

1 Patrick J. Carome (*pro hac vice*)  
Ari Holtzblatt (*pro hac vice*)  
2 WILMER CUTLER PICKERING  
HALE AND DORR LLP  
3 1875 Pennsylvania Ave, NW  
4 Washington, DC 20006  
Telephone: (202) 663-6000  
5 Facsimile: (202) 663-6363  
patrick.carome@wilmerhale.com  
6

7 Mark D. Flanagan (SBN 130303)  
Thomas G. Sprankling (SBN 294831)  
8 WILMER CUTLER PICKERING  
HALE AND DORR LLP  
9 950 Page Mill Road  
Palo Alto, CA 94304  
10 Telephone: (650) 858-6000  
11 Facsimile: (650) 858-6100  
mark.flanagan@wilmerhale.com  
12

*Attorneys for Defendant*

13  
14 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
15 COUNTY OF SAN FRANCISCO  
16

17 JARED TAYLOR; NEW CENTURY  
FOUNDATION,  
18  
19 Plaintiffs,  
20 v.  
21 TWITTER, INC.,  
22 Defendant.

CASE No. CGC-18-564460  
**DEFENDANT TWITTER, INC.'S  
MEMORANDUM IN SUPPORT OF  
SPECIAL MOTION TO STRIKE UNDER  
CALIFORNIA CODE OF CIVIL  
PROCEDURE SECTION 425.16 THE  
AMENDED COMPLAINT OF  
PLAINTIFFS JARED TAYLOR AND  
NEW CENTURY FOUNDATION**

Judge: Hon. Harold E. Kahn  
Reservation No: 04240524-03  
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1 In enacting this State’s anti-SLAPP statute, the Legislature explained that “participation in  
2 matters of public significance . . . should not be chilled through abuse of the judicial process.” Cal.  
3 Civ. Proc. Code § 425.16(a). Because this suit seeks to “chill [the Defendant’s] valid exercise of the  
4 constitutional right[] of freedom of speech,” and because Plaintiffs cannot establish a “probability”  
5 that they will prevail, the Amended Complaint should be stricken in its entirety. *Id.* § 425.16(b).

6 Defendant Twitter, Inc. is a private-sector company that runs “the world’s largest  
7 microblogging site.” First Am. Compl. (“FAC”) ¶ 16. To protect users’ safety and experience,  
8 Twitter requires all users to agree to its Terms of Service and to abide by the “Twitter Rules.” *Id.*  
9 ¶¶ 40-44. While Twitter aims to “[g]ive everyone the power to create and share ideas instantly,  
10 without barriers” (*id.* ¶ 61), these “limitations on the type of content and behavior that [Twitter]  
11 allow[s]” are meant to ensure “people feel safe expressing diverse opinions and beliefs.” *See*  
12 Current Twitter Rules (attached as Sprankling Decl., Ex. G); *see also* FAC, Ex. D (2011 Rules). For  
13 example, Twitter does not permit “direct, specific threats of violence” and bars “accounts belonging  
14 to or affiliated with violent extremist groups.” FAC, Exs. D, O. Twitter believes that the presence  
15 of users affiliated with groups that promote violence “risk[s] having a chilling effect on opponents  
16 and bystanders” and “could also have dangerous consequences offline[.]” FAC, Ex. O.

17 Plaintiffs Jared Taylor and New Century Foundation are—according to sources cited in their  
18 Amended Complaint (at ¶ 37)—proponents of “crudely white supremacist” ideas who organize  
19 gatherings that are “typically banned from hotels and conference rooms as soon as the proprietors  
20 find out about [their] racist mission.” Southern Poverty Law Center (“SPLC”), *Jared Taylor*; Gelin,  
21 *White Flight*, Slate (Nov. 2014) (attached as Sprankling Decl., Exs. A, B). Plaintiffs are suing  
22 Twitter over its decision to suspend their accounts after concluding they were “affiliated with a  
23 violent extremist group.” FAC ¶ 45. They urge this Court to rule that California law bars Twitter  
24 from controlling who can maintain an account on its platform, even though Twitter (a) adopted its  
25 violent extremist group rule out of a concern that having such persons on the platform risks  
26 “chilling” the speech of “opponents and bystanders” or could “have dangerous consequences  
27 offline,” FAC, Ex. O; and (b) has determined that some users, including Plaintiffs, have an affiliation  
28 that violates that rule. If successful, this suit would infringe Twitter’s own First Amendment right to

1 “exercise editorial control and judgment” to maintain a forum where users feel safe to express  
2 themselves. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). This suit would thus  
3 chill—not safeguard—the Constitution’s “cherished free speech protections.” *See* FAC ¶ 26.

