

1 **Willkie Farr & Gallagher LLP**
 Jonathan A. Patchen (SBN 237346)
 2 jpatchen@willkie.com
 Yuhan Alice Chi (SBN 324072)
 3 ychi@willkie.com
 One Front Street, 34th Floor
 4 San Francisco, CA 94111
 Telephone: (415) 858-7400
 5 Facsimile: (415) 858-7599
 6

7 **Willkie Farr & Gallagher LLP**
 Michael Gottlieb (DCBN 974960), *pro hac vice*
 8 mgottlieb@willkie.com
 Meryl Conant Governski (DCBN 1023549), *pro hac vice*
 9 mgovernski@willkie.com
 1875 K Street, N.W.
 10 Washington, DC 20006
 Telephone: (202) 303-1442
 11 Facsimile: (202) 303-2442
 12

13 **Attorneys for Defendant Twitter, Inc.**

14 **UNITED STATES DISTRICT COURT**
 15 **NORTHERN DISTRICT OF CALIFORNIA**
 16 **SAN FRANCISCO DIVISION**

17 JUSTIN HART,
 Plaintiff,
 18 vs.
 19 FACEBOOK, INC., TWITTER, INC.; VIVEK
 20 MURTHY in his official capacity as United
 States Surgeon General; JOSEPH R. BIDEN,
 21 JR., in his official capacity as President of the
 United States; the DEPARTMENT OF
 22 HEALTH AND HUMAN SERVICES, and the
 OFFICE OF MANAGEMENT AND BUDGET,
 23 Defendants.
 24

Case No. 3:22-cv-00737-CRB

**TWITTER, INC.’S NOTICE OF MOTION
 AND MOTION TO DISMISS COMPLAINT;
 MEMORANDUM OF POINTS AND
 AUTHORITIES; DECLARATION OF
 JONATHAN A. PATCHEN; AND
 [PROPOSED] ORDER**

Judge: Hon. Charles R. Breyer
 Date: April 21, 2022
 Time: 10:00 AM
 Ctrm: Courtroom 6

Action Filed: August 31, 2021
 Trial Date: None

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NOTICE OF MOTION

PLEASE TAKE NOTICE THAT, on April 21, 2022, at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 6, Floor 17, of the United States District Court for the Northern District of California, San Francisco Division, Twitter, Inc. (“Twitter”) will and hereby does move the Court to dismiss the complaint filed by Plaintiff Justin Hart pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* Dkt. No. 1 (hereinafter “Complaint”). This Motion to Dismiss is based on this Notice of Motion, the Memorandum of Points and Authorities, Request for Judicial Notice, and the supporting declaration of Jonathan A. Patchen.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Twitter requests the Court dismiss with prejudice all of Plaintiff’s claims against Twitter (Counts I, III–IV of the Complaint).

STATEMENT OF ISSUES TO BE DECIDED

1. Whether Plaintiff brought a cognizable cause of action under the First Amendment.
2. Whether Plaintiff plausibly alleged that Twitter violated the Free Speech clause of the California Constitution.
3. Whether Plaintiff plausibly alleged a claim under promissory estoppel.
4. Whether Plaintiff’s Complaint is barred by the First Amendment of the federal Constitution, Section 230 of the Communications Decency Act, and Twitter’s Terms of Service.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **SUMMARY OF ARGUMENT**

3 Plaintiff Hart violated Twitter’s policy prohibiting “misleading and potentially harmful
4 information related to COVID-19.” In response, Twitter removed the violative content and
5 temporarily locked his account. Plaintiff filed this lawsuit seeking an order declaring Twitter’s
6 enforcement of its Terms of Service unconstitutional and forcing Twitter to re-publish the violative
7 content, including based on the flawed premise that he is legally entitled to publish whatever content
8 he wants on Twitter without restriction and irrespective of Twitter’s own policies and rights.
9 Plaintiff fails to allege facts sufficient to state a valid claim and his lawsuit is barred by contract, by
10 the First Amendment of the federal Constitution, and by Section 230 of the Communications
11 Decency Act (“Section 230”). Plaintiff’s lawsuit should be dismissed in its entirety.

12 *First*, Plaintiff cannot allege a cognizable cause of action under the federal Constitution
13 because Twitter is not a state actor and Plaintiff provides no factual allegation demonstrating that
14 Twitter acted in concert with any of the Federal Defendants. *See* Argument § I; Compl. ¶¶ 51–65
15 (“Count I”).¹ In fact, this Court recently rejected an identical claim when it determined that Twitter
16 is a “private entity” and held that “one-off, one-way communication” from the government to
17 Twitter does not “transform[] what might otherwise be private content-moderation decisions into
18 state action.” *O’Handley v. Padilla*, No. 21-cv-07063-CRB, 2022 WL 93625, at *9–10 (N.D. Cal.
19 Jan. 10, 2022) (Breyer, J.).

20 *Second*, the Complaint fails to allege a violation of “the Free Speech clause of the California
21 Constitution.” Compl. ¶¶ 75–79 (“Count III”).² Like the First Amendment, the California
22 Constitution’s Free Speech clause applies only to the government, not corporations, and courts in
23

24 _____
25 ¹ The Complaint uses paragraph numbers 1-26 twice. For clarity, citations to the second set of
26 paragraphs numbered 1–26 in the Complaint shall be followed by “*bis*” (e.g., ¶ 3 *bis*).

27 ² Presumably the Complaint is referring to Article I, Section 2 of the California Constitution, which
28 states: “Every 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”
(hereinafter, “Free Speech Clause”).

1 California have refused to expand the narrow exception where private property “is freely and openly
2 accessible to the public” to services similar to those offered by Twitter here. *See* Argument § II.

3 *Third*, Plaintiff fails to demonstrate or even assert any specific promise made by Twitter to
4 Plaintiff that could potentially support his claim of Promissory Estoppel. *See* Compl. ¶¶ 80–87
5 (“Count IV”); Argument § III. Furthermore, even assuming some vague promise existed, Plaintiff
6 cannot show that he reasonably relied on the alleged promise to his detriment where the purported
7 promise directly contradicts Twitter’s Terms of Service, and where Plaintiff fails to allege any facts
8 indicating he was harmed by the alleged reliance. *See* Argument § III.

9 *Fourth, and finally*, all of Plaintiff’s claims are barred by the First Amendment of the federal
10 Constitution, Section 230 of the Communications Decency Act (“Section 230”), and Twitter’s
11 Terms of Service. Twitter has a federal constitutional right to assert editorial control over its
12 platform, which would be violated if forced to publish content it deems to be harmful. *See*
13 Argument § IV(A). Binding law also prohibits Plaintiff from filing a lawsuit against an interactive
14 computer service, like Twitter, in connection with its decision to assert editorial control by removing
15 content that violates its Terms of Service. *See* Argument § IV(B). Finally, Twitter’s Terms of
16 Service bar this lawsuit because by agreeing to comply with its Terms, Plaintiff consented to Twitter
17 removing content that violated its policies. *See* Argument § IV(C).

