” from discriminating against
9 “[a]ll persons” on the basis of their “sex, race, color, religion, ancestry, national origin, disability,
10 medical condition, genetic information, marital status, sexual orientation, citizenship, primary
11 language, or immigration status.” Cal. Civ. Code § 51(b). The Unruh Act has not been held to
12 protect persons based on their viewpoints. Plaintiff asserts that California courts have interpreted
13 the Unruh Act “to go beyond the explicit list of prohibitive forms of discrimination in the statute”
14 and “to include any arbitrary discrimination by a business.” Opp. at 14. Her reliance on *Rotary*
15 *Club of Duarte v. Bd. of Dirs.*, 178 Cal. App. 3d 1035, 1047 (Cal. App. 2d Dist. 1986) is
16 misplaced. Although the California Court of Appeal held that the Unruh Act prohibits “any
17 arbitrary discrimination by a business” the case concerned discrimination on the basis of sex.
18 *Rotary Club*, 178 Cal. App. 3d at 1047. Plaintiff cites no authority holding that the Unruh Act
19 applies to discrimination on the basis of viewpoints or content of speech. Because Section 230
20 does not preempt the Unruh Act and thus does not affect speech protected by the Act, there is no
21 justiciable First Amendment claim.

22 Accordingly, Section 230 does not provide an independent basis for Plaintiff’s First
23 Amendment claim. Given the infirmities in the FAC, any future amendment would be futile. The
24 Court **GRANTS** Defendants’ motions to dismiss Plaintiff’s First Amendment claim without leave
25 to amend.

26 b. Constitutionality of Section 230

27 To the extent that Twitter relies on Section 230 immunity to argue that Plaintiff’s claims of
28 Twitter’s liability are barred, she seeks declaratory relief that Section 230 is unconstitutional

1 because it violates the First Amendment. FAC ¶ 4; Opp. at 27. But because Plaintiff’s First and
 2 Fifth Amendment claims can be resolved on non-constitutional grounds, it is unnecessary to
 3 adjudicate this constitutional question. *See Spector Motor Service v. McLaughlin*, 323 U.S. 101,
 4 105 (1944) (“If there is one doctrine more deeply rooted than any other in the process of
 5 constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . .
 6 unless such adjudication is unavoidable”); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936)
 7 (Brandeis, J., concurring) (“[I]f a case can be decided on either of two grounds, one involving a
 8 constitutional question, the other a question of statutory construction or general law, the Court will
 9 decide only the latter”).

10 B. Plaintiff’s Fifth Amendment Equal Protection Claim

11 Plaintiff also alleges that Defendants violated her Fifth Amendment right to equal
 12 protection. Specifically, she claims that “[b]y granting use of a forum (the Internet and Twitter) to
 13 people whose views Defendants find acceptable, but denying or restricting use to those expressing
 14 less favored or more controversial views, such as those expressed by Plaintiff and others similarly
 15 situated, Defendants have violated the equal protection guarantee of the Fifth Amendment.” FAC
 16 ¶ 112. She agrees with Defendants, however, that her “Fifth Amendment Equal Protection Claim
 17 rises or falls along with the First Amendment Free Speech Claim insofar as both claims are
 18 predicated upon the same facts.” Opp. at 21 n.7.

19 For the reasons stated above, Plaintiff does not plausibly allege that Twitter was acting as a
 20 state actor because she does not provide facts that plausibly allege joint action between
 21 Defendants. As such, Plaintiff’s Fifth Amendment claim is dismissed, in addition to her First
 22 Amendment claim. *See S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 523
 23 (1987) (rejecting a Fifth Amendment equal protection claim against the United States Olympic
 24 Club because they were “not a governmental actor” to which the Constitution applies).⁵

25 _____
 26 ⁵ And even if this Court found that Twitter’s conduct amounts to state action, Plaintiff does not
 27 provide any facts indicating that Twitter engaged in discrimination aside from the conclusory
 28 allegations previously listed. Twitter contends that its “editorial policies apply equally to all
 individuals and all viewpoints.” Twitter Mot. at 5. Although Plaintiff alleges that those “who
 criticized the government’s vaccination policy were discriminated against” she does not “identify
 a single Twitter user who was treated more favorably than she was treated.” *Id.*

1 Accordingly, this Court **GRANTS** Defendants' motions to dismiss Plaintiff's Fifth Amendment
2 claim without leave to amend.

3 **IV. CONCLUSION**

4 For the reasons explained above, the Court **GRANTS** Defendants' motions to dismiss
5 Plaintiff's FAC in its entirety with prejudice.

6 This order disposes of Docket Nos. 48 and 49. The Clerk of Court is instructed to enter
7 Judgment and close the case.

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9 **IT IS SO ORDERED.**

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11 Dated: March 18, 2022

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EDWARD M. CHEN
United States District Judge

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United States District Court
Northern District of California