4 Plaintiffs’ claims are meritless for several reasons. Because their claims seek to hold Twitter  
5 liable for blocking user-generated content, they are barred in their entirety by § 230(c)(1) of the  
6 federal Communications Decency Act, 47 U.S.C. § 230(c)(1). Because Plaintiffs’ suit impinges on  
7 Twitter’s right to exercise editorial control in creating a safe environment for its users, the First  
8 Amendment also bars their claims. And regardless of these absolute bars, Plaintiffs have failed to  
9 allege—and will be unable to factually substantiate—any viable claims. The Court should therefore  
10 strike Plaintiffs’ suit in its entirety under the anti-SLAPP statute. Cal. Civ. Proc. Code § 425.16(b).

#### 11 **BACKGROUND**

12 Twitter is a free social networking service that allows its hundreds of millions of users to  
13 share their views and track current events. FAC ¶¶ 16, 62. Twitter users stay connected by reading  
14 and posting “Tweets,” short messages limited to a certain number of characters. *Id.* The brevity of  
15 the messages and the ability to react instantaneously to political, cultural, and social happenings have  
16 made Twitter one of the world’s most popular online platforms. *Id.* ¶¶ 16-19.

17 Twitter’s services are free, but users must agree to Twitter’s User Agreement, including  
18 Twitter’s Terms of Service (“ToS”) and the Twitter Rules, which, in turn, incorporate various  
19 policies. *See* FAC ¶¶ 16, 19. Together these documents lay down guidelines for who may maintain  
20 an account and what type of content can be shared, and they reserve to Twitter the right to restrict  
21 any user-generated content and suspend any user. *See id.* ¶¶ 97-99; FAC, Ex. G (current ToS), Exs.  
22 K, L, M (prior versions of ToS)<sup>1</sup>, Ex. D (June 2011 Twitter Rules), Current Twitter Rules,  
23 Sprankling Decl., Ex. G. Because Twitter is continuously refining how to “make Twitter a better  
24 experience for all,” it has consistently “reserve[d] the right” “to change these rules from time to  
25

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26 <sup>1</sup> Plaintiffs did not attach to the Amended Complaint the versions of the ToS in place when  
27 they opened their accounts. Those earlier versions similarly stated that “[w]e [Twitter] reserve the  
28 right at all times (but will not have an obligation) to remove or refuse to distribute any Content on  
the Services and to terminate users or reclaim usernames.” Twitter ToS, Version 4 (attached as  
Sprankling Decl., Ex. E); Twitter ToS, Version 5 (attached as Sprankling Decl., Ex. F).

1 time.” FAC, Ex. D (June 2011 Twitter Rules); Current Twitter Rules, Sprankling Decl., Ex. G  
2 (same). Twitter has also consistently “reserve[d]” the right to “revise the[] Terms [of Service] from  
3 time to time,” stating that “[b]y continuing to access or use the Services after those revisions become  
4 effective, you agree to be bound by the revised Terms.” FAC, Exs. G, K, L, M; *see also supra* n.1

5 On November 17, 2017, Twitter publicly announced and put into place “updated . . . rules  
6 around abuse and hateful conduct as well as violence and physical harm . . . [to] be enforced starting  
7 December 18.” Twitter Safety Tweet (attached as Sprankling Decl., Ex. C); FAC ¶¶ 41-43. The  
8 updates included a new Rule against “violent extremist groups,” which states that users “may not  
9 affiliate with organizations that—whether by their own statements or activity both on or off the  
10 platform—use or promote violence against civilians to further their causes.” FAC, Ex. O. The Rule  
11 incorporates a policy that defines “violent extremist groups” as those that (1) “identify through their  
12 stated purpose, publications, or actions, as an extremist group,” (2) “have engaged in, or currently  
13 engage in, violence (and/or the promotion of violence) as a means to further their cause,” and  
14 (3) “target civilians in their acts (and/or promotion) of violence.” FAC ¶ 43; *id.*, Ex. O. The policy  
15 also includes Twitter’s rationale for the change: Although “[w]e take pride in Twitter being a  
16 platform where a diverse range of opinions can be held and discussed, . . . groups or individuals  
17 associated with them who engage in and promote violence against civilians both on and off the  
18 platform . . . risk having a chilling effect on opponents and bystanders” and the “violence that such  
19 groups promote could also have dangerous consequences offline.” FAC ¶ 42; *id.*, Ex. O.