18 Plaintiff cannot cure these deficiencies. Twitter’s Motion should be granted without leave
19 to amend.

20 **BACKGROUND**

21 **A. Overview of Twitter Platform, Terms of Service, and Content Moderation** 22 **Policies.**

23 Twitter is a corporation that operates an online platform allowing people to create a personal
24 profile on which to share content and communicate with other people—using “Tweets.” Compl. ¶¶
25 14, 41–42. Twitter conditions the use of its platform on compliance with its Terms of Service
26 (“Terms” or “Terms of Service”) and various rules and policies, which are posted on Twitter’s
27 website. *Id.* ¶¶ 44–46 (referring to the Terms of Service and “Twitter Rules” and citing
28 help.twitter.com/en/rules-and-policies/twitter-rules). Twitter informs anyone interested in using its

1 services that they are authorized to do so “only if you agree to form a binding contract” with Twitter
 2 by agreeing to the Twitter User Agreement, which comprises the “Terms of Service, Privacy Policy,
 3 the Twitter Rules and Policies, and all incorporated policies.” Declaration of Jonathan Patchen
 4 (“Patchen Decl.”) Ex. 1.³ In its Terms of Service, Twitter “reserve[s] the right to remove Content
 5 that violates the User Agreement” and directs people to its website for information “regarding
 6 specific policies and the process for reporting or appealing violations.” Ex. 1 § 3.⁴

7 One of Twitter’s policies prohibits using “Twitter’s services to share false or misleading
 8 information about COVID-19 which may lead to harm.” Compl. ¶ 6 *bis*; Patchen Decl. Ex. 2
 9 (“Covid-19 Misleading Information Policy”).⁵ At the time relevant here, Twitter’s COVID-19
 10 Misleading Information Policy stated:

11 Content that is demonstrably false or misleading and may lead to
 12 significant risk of harm (such as increased exposure to the virus, or
 13 adverse effects on public health systems) may not be shared on Twitter.
 14 This includes sharing content that may mislead people about the nature
 15 of the COVID-19 virus; the efficacy and/or safety of preventative
 16 measures, treatments, or other precautions to mitigate or treat the
 17 disease; official regulations, restrictions, or exemptions pertaining to
 18 health advisories; or the prevalence of the virus or risk of infection or
 19 death associated with COVID-19. In addition, we may label Tweets
 20 which share misleading information about COVID-19 to reduce their
 21 spread and provide additional context.

19 ³ As explained in Twitter’s Request for Judicial Notice filed concurrently with this Motion,
 20 Twitter’s Terms of Service (Compl. ¶ 46), Covid-19 Misleading Information Policy (*id.* ¶¶ 5–6 *bis*),
 21 and rules and policies posted on its website (*id.* ¶ 44) are both incorporated by reference in the
 22 Complaint and subject to judicial notice. All “Ex.” citations refer to the exhibits attached to the
 23 Patchen Declaration.

22 ⁴ By accepting the User Agreement, Plaintiff agreed to be bound by the current version of the Terms
 23 of Service. Patchen Decl. Ex. 1 § 6 (“the most current version of the Terms, which will always be
 24 at twitter.com/tos, will govern our relationship with you . . . By continuing to access or use the
 25 Service after those revisions become effective, you agree to be bound by the revised Terms”).

25 ⁵ The Complaint quotes Twitter’s notice to Plaintiff that explicitly references Twitter’s policy
 26 prohibiting the spread of misleading information about COVID-19, while simultaneously alleging
 27 that at “no point in the terms of service or Twitter Rules does Twitter prohibit viewpoints that
 28 oppose wearing masks.” *Compare* Compl. ¶ 6 *bis*, with *id.* ¶ 46. As discussed below, the Court
 should not credit allegations that contradict materials properly before the Court, including those
 based on incorporation by reference.

1 Ex. 3. Twitter informed accountholders that it “will label or remove false or misleading
2 information” about *inter alia* personal protective equipment “such as claims about the efficacy and
3 safety of face masks to reduce viral spread” and that penalties may include account locks. *Id.*

4 **B. Plaintiff’s Use Of The Twitter Platform.**

5 According to the Complaint, Plaintiff runs a “consulting business” and an “online website,
6 RationalGround.com, where he sells subscriptions to his articles and research on COVID-19 and
7 the government’s response to it.” Compl. ¶ 48. Plaintiff alleges that he joined Twitter in 2007 and
8 uses it “as a feeder for his other social media accounts,” as a “networking tool,” and to promote his
9 website. *Id.* ¶¶ 47–48. According to the Complaint, Plaintiff published the following Tweet on or
10 around July 18, 2021:

11 So the CDC just reported that 70% of those who came down with
12 #COvId19 symptoms had been wearing a mask. We know that masks
13 don’t protect you . . . but at some point you have to wonder if they are
14 PART of the problem.

15 *Id.* ¶ 5 *bis* (ellipses in original) (“Violative Tweet”). The same day, Twitter locked Plaintiff’s
16 account and provided him with notice that he violated the Covid-19 Misleading Information Policy:

17 **Hi Justin Hart,**

18 **Your Account, @justin_hart has been locked for violating the
19 Twitter Rules.**

20 Specifically for: Violating the policy on spreading misleading and
21 potentially harmful information related to COVID-19.

22 *Id.* ¶ 6 *bis* (emphasis in original).

23 **C. Plaintiff Files This Lawsuit.**

24 On August 31, 2021, Plaintiff filed this lawsuit in the United States District Court for the
25 Southern District of California against United States President Joseph R. Biden, Jr., Surgeon
26 General Vivek Murthy, the Department of Health and Human Services, the Office of Management
27 and Budget (collectively, “Federal Defendants”), Facebook, Inc., and Twitter. The Complaint
28 asserts—based solely on “information and belief”—that the Federal Defendants directed Twitter to
“remove Hart’s social media posts because they disagreed with the viewpoints he espoused in them

1” *Id.* ¶ 20 *bis*. The sole purported factual basis alleged to link Twitter with the Federal
 2 Defendants is public statements made during White House press briefings on July 15 and 16, 2021,
 3 in a Surgeon General Advisory, and in a media report, including Dr. Murphy “asking [our
 4 technology companies] to consistently take action against misinformation super-spreaders on their
 5 platforms.” *Id.* ¶¶ 8–20 *bis* (brackets in original); Patchen Decl. Exs. 4–6.⁶

6 On November 8, 2021, Twitter moved to transfer the case from the Southern District to this
 7 one. Dkt. Nos. 33-34. On February 2, 2022, the Honorable Thomas J. Whelan of the Southern
 8 District ordered the lawsuit transferred to this District because *inter alia* the forum-selection clause
 9 in the Terms of Service was “valid and enforceable” and applicable to all of the claims in this suit.
 10 Dkt. No. 45 at 5-7. On February 22, 2022, this Court granted a joint stipulation setting March 17,
 11 2022 as the deadline to respond to Plaintiff’s Complaint, including any motion under California
 12 Code of Civil Procedure § 425.16. Dkt. No. 64.

13 LEGAL STANDARDS

14 Federal Rule of Civil Procedure 12(b)(6) requires dismissal of a cause of action for failure
 15 to state a claim upon which relief can be granted. A cause of action may be dismissed as a matter
 16 of law when it “lacks either ‘a cognizable legal theory’ or ‘sufficient facts alleged’ under such a
 17 theory.” *O’Handley*, 2022 WL 93625, at *6 (quoting *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d
 18 1201, 1208 (9th Cir. 2019)). A plaintiff must plead factual allegations that “plausibly (not merely
 19 conceivably) entitle plaintiff to relief.” *Maya v. Centex Corp.*, 658 F.3d 1060, 1067–68 (9th Cir.
 20 2011). A claim is plausible only “when the plaintiff pleads factual content that allows the court to
 21 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*
 22 *Iqbal*, 556 U.S. 662, 678 (2009) (requires more than a “sheer possibility,” “naked assertion” or
 23 “formulaic recitation” of the elements of a cause of action). Courts are not required to accept as
 24 true “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
 25

26 _____
 27 ⁶ The Complaint does not attach the public statements that it cites and on which it integrally relies,
 28 and which are subject to incorporation by reference and judicial notice for the reasons discussed in
 Twitter’s Request For Judicial Notice filed concurrently with this Motion.

1 inferences.” *Informed Consent Action Network v. YouTube LLC*, No. 20-cv-09456-JST, 2022 WL
 2 278386, at *3 (N.D. Cal. Jan. 31, 2022) (quoting *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055
 3 (9th Cir. 2008)); see *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (not required to “assume
 4 the truth of legal conclusions merely because they are cast in the form of factual allegations”
 5 (citation omitted)). Nor must a court “accept as true allegations that contradict matters properly
 6 subject to judicial notice or by exhibit.” *Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112,
 7 1115 (9th Cir. 2014) (citations omitted).

8 ARGUMENT

9 I. PLAINTIFF’S FEDERAL CONSTITUTIONAL CLAIM FAILS AS A MATTER OF 10 LAW.

11 Plaintiff’s claim under the First Amendment of the federal Constitution fails because there
 12 is no direct cause of action under the federal Constitution. *Infra* § I(A). And the Court should not
 13 give leave to amend because Plaintiff has not, and cannot, allege facts sufficient to show state action.
 14 *Infra* § I(B).

15 A. Plaintiff’s Complaint Must Be Dismissed Because There Is No Direct Cause Of 16 Action Under The Federal Constitution.

17 The law does not recognize a “cause of action directly under the United States Constitution.”
 18 *Azul-Pacifico, Inc. v. City of L.A.*, 973 F.2d 704, 705 (9th Cir. 1992); *Tulsi Now, Inc. v. Google,*
 19 *LLC*, No. 2:19-cv-06444-SVW-RAO, 2020 WL 4353686, at *1 (C.D. Cal. Mar. 3, 2020).
 20 Accordingly, Count I should be dismissed because it alleges only a direct violation, rather than an
 21 action under *Bivens v. Six Unknown Named Agents of Federal Bureau Agents*, 403 U.S. 388 (1971)
 22 (“*Bivens*”),⁷ which is the recognized basis to assert a violation of the federal Constitution by the
 23

24 _____
 25 ⁷ It would be futile for Plaintiff to add a *Bivens* claim against Twitter because a *Bivens* action lies
 26 only as to individuals, not corporations. *Children’s Health Def. v. Facebook Inc.*, 546 F. Supp. 3d
 27 909, 933 (N.D. Cal. 2021). Plaintiff does not name an individual defendant—he has named only
 28 Twitter, which he admits is a corporation. Compl. ¶ 14. Separately, amendment is futile because
 the Ninth Circuit has never recognized *Bivens* as a basis for a purported First Amendment violation.
 See *Vega v. United States*, 881 F.3d 1146, 1153 (9th Cir. 2018).

1 federal Government. *Doe v. Google LLC*, No. 20-cv-07502-BLF, 2021 WL 4864418, at *1 n.1
 2 (N.D. Cal. Oct. 19, 2021). The Court need not engage in any further analysis to dismiss Count I.⁸

3 **B. Any Amendment Would Be Futile Because Plaintiff Cannot Allege A**
 4 **Constitutional Claim Against A Private Party Like Twitter.**

5 Twitter is a private actor and Plaintiff fails to allege facts sufficient to show a compulsion
 6 or joint action theory of state action. Plaintiff concedes that Twitter is a private corporation, Compl.
 7 ¶ 54, and binding authority firmly establishes that private online service companies, like Twitter,
 8 are not governmental actors, *see Prager Univ. v. Google LLC*, 951 F.3d 991, 995 (9th Cir. 2020);
 9 *Howard v. AOL, Inc.*, 208 F.3d 741, 754 (9th Cir. 2000); *see also O’Handley*, 2022 WL 93625, at
 10 *8 (“Twitter is a private entity.”); *Fed. Agency of News, LLC v. Facebook, Inc.*, 395 F. Supp. 3d
 11 1295, 1308–09 (N.D. Cal. 2019); *accord Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct.
 12 1921, 1930 (2019) (“merely hosting speech by others is not a traditional, exclusive public function
 13 and does not alone transform private entities into state actors subject to First Amendment
 14 constraints”). Plaintiff’s federal constitutional claim warrants dismissal because the
 15 “First Amendment of the United States Constitution *only* applies to government actors; it does not
 16 apply to private corporations or persons.” *Redden v. Women’s Ctr. of San Joaquin Cnty.*, No. C 05-
 17 03099 CRB, 2006 WL 132088, at *1 (N.D. Cal. Jan. 17, 2006) (Breyer, J.) (emphasis added); *see*
 18 Compl. ¶ 3 (“axiomatic” that the First Amendment constrains only *governmental* attempts to
 19 regulate speech (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828
 20 (1995)); *see also Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (“constitutional guarantee of free
 21 speech is a guarantee only against abridgment by government”); *Atkinson v. Meta Platforms, Inc.*,
 22 No. 20-17489, 2021 WL 5447022, at *1 (9th Cir. Nov. 22, 2021) (“First Amendment only restricts
 23 government action”); *Karas v. Access Hollywood*, No. C 12-02310 CRB, 2012 WL 3116230, at *2

24
 25 ⁸ If the Court dismisses the first count and the claims as to the Federal Defendants, it could decline
 26 to exercise supplemental jurisdiction over the state-based claims as this Court did in *O’Handley*,
 27 2022 WL 93625, at *22. *See also Divino Grp. LLC v. Google LLC*, No. 19-cv-04749-VKD, 2021
 28 WL 51715, at *9 (N.D. Cal. Jan. 6, 2021). Nevertheless, Twitter respectfully suggests that because
 all of the claims against Twitter are clearly subject to dismissal without leave to amend, and will be
 fully briefed, that the Court address all of them as a matter of judicial efficiency and comity.

1 (N.D. Cal. July 31, 2012) (Breyer, J.) (amendments to the federal Constitution “apply to and
 2 restrict only the Federal Government and not private persons” (internal citations omitted)); *accord*
 3 *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

4 In order to avoid the “presumption that private conduct does not constitute governmental
 5 action” (*O’Handley*, 2022 WL 93625, at *26), Plaintiff attempts to allege that Twitter’s conduct fits
 6 within certain narrow exceptions that allow a private actor to be treated as a government actor.
 7 Plaintiff alleges that two exceptions apply here: that Twitter (1) was “subject to government
 8 compulsion” (the “Coercion” theory) or (2) acted as a “willful participant[.]” when it “removed posts
 9 based on their viewpoint at the direction of Murthy and Biden” (the “Joint Action” theory). Compl.
 10 ¶¶ 1–2, 4, 7–20 *bis*, 53, 55–61.⁹ Each theory should be rejected because they are unsupported by
 11 the law or Plaintiff’s factual allegations, and because there are no facts that Plaintiff could plead
 12 that would demonstrate state action.

13 1. The Complaint fails to plead any factual allegation demonstrating
 14 governmental Coercion.