20 The Amended Complaint describes Plaintiff Jared Taylor as a “well-known author and public  
21 intellectual” who promotes the view that “race is a biological reality” and “part of individual and  
22 group identity” and that “different races are not—as groups—identical or equivalent.” FAC ¶¶ 27-  
23 28. Plaintiff New Century Foundation was founded by Taylor in 1994 to “disseminate facts about  
24 race and race relations,” including through Taylor’s publication, “American Renaissance.” *Id.* ¶ 13.  
25 According to an SPLC profile of Taylor quoted in the Amended Complaint (at ¶ 37), “Taylor  
26 projects himself as a courtly presenter of ideas that most would describe as crudely white  
27 supremacist—a kind of modern-day version of the refined but racist colonialist of old.” SPLC,  
28 *Jared Taylor*, Sprankling Decl., Ex. A. An article in Slate magazine (also quoted in the Amended

1 Complaint (at ¶ 37)) reports that “[w]hen [Taylor] tries to organize a meeting for . . . *American*  
2 *Renaissance*, it is typically banned from hotels and conference rooms as soon as the proprietors find  
3 out about its racist mission.” Gelin, *White Flight*, Slate (Nov. 2014), Sprankling Decl., Ex. B.<sup>2</sup>

4 The Amended Complaint alleges that both Taylor and American Renaissance opened Twitter  
5 accounts in 2011 and that Twitter banned the accounts on December 18, 2017. FAC ¶¶ 29, 32, 45-  
6 46. Although the Amended Complaint alleges that neither “Taylor nor American Renaissance has  
7 ever promoted or advocated violence” or “affiliated with any groups that promote or practice  
8 violence,” *id.* ¶ 35, it acknowledges that Twitter banned Taylor and American Renaissance after  
9 Twitter ““found [them] to be violating Twitter’s Terms of Service, specifically the Twitter Rules  
10 against being affiliated with a violent extremist group,”” *id.* ¶ 45.

11 In February 2018, Plaintiffs filed this suit and a month later amended their complaint. They  
12 seek a broad injunction requiring Twitter to reinstate their accounts, to cease enforcing “its facially  
13 overbroad policy on ‘Violent Extremist Groups,’” and to cease “suspend[ing] or ban[ning] user  
14 accounts based on the user’s viewpoint or perceived political affiliations.” FAC at 41-42. The  
15 Amended Complaint purports to add, among other things, allegations on behalf of “hundreds” of  
16 unidentified users whom Twitter also allegedly banned based on its Rule against violent extremist  
17 groups. *Id.* ¶¶ 46, 56.<sup>3</sup> The Amended Complaint’s entire theory appears to be that Twitter  
18 impermissibly banned Plaintiffs and these other users because they “express conservative  
19 viewpoints,” FAC ¶ 6, even though it fails to identify any specific actions or statements by Twitter  
20 or its employees indicating these individuals’ “conservative viewpoints” were the reason for the ban.

21 The Amended Complaint asserts that Twitter, even though it is a private-sector business,  
22 violated the California Constitution’s protection of speech and association by suspending Plaintiffs’  
23 accounts. FAC ¶¶ 58-84. It also asserts two other state law claims, alleging that Twitter (1) violated  
24 the Unruh Civil Rights Act, and (2) violated California’s Unfair Competition Law. *Id.* ¶¶ 85-111.

25  
26 <sup>2</sup> SPLC is a non-profit that “publish[es] investigative reports” about “domestic hate groups and  
other extremists.” <https://www.splcenter.org/issues/hate-and-extremism> (visited Apr. 14, 2018).