15 To demonstrate Coercion, Plaintiff must, but fails to, allege facts demonstrating that the
 16 Federal Defendants “exercised coercive power or has provided such significant encouragement,
 17 either overt or covert,” that Twitter’s choice to remove the Violative Tweet and lock Plaintiff’s
 18 account “must in law be deemed” that of the government. *Children’s Health Def. v. Facebook Inc.*,
 19 546 F. Supp. 3d 909, 932 (N.D. Cal. 2021) (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 840
 20 (1982)); *see Informed Consent Action Network*, 2022 WL 278386, at *7; *accord Blum v. Yaretsky*,

21 ⁹ The Supreme Court has articulated four tests for evaluating state action: (1) public function; (2)
 22 the joint action; (3) state compulsion; and (4) the governmental nexus. *Ohno v. Yasuma*, 723 F.3d
 23 984, 995-96 (9th Cir. 2013) (citing cases); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842-43 (1982);
 24 *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974); *Marsh v. Alabama*, 326 U.S. 501 (1946);
 25 *O’Handley*, 2022 WL 93625, at *8. The Complaint appears to rely exclusively on the Coercion and
 26 Joint Action tests. However, to the extent Plaintiff’s allegation that the government “accepted the
 27 benefits” of Twitter’s behavior is an attempt to assert the Nexus test, this argument also must be
 28 rejected. Compl. ¶ 62. Even if the public benefits to some degree from Twitter removing
 misinformation about COVID-19, this benefit is not sufficient to confer state action. *See Gorenc v.*
Salt River Project Agric. Improvement & Power Dist., 869 F.2d 503, 507-08 (9th Cir. 1989).
 Twitter also reserves all rights if Plaintiff attempts to assert additional state action theories in
 response to this Motion.

1 457 U.S. 991 (1982). The Complaint does not plead any allegations that would warrant finding that
2 the government coerced Twitter to take any action, generally or with respect to the Plaintiff.

3 The crux of Plaintiff’s Coercion claim is a single allegation—based only on “information
4 and belief”—that the Federal Defendants “directed Defendants Facebook and Twitter to remove
5 Hart’s social media posts because they disagreed with the viewpoints he espoused in them and
6 conspired with Facebook and Twitter to do so.” Compl. ¶ 20 *bis*. The Court need not accept nor
7 draw any inference from such a “conclusory, unwarranted” allegation. *Informed Consent Action*
8 *Network*, 2022 WL 278386, at *3. There is not a single factual allegation in the Complaint that
9 would support inferring that any of the Federal Defendants knew about the existence of Plaintiff or
10 his Twitter account, let alone that any of the Federal Defendants ever: reviewed his tweets; had any
11 discussions with Twitter about them, including the Violative Tweet; or directed Twitter to act on
12 the same. *Children’s Health Def.*, 546 F. Supp. at 933 (no coercion where no allegation that anyone
13 directed defendants “to take any specific reaction with regard to” plaintiff); *Daniels v. Alphabet*
14 *Inc.*, No. 20-cv-04687-VKD, 2021 WL 1222166, at *6 (N.D. Cal. Mar. 31, 2021) (“speculative
15 assertions” insufficient to plead that government “directed a particular result”); *Doe*, 2021 WL
16 4864418, at *3 (“generalized statements from lawmakers” that did not “mention Plaintiffs’ names,
17 their YouTube or Google accounts, their channels, or their videos” insufficient “to show that the
18 government ‘commanded’ the suspension of Plaintiffs’ accounts”); *see also George v. Pac.-CSC*
19 *Work Furlough*, 91 F.3d 1227, 1232 (9th Cir. 1996) (coercion only where government directs a
20 “certain course of action”).

21 Nor would it be reasonable to infer that the Federal Defendants “directed” Twitter to take
22 any action with respect to Plaintiff or his account because the facts as pleaded contradict such a
23 finding. The Complaint concedes that Twitter removed the Violative Tweet *prior to* any of the
24 “direct[ives]” by the Federal Government. Compl. ¶ 7 *bis*. That timeline undermines, rather than
25 supports, any inference that Twitter acted at the behest of the Federal Defendants when determining
26 that Plaintiff’s Twitter violated its Terms of Service and its Rules. *See Atkinson*, 2021 WL 5447022,
27 at *1 (no plausible claim of coercion where allegations “cast Meta Platforms’ decision to adopt
28

1 community standards as a self-interested business decision”); *Collins v Womancare*, 878 F.2d 1145,
2 1155 (9th Cir. 1989) (no coercion where “impetus” for the conduct came from private employees).

3 The sole remaining basis for Plaintiff’s coercion claim—namely, general statements by
4 Federal Defendants about their desire for private social media companies to stop the spread of
5 disinformation about COVID-19—also fails. Plaintiff has not alleged any direct communication
6 between the Federal Defendants and Twitter.¹⁰ In fact, the Federal Defendants’ statements in the
7 Complaint and contained in the underlying materials contradict the allegation of a “directive” by
8 reflecting that the communications from the Federal Defendants were mere requests. *Compare*,
9 *e.g.*, Compl. ¶ 20 *bis*, with ¶¶ 8 *bis* (“asking”), 10 *bis* (“flagging”); 58 (“request”).¹¹ A request
10 does not constitute Coercion. *See, e.g., George*, 91 F.3d at 1232. Public statements or
11 encouragement by federal politicians “regardless of how influential – do not constitute ‘action’ on
12 the part of the federal government” and therefore cannot provide a basis to assert coercion.
13 *Informed Consent Action Network*, 2022 WL 278386, at *7 (citation omitted). Furthermore, none
14 of the Federal Defendants’ public statements reflect their having “‘commanded a particular result
15 in, or otherwise participated in” Twitter’s decisions relating to Plaintiff’s account. *Id.* (citation
16 omitted). The Complaint fails to point to any “law or custom” or practice in which the Federal
17 Defendants forced Twitter to take a “certain course of action” or exercised legal control over
18 Twitter. *George*, 91 F.3d at 1232.

19 Even accepting *arguendo* that the Federal Defendants “directed” Twitter to remove the
20 Violative Tweet or COVID-19 Misinformation more generally, this would still not amount to
21 coercion. The Ninth Circuit requires a plaintiff to “show ‘something more’ than state compulsion
22

23 ¹⁰ The Advisory mentions Twitter only in reference to its COVID-19 Misleading Information Policy
24 to support the statement that some “technology platforms have improved efforts to monitor and
25 address misinformation by reducing the distribution of false or misleading posts and directing users
26 to health information from credible sources.” *See* Ex. 6 at 6 n.49.

25 ¹¹ *See also id.* at 6, 12 (“What Technology Platforms Can Do” listing some “kinds of measures”
26 they can take); Ex. 4 at 3 (“asking them to operate with greater transparency and accountability,”
27 “asking them to monitor,” “asking them to consistently take action”); Ex. 5 at 6-7 (“making sure
28 social media platforms are aware,” “flagging or raising,” “steps that everyone can take,” “some of
the steps that we think could be constructive for public health”).

1 in order to hold a private defendant liable as a governmental actor,” specifically “some nexus
 2 between the wrongful act and the private entity.” *Sutton v. Providence St. Joseph Med. Ctr.*, 192
 3 F.3d 826, 835, 838 & n.5, 841 (9th Cir. 1999) (describing “something more” as “proximate cause”);
 4 *see also Blum*, 457 U.S. at 1004. Here, the Complaint does not allege any facts showing proximate
 5 cause between the purported “directive” and Twitter’s conduct. To the contrary, as discussed above,
 6 the Complaint concedes that Twitter removed the Violative Tweet *prior to* any of the “direct[ives]”
 7 by the Federal Government. Compl. ¶ 7 *bis*.

8 2. The Complaint fails to plead joint action.

9 Plaintiff’s attempt to allege Joint Action between the Federal Defendants and Twitter fails
 10 for overlapping reasons. The Joint Action test requires that there be a “substantial degree of
 11 cooperative action” between the government and a private entity, *Franklin v. Fox*, 312 F.3d 423,
 12 445 (9th Cir. 2002), that the former has “far insinuated itself into a position of interdependence with
 13 [the private entity] that it must be recognized as a joint participant in the challenged activity[,]”
 14 *O’Handley*, 2022 WL 93625, at *9 (brackets in original) (quoting *Gorenc*, 869 F.2d at 507); *see*
 15 *also Collins*, 878 F.2d at 1154. The Complaint concedes that Twitter removed the Violative Tweet
 16 and locked his account *prior to* the alleged statements of the Federal Defendants, which alone makes
 17 it contradictory, if not impossible, to infer that Twitter acted based on those statements.

18 More critically, the Complaint’s Joint Action allegations rest on insufficient recitations of
 19 law and conclusory allegations—none of which plausibly allege a “substantial degree of cooperative
 20 action” (or any degree whatsoever) between Twitter and the Federal Government. *Compare* Compl.
 21 ¶¶ 1 (“conspir[ing]”), 2 (“collusion”), 59 (“worked in concert and/or conspiracy”) 61 (“willful
 22 participant”), 13–20 *bis*, 53 (“directed”), 62 (accepted “benefits”); *with Dietrich v. John Ascuaga’s*
 23 *Nugget*, 548 F.3d 892, 900 (9th Cir. 2008) (“bare allegation” of “joint action will not overcome a
 24 motion to dismiss” (quoting *DeGrassi v. City of Glendora*, 207 F.3d 636, 647 (9th Cir. 2000));
 25 *George*, 91 F.3d at 1231 (affirming dismissal where no “facts to support a claim of concerted
 26 action”); *O’Handley*, 2022 WL 93625, at *10. Nor does Plaintiff include any factual allegations
 27 from which the Court could infer any sort of cooperation between Twitter and the Federal
 28

1 Defendants. As discussed above, Plaintiff does not allege that Twitter and the Federal Defendants
 2 ever engaged in any direct communication, including any discussion about Plaintiff or Twitter’s
 3 decision relating to his account. *See Children’s Health Def.*, 546 F. Supp. 3d at 926 (must allege
 4 “facts showing personal involvement” and “specifically” in the defendant’s decision to remove
 5 disinformation about COVID-19 to show joint action).

6 Instead, the Complaint relies entirely on public statements by government officials
 7 requesting that social media companies stem the flow of misinformation about Covid-19 to establish
 8 joint action. Compl. ¶¶ 9–19 *bis*. Legal authority makes clear these types of public statements are
 9 insufficient to establish Joint Action. *Atkinson*, 2021 WL 5447022, at *1 (“the fact that state
 10 officials responded to Meta Platforms’ unsolicited inquiries does not plausibly allege such a degree
 11 of ‘interdependence that the state must be recognized as a joint participant’ in Meta Platforms’
 12 editorial decisions” (cleaned up)); *Informed Consent Network*, 2022 WL 278386, at *4-5
 13 (“statements by members of Congress urging Defendants to take action” reflect “little more than a
 14 shared interest in a problem of misinformation” and are not “sufficient to show that the Government
 15 was a “joint participant in the challenged activity”); *Daniels*, 2021 WL 1222166, at *1–2, 6
 16 (“publicly expressed views of individual members of Congress” to YouTube to remove Covid-19
 17 misinformation “do not constitute ‘action’ on the part of the federal government”); *Doe*, 2021 WL
 18 4864418, at *5 (“no allegation that government officials were in the room or somehow directly
 19 involved in the decision to suspend” account); *accord Taylor v. List*, 880 F.2d 1040, 1048 (9th Cir.
 20 1989) (“Mere passive acquiescence in the direction of state officials generally is not sufficient”);
 21 *O’Handley*, 2022 WL 93625, at *9-10 (citing cases).¹²

22 This Court held in *O’Handley* that a “single message to Twitter, flagging a single O’Handley
 23 tweet” containing misinformation about an election was an insufficient basis to find Joint Action

24
 25 ¹² *See also Abu-Jamal v. Nat’l Pub. Radio*, No. 96-0594, 1997 WL 527349, at *1 (D.D.C. Aug. 21,
 26 1997), *aff’d*, 159 F.3d 635 (D.C. Cir. 1998) (no joint action where Senator contacted and
 27 successfully demanded NPR cancel broadcast); *Aaron v. Aguirre*, No. 06-cv-1451-H(POR), 2006
 28 WL 8455871, at *21 (S.D. Cal. Dec. 13, 2006) (dismissal where failed to “detail actions” connecting
 defendant to government); *Coleman v. Sterling*, No. 09-cv-1594-W-BGS, 2011 WL 839552, at *3
 (S.D. Cal. Mar. 7, 2011) (must plead “meeting of the minds”).

1 because the message “did not direct or even request that Twitter take any particular action in
2 response to the tweet” and “one-off, one-way communication” in which one party is “supplying
3 information” to another does not amount to “substantial cooperation.” *Id.* (citing cases). Here, as
4 discussed above, Plaintiff fails to even allege any direct communication between Twitter and the
5 Federal Defendants, let alone any communication about his account. As far as allegations about
6 public statements encouraging social media companies to prevent spreading of COVID-19
7 misinformation, this Court in *O’Handley* rightly held that such statements do not create Joint
8 Action. *Id.* at *10-11 (“statements about working together do not demonstrate joint action,”
9 especially in the absence of any allegations that “Twitter consulted or conferred with the
10 government on content decisions” (relying on *Children’s Health Def.*, 546 F. Supp. 3d at 928)). Just
11 as in *O’Handley*, Plaintiff makes no allegation demonstrating that the government played any role
12 in any of Twitter’s internal decisions regarding Plaintiff’s Violated Tweet. As in *O’Handley*, the
13 Court should find that Plaintiff has not and cannot demonstrate any Joint Action between the Federal
14 Defendants and Twitter and dismiss the Complaint with prejudice.

15 The Complaint also makes vague allegations of a conspiracy throughout in an attempt to
16 establish Joint Action (*e.g.*, ¶¶ 1, 4, 59), but those allegations similarly cannot show joint action.
17 To plead Joint Action by conspiracy, Plaintiff has to plausibly allege that Twitter and the Federal
18 Defendants “share the common objective of the conspiracy” to “deprive [Plaintiff] of his
19 constitutional right.” *Taylor*, 880 F.2d at 1048; *see Franklin*, 312 F.3d at 445 (“have acted in
20 concert in effecting a particular deprivation of constitutional rights”); *Fonda v. Gray*, 707 F.2d 435,
21 438 (9th Cir. 1983) (“an agreement or ‘meeting of the minds’ to violate constitutional rights must
22 be shown”). Here, the Complaint pleads only conclusory allegations about Twitter purportedly
23 conspiring with the Federal Defendants and does not allege any conspiratorial objective or
24 agreement between Twitter and the Federal Defendants to specifically violate his rights. *See*
25 *generally* Compl. This does not provide a basis to infer a conspiracy sufficient to plead Joint Action.
26 *See O’Handley*, 2022 WL 93625, at *11–12 (allegations of government “work[ing] closely with
27 social media companies” to prevent misinformation spreading “might demonstrate a meeting of the
28

1 minds to promptly address [] misinformation, but not a meetings of the minds to ‘violate
2 constitutional rights,’ let alone [Plaintiff’s] constitutional rights”). Accordingly, as in *O’Handley*,
3 the Court should reject Plaintiff’s claims of conspiracy here.

4 Plaintiff’s reliance on *Ohno v. Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013) and *Tsao v. Desert*
5 *Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012) at Compl. ¶¶ 55-57 as a basis for finding Joint
6 Action here also is misplaced and should be rejected. In *Desert Palace*, the Ninth Circuit found
7 state action where the Las Vegas police department actually trained, provided information to, and
8 delegated authority to private security guards to effectuate the arrest at issue in that case. *Desert*
9 *Palace, Inc.*, 698 F.3d at 1140-41. As this Court explained in *O’Handley*, *Desert Palace* “only
10 illustrates how meager the allegations here are” as to Joint Action:

11 The State did not delegate to Twitter any “authority, normally reserved
12 to the state.” Nor, in its single email sending Twitter information, did
13 the State “exert control over how Twitter used the information it
14 obtained.” While the State might have approved of how Twitter acted
15 in response to [Plaintiff’s] tweet—and it might just as well not have—
16 mere approval or acquiescence does not make the State responsible for
17 Twitter’s actions.

18 2022 WL 93625, at *10 (cleaned up and citations omitted); *accord Informed Consent Network*,
19 2022 WL 278386, at *4. As in *O’Handley*, Plaintiff’s reliance on *Desert Palace* provides no support
20 for a claim of Joint Action here.

21 Plaintiff cites *Ohno* for the general proposition that Joint Action can exist when the
22 government “affirms, authorizes, encourages, or facilitates unconstitutional conduct through its
23 involvement with a private party.” However, Plaintiff’s reliance on this case ignores the fact that
24 the Ninth Circuit rejected any claims of state action in *Ohno* and specifically found that there was
25 no behavior fairly attributable to state actors or any meaningful receipt of benefits by the state. 723
26 F.3d at 996–97. The holding of that case—that enforcing a foreign judgment by a “domestic court
27 in the United States”—is inapposite to the legal question before this Court as to whether a private
28 company acts jointly with the federal government by taking actions that happen to be consistent

1 with public statements by federal politicians. *Id.* at 993–95. The Complaint warrants dismissal
 2 without leave to amend because it does not, and cannot, allege any facts that demonstrate Joint
 3 Action.

4 **II. PLAINTIFF FAILS TO STATE A CLAIM UNDER THE CALIFORNIA**
 5 **CONSTITUTION.**

6 Plaintiff attempts to assert that Twitter’s enforcement action against his Violative Tweet
 7 also violates the California Constitution. This claim is without merit because Twitter is not a state
 8 actor, and the limited exception California courts have recognized for companies that offer private
 9 property “freely and openly” to the general public is not applicable here. Like its federal
 10 counterpart, the Free Speech Clause of the California Constitution requires a plaintiff to allege state
 11 action to plead a cognizable constitutional violation. *Golden Gateway Ctr. v. Golden Gateway*
 12 *Tenants Ass’n*, 26 Cal. 4th 1013, 1021, 1023 (2001) (plurality) (“California’s free speech clause
 13 contains a state action limitation”).¹³ Plaintiff admits that Twitter is not a state actor but nevertheless
 14 argues that *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1979) mandates that the “Free
 15 Speech clause of the California Constitution” bars Twitter from removing content because it is a
 16 “modern-day town square” that provides “an essential and invaluable forum” for Plaintiff’s exercise
 17 of the Free Speech Clause. Compl. ¶¶ 76–78. Plaintiff’s expansive theory has been widely rejected
 18 by California courts, and this Court should not break new ground.

19 Applying *Pruneyard*, California courts have interpreted the California Free Speech Clause
 20 to apply to private companies “*only if the property is freely and openly accessible to the public.*”
 21 See *Golden Gateway Ctr.*, 26 Cal. 4th at 1021, 1031–33 (emphasis added) (acknowledging
 22 “ambiguities” and a “notable gap” in the reasoning of *Pruneyard*); accord *Ralphs Grocery Co. v.*
 23 *United Food & Com. Workers Union Loc. 8*, 55 Cal. 4th 1083, 1118 (2012). But private companies
 24

25 ¹³ The Ninth Circuit has concluded that “the California Supreme Court would impose a state action
 26 requirement on Article I, section 2(a), along the lines suggested in the *Golden Gateway* plurality
 27 opinion” in light of the absence of controlling precedent from the California Supreme Court on the
 28 question. *Bolbol v. Feld Ent., Inc.*, 613 F. App’x 623, 625 (9th Cir. 2015) (relying on *Yu v. Univ.*
of La Verne, 196 Cal. App. 4th 779 (2011)).

1 that limit the provision of services only to individuals who expressly agree *ex ante* to abide by the
2 terms of service do not make their “property . . . freely and openly accessible to the public.” *Golden*
3 *Gateway Ctr.*, 26 Cal. 4th at 1021. Instead, Twitter’s requirement that *all* people who use its
4 services agree to a binding Terms of Service limits entry to only those individuals who have entered
5 into an enforceable legal agreement with Twitter. Unlike public streets or open-air malls, Twitter
6 restricts access by requiring agreement with its Terms of Service before entering and this
7 distinguishes Twitter from any property that has been recognized as a public forum under California
8 law. *See Fashion Valley Mall, LLC v. NLRB*, 42 Cal. 4th 850, 858 (2007) (public forum “if it is
9 open to the public in a manner similar to that of public streets and sidewalks”); *San Diego Branch*
10 *of Nat’l Ass’n for the Advancement of Colored People v. Cnty. of San Diego*, No. 16-cv-2575-JLS
11 (BGS), 2017 WL 2445541, at *6 (S.D. Cal. June 6, 2017) (parking lot behind company not public
12 forum); *see also Campbell v. Feld Ent. Inc.*, No. 12-cv-4233-LHK, 2014 WL 1366581, at *8 (N.D.
13 Cal. Apr. 7, 2014).

14 Plaintiff has not provided and Twitter is not aware of any authority extending *Pruneyard*
15 outside of the context of real property, let alone any holding that privately owned websites, like
16 Twitter, become state actors by offering a platform where people who agree to a platform’s terms
17 of service are allowed to post on the website. To the contrary, courts in this District and others have
18 rejected identical arguments and declined to extend *Pruneyard* to online service providers. *See*
19 *Zimmerman v. Facebook, Inc.*, No. 19-cv-04591-VC, 2020 WL 5877863, at *2 (N.D. Cal. Oct. 2,
20 2020) (rejecting argument that YouTube is a state actor for purposes of Free Speech Clause as an
21 operator of a “digital town square”); *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d 1099, 1115-
22 16 (N.D. Cal. 2017), *aff’d and remanded*, 938 F.3d 985 (9th Cir. 2019), *cert. granted, judgment*
23 *vacated on other grounds*, 141 S. Ct. 2752 (2021) (rejecting argument that LinkedIn is a “modern-
24 day equivalent of the shopping mall or town square,” including because no court has “expressly
25 extended *Pruneyard* to the Internet generally” and the “Court has doubts” about whether it could
26 be so applied and the “potentially sweeping consequences”); *Domen v. Vimeo, Inc.*, 433 F. Supp.
27 3d 592, 607 (S.D.N.Y. 2020), *aff’d*, 991 F.3d 66 (2d Cir. 2021), *reh’g granted and opinion vacated*,

1 2 F.4th 1002 (2d Cir. 2021), and *amended and superseded on reh'g*, 6 F.4th 245 (2d Cir. 2021), and
 2 *aff'd*, 6 F.4th 245 (2d Cir. 2021) (same); *see also Kinderstart.com LLC v. Google, Inc.*, No. C 06-
 3 2057 JF (RS), 2006 WL 3246596, at *7 (N.D. Cal. July 13, 2006) (rejecting argument that Google
 4 is a state actor by being the “functional equivalent of a traditional public forum”). Similarly, in
 5 the context of federal constitutional claims, the Ninth Circuit refused to treat a private Internet
 6 company as a public forum simply because it offered a public-facing platform used with “ubiquity.”
 7 *Prager Univ.*, 951 F.3d at 995 (“Despite YouTube’s ubiquity and its role as a public-facing
 8 platform, it remains a private forum” under the First Amendment); *Zimmerman*, 2020 WL 5877863,
 9 at *2 (apply reasoning of *Prager* as “equally applicable” to “exact argument” that YouTube is a
 10 state actor for purposes of the Free Speech Clause because it operates as a “digital town square”).¹⁴
 11 This Court should similarly reject Plaintiff’s attempt to improperly expand *Pruneyard*.

12 **III. PLAINTIFF FAILS TO STATE A CLAIM FOR PROMISSORY ESTOPPEL.**

13 The Complaint also fails to state a claim for promissory estoppel, which requires: “(1) a
 14 promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made;
 15 (3) the reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel
 16 must be injured by his or her reliance.” *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 38 (2021).

17 The Complaint does not plausibly allege any promise Twitter made to Plaintiff. Instead, it
 18 only recites the legal element of a “clear and unambiguous promise’ to Hart that he could use their
 19 services to communicate and network with” other people on Twitter. Compl. ¶¶ 41–50, 80–87.
 20 This conclusory allegation is insufficient. *Murphy*, 60 Cal. App. 5th at 39 (“No plausible reading
 21 of the six contract terms and general statements Murphy identifies promises users that they will not
 22 have their content removed nor lose access to their account based on what they post online.”); *see*
 23

24 ¹⁴ Even if the Court permits Count II to stand, which it should not, it should dismiss Plaintiff’s
 25 attempt to recover financial damages because the Supreme Court of California has declined “to
 26 recognize a constitutional tort action for damages to remedy the asserted violation of article I,
 27 section 2(a)” of the California Constitution. *Degrassi v. Cook*, 29 Cal. 4th 333, 335 (2002);
 28 *Katzberg v. Regents of the Univ. of Cal.*, 29 Cal. 4th 300, 311 (2002); *accord Madrid v. H. Anglea*,
 No. 1:19-cv-01456-JLT (PC), 2020 WL 1689709, at *5 (E.D. Cal. Apr. 7, 2020); *Minkley v. Eureka*
City Schs., No. 17-cv-3241-PJH, 2017 WL 4355049, at *16 (N.D. Cal. Sept. 29, 2017).

1 also *Glen Holly Ent., Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1017 (9th Cir.), *opinion amended on*
 2 *denial of reh’g*, 352 F.3d 367 (9th Cir. 2003) (upholding dismissal where alleged promise was “not
 3 definite enough to be enforceable”); *Ryan v. Sandia Corp.*, No. C 15-4102 CRB, 2016 WL 1697946,
 4 at *4 (N.D. Cal. Apr. 28, 2016) (Breyer, J.) (dismissal of promissory estoppel for failure to specify
 5 “who made which promises to her, when the promises were made, or what the specifics of any
 6 promises might have been”).

7 Nor would it be possible for Plaintiff to “reasonably rely on promises that Twitter would not
 8 restrict access” to his account because that “promise” is directly contrary to the Twitter Terms of
 9 Service. *Murphy*, 60 Cal. App. 5th at 38; Ex. 1 § 4 (Twitter “may suspend or terminate your account
 10 or cease providing you with all or part of the Services at any time for any or no reason, including,
 11 but not limited to, if” Twitter reasonably believes he has “violated these Terms or the Twitter Rules
 12 and Policies”); Ex. 2 (consequences for violating Covid-19 Misleading Information Policy includes
 13 deleting the tweets, locking the account, or permanently suspending it).¹⁵ The Complaint also fails
 14 to plead any facts showing that Plaintiff changed his position, i.e., decided to publish the Violative
 15 Tweet, based on Twitter’s alleged promise not to suspend his use of its services. *Ngo v. Green Tree*
 16 *Servicing LLC*, No. 13-cv-2929 W (RBB), 2014 WL 1028885, at *4 (S.D. Cal. Mar. 13, 2014)
 17 (failure to state a claim for promissory estoppel where “only reasonable inference is that Plaintiff
 18 stopped making payments because of her financial hardship, and not because of anything Defendant
 19 did or did not do”); *Lemon v. Bear Stearns Residential Mortg. Corp.*, No. 2:11-cv-03677-ODW,
 20 2012 WL 2395169, at *10 (C.D. Cal. June 25, 2012) (dismissal where “allege no facts
 21 demonstrating that they changed their position in reliance”).

22 In sum, Plaintiff may disagree with Twitter’s policies regarding the spread of Covid-19
 23 misinformation, but that disagreement is an insufficient basis to allege that Twitter made a promise
 24 that it did not and which contradicts written contractual terms to which he expressly agreed. *See*
 25

26 ¹⁵ The Court should reject the Complaint’s assertion that at “no point in the terms of service or
 27 Twitter Rules does Twitter prohibit viewpoints that oppose wearing masks” (Compl. ¶ 46) as
 28 directly contradictory to other allegations of the Complaint and materials cited therein. *Supra* at
 Background § B (citing *inter alia* Compl. ¶ 6 *bis*).

1 *Distance Learning Co. v. Silly Monkey Studios, LLC*, No. 16-cv-06943-SK, 2017 WL 9613958, at
2 *1–2 (N.D. Cal. Feb. 14, 2017).

3 **IV. ALL OF PLAINTIFF’S CLAIMS AGAINST TWITTER ARE BARRED.**

4 **A. The First Amendment Bars All Of Plaintiff’s Claims As To Twitter.**

5 Beyond Plaintiff’s failure to state any legal cognizable claim, his claims are also barred by
6 the First Amendment. The relief sought by Plaintiff—including permanently enjoining Twitter
7 “from monitoring, flagging, and deleting social media posts based on the viewpoints the posts
8 espouse” (Compl. ¶¶ 5, 50, 64–65, 79, 86–87)—falls squarely within the First Amendment’s
9 protections for Twitter’s own speech and editorial judgment. Because Plaintiff’s suit “directly
10 targets the way a content provider chooses to deliver, present, or publish news content on matters
11 of public interest,” it “is based on conduct in furtherance of free speech rights[.]” *Greater L.A.*
12 *Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 424–25 (9th Cir. 2014).

13 The First Amendment “protects private entities” from requirements that they “open their
14 property for speech by others.” *Halleck*, 139 S. Ct. at 1931 n.2 (emphasis in original); *Pac. Gas &*
15 *Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 11 (1986) (plurality) (“State is not free either
16 to restrict appellant’s speech to certain topics or views or to force appellant to respond to views that
17 others may hold”); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (First
18 Amendment protects “exercise of editorial control and judgment”). This Court has recognized that,
19 like “a newspaper or a news network, Twitter makes decisions about what content to include,
20 exclude, moderate, filter, label, restrict, or promote.” *O’Handley*, 2022 WL 93625, at *14.
21 Accordingly, Twitter’s decisions are protected by the First Amendment. Indeed, Federal district
22 courts have held that the First Amendment protects decisions made by online platforms to decide
23 what content to publish and not to publish. *See NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082,
24 1090-93 (N.D. Fla. 2021), *appeal filed* (July 13, 2021); *La’Tiejira v. Facebook, Inc.*, 272 F. Supp.
25 3d 981, 991 (S.D. Tex. 2017); *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 443 (S.D.N.Y. 2014);
26 *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–30 (D. Del. 2007). All of the remedies sought
27 by Plaintiff—damages and injunctive relief—are all premised on the idea that Twitter should be
28

1 punished for, and forbidden from, deciding what content to publish. The First Amendment
 2 precludes this outcome and requires dismissing Plaintiff’s Twitter-related claims. *O’Handley*, 2022
 3 WL 93625, at *15 (“Twitter has important First Amendment rights that would be jeopardized by a
 4 Court order telling Twitter what content-moderation policies to adopt and how to enforce those
 5 policies. The Court will issue no such order”).

6 **B. Section 230(c) Bars All Of Plaintiff’s Claims Against Twitter.**

7 Plaintiff’s claims also are subject to dismissal under Section 230 of the Communications
 8 Decency Act, which provides “robust” immunity to internet service providers, like Twitter, in order
 9 to encourage them to “self-regulate the dissemination of offensive material over their services.” 47
 10 U.S.C. § 230(c); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 43–44 (2006) (quoting *Zeran v. AOL, Inc.*,
 11 129 F.3d 327, 331–33 (4th Cir. 1997)); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123
 12 (9th Cir. 2003); *Hassell v. Bird*, 5 Cal. 5th 522, 534–35 (2018). Section 230(c)(1) bars attempts to
 13 treat an interactive computer service as “the publisher or speaker” of information provided by
 14 “another information content provider.” *Id.*¹⁶ Accordingly, this lawsuit is barred in its entirety
 15 because all of Plaintiff’s claims would require the Court to treat Twitter “as the ‘publisher or
 16 speaker’ of content” because “removing content is something publishers do, and to impose liability
 17 on the basis of such conduct necessarily involves treating the liable party as a publisher.” *Kifle v.*
 18 *YouTube LLC*, No. 21-cv-01752-CRB, ECF No. 71 at 5-6 (N.D. Cal. Oct. 5, 2021) (Breyer, J.)
 19 (citing cases) (holding Section 230(c)(1) barred contract claims that “center on YouTube’s ability
 20 to terminate” a user’s account and remove posted content)); see *Barnes v. Yahoo!, Inc.*, 570 F.3d
 21 1100, 1102 (9th Cir. 2000); *Sikhs for Just. “SFJ”, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088,
 22
 23

24 ¹⁶ There can be no dispute that Twitter is an “interactive computer service.” See Compl. ¶¶ 41–43;
 25 Section 230(f)(2) (defining interactive service provider as entity that “provides or enables computer
 26 access by multiple users to a computer service”); *Brittain v. Twitter, Inc.*, No. 19-cv-00114-YGR,
 27 2019 WL 2423375, at *2 (N.D. Cal. June 10, 2019), *appeal dismissed*, No. 19-16622, 2020 WL
 28 4877527 (9th Cir. Mar. 6, 2020); *Murphy*, 60 Cal. App. 5th at 17, 25. Plaintiff effectively admits
 to being an “information content provider” by pleading that he created content provided via Twitter.
 See 47 U.S.C. § 230(f)(3); Compl. ¶¶ 5–6 *bis*.

1 1092–93 (N.D. Cal. 2015); *Barrett*, 40 Cal. 4th at 22; *Murphy*, 60 Cal. App. 5th at 26; *Cross v.*
 2 *Facebook, Inc.*, 14 Cal. App. 5th 190, 207 (2017).¹⁷

3 Likewise, Section 230(c)(2) requires dismissal of Plaintiff’s claims because it prohibits
 4 liability for “any action voluntarily taken in good faith to restrict access to or availability of material
 5 that the provider considers to be obscene or otherwise objectionable,” irrespective of whether “such
 6 material is constitutionally protected,” and the Complaint does not allege any bad faith. *Barnes*,
 7 570 F.3d at 1105 (alterations omitted) (noting that Section 230(c)(2) is additive to 230(c)(1));
 8 *Goddard v. Google, Inc.*, No. C 08-2738JF (PVT), 2008 WL 5245490, at *6 (N.D. Cal. Dec. 17,
 9 2008) (“The intent of Congress in enacting § 230(c)(2) was to encourage efforts by Internet service
 10 providers to eliminate such material by immunizing them from liability where those efforts
 11 failed.”).¹⁸

12 C. The Terms of Service Bar The Complaint.

13 Plaintiff’s claims against Twitter also fail because by agreeing to Twitter’s Terms of Service,
 14 he understood that Twitter may—without incurring any liability to the people who use its services—
 15 “refuse to distribute” any user-generated content for “any or no reason,” including but not limited
 16 to if Twitter believes that users have “violated these Terms or the Twitter Rules and Policies.”
 17 Patchen Decl. Ex. 1 § 4. Those provisions, to which Plaintiff agreed as a condition of using Twitter
 18 and from which his claims arise, prevent him from seeking to hold Twitter liable for doing exactly
 19 what he alleges it did: refuse to distribute a Tweet for violation of Twitter’s policies. *See, e.g.*,

22 ¹⁷ *See* Compl. Count I (“violated the Free Speech Clause of the First Amendment when they acted
 23 jointly to **remove** Hart’s social media posts”), Count III (“violated the Free Speech clause of the
 24 California Constitution when they **blocked** Hart”), ¶ 85 (Count IV: alleging “**removal** and **flagging**
 of Hart’s posts and suspension of his account” contravened promise to “use” Twitter’s “services to
 communicate and network”) (all emphases added).

25 ¹⁸ *Barnes*’ denial of Section 230(c)(1) to a claim of promissory estoppel does not dictate a different
 26 result because unlike in that case, the alleged promise that Plaintiff “could use their services to
 27 communicate and network” is not derived from any contract or specific promise by Twitter but
 28 rather from the exercise of its editorial decision to limit the spread of disinformation. *Barnes*, 570
 F.3d at 1102.

1 *Caraccioli v. Facebook, Inc.*, 700 F. App'x 588, 590 (9th Cir. 2017) (affirming district court's
2 dismissal under Facebook's terms of service).

3 **V. DISMISSAL WITHOUT LEAVE TO AMEND IS WARRANTED.**

4 A court may deny leave to amend where amendment would be futile because the claim is
5 barred as a matter of law. *Sikhs for Just.*, 144 F. Supp. 3d at 1096 (quoting *Bonin v. Calderon*, 59
6 F.3d 815, 845 (9th Cir. 1995)); accord *Daniels*, 2021 WL 1222166, at *13. For all the reasons
7 discussed above, Plaintiff cannot plead any set of facts that would overcome the legal hurdles to all
8 of his claims. *O'Handley*, 2022 WL 93625, at *28 (dismissing analogous claims with prejudice).
9 Dismissal with prejudice is warranted here.

10 **CONCLUSION**

11 For the foregoing reasons, Twitter respectfully requests that this Court grant this Motion,
12 without leave to amend, and dismiss Plaintiff's Complaint as to Twitter with prejudice.

13
14 Dated: March 17, 2022

Respectfully submitted,

15
16 By: /s/ Jonathan A. Patchen
Jonathan A. Patchen
17 Michael Gottlieb
18 Meryl Conant Governski
Yuhan Alice Chi
19 WILLKIE FARR & GALLAGHER LLP
Attorneys for Defendant Twitter, Inc.