27 <sup>3</sup> While purporting to bring claims “on behalf of themselves, those similarly situated, and the  
28 general public” (FAC at 1), Plaintiffs represented during a meet and confer on April 16 that they are  
not seeking to litigate this case as a class action. *See* Sprankling Decl. ISO Demurrer ¶ 5.

1 **ARGUMENT**

2 The California Supreme Court has explained that “because unnecessarily protracted litigation  
3 would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases  
4 involving free speech is desirable.” *Good Gov’t Grp. v. Superior Ct.*, 22 Cal.3d 672, 685 (1978). To  
5 help accomplish this goal, the anti-SLAPP statute provides that “[a] cause of action against a person  
6 arising from any act of that person in furtherance of the person’s right of petition or free speech . . .  
7 shall be subject to a special motion to strike, unless the court determines that the plaintiff has  
8 established that there is a probability that the plaintiff will prevail on the claim.” Cal. Civ. Proc.  
9 Code § 425.16(b)(1); *see also Cross v. Facebook*, 14 Cal.App.5th 190, 254-255 (2017) (granting  
10 Facebook’s anti-SLAPP motion); *Kronemyer v. Internet Movie Data Base, Inc.*, 150 Cal.App.4th  
11 941, 947, 952 (2007) (granting IMDB’s motion against suit seeking to compel inclusion of third-  
12 party content). The Legislature has instructed that the statute “be construed broadly.” § 425.16(a).

13 In an anti-SLAPP proceeding, “the moving defendant bears the burden of identifying all  
14 allegations of protected activity, and the claims for relief supported by them.” *Baral v. Schnitt*, 1  
15 Cal.5th 376, 396 (2016). If the court finds that first step satisfied, “the burden shifts to the plaintiff  
16 to demonstrate that each challenged claim . . . is legally sufficient and factually substantiated.” *Id.* at  
17 384. At this second step, “[t]he court, without resolving evidentiary conflicts, must determine  
18 whether the plaintiff’s showing, if accepted by the trier of fact, would be sufficient to sustain a  
19 favorable judgment. If not, the claim is stricken.” *Id.* at 396. In other words, rather than simply rest  
20 on the allegations of their complaint, plaintiffs must support their claims with affirmative evidence.

21 **I. Plaintiffs’ Complaint Arises From Twitter’s Protected Activity**

22 The anti-SLAPP statute applies to, *inter alia*, claims targeting expressive activity occurring  
23 on a “public forum” “in connection with an issue of public interest.” Cal. Civ. Proc. Code  
24 § 425.16(e)(3). Plaintiffs’ suit is based entirely on Twitter’s editorial decision to ban them from  
25 using the company’s social media platform to communicate about “their recent publications,  
26 forthcoming conferences, public appearances, articles, videos, podcasts, and their commentary on  
27 the news of the day.” *See* FAC ¶ 33; *supra* at 8-9. As such, it falls within § 425.16’s scope. *See*,  
28 *e.g.*, *Cross*, 14 Cal.App.5th at 202 (statute implicated if suit “directly targets the way a content

1 provider chooses to deliver, present, or publish news content on matters of public interest”).

2 *First*, a private-sector communication platform’s decision to decline to post content is  
3 protected expressive activity under § 425.16. In *Kronemyer*, for example, the plaintiff contended  
4 that IMDB’s decision not to include certain film information on its website could not fall under the  
5 anti-SLAPP statute because it “was based on *inaction*—a failure to speak—rather than conduct or  
6 speech.” 150 Cal.App.4th at 947. The court rightly rejected that argument—explaining that “the  
7 constitutional right of free speech includes the right not to speak.” *Id.* at 947, 952; *accord Greater*  
8 *L.A. Agency on Deafness v. CNN, Inc.*, 742 F.3d 414, 423 (9th Cir. 2014) (decision not to provide  
9 closed captioning for hearing-impaired viewers was protected conduct under anti-SLAPP statute).

10 *Second*, “websites accessible to the public ... are ‘public forums’ for the purposes of the anti-  
11 SLAPP statute.” *See Barrett v. Rosenthal*, 40 Cal.4th 33, 41 n.4 (2006); *see also, e.g., Cross*, 14  
12 Cal.App.5th at 199 (Facebook is a public forum for anti-SLAPP purposes); *Kronemyer*, 150  
13 Cal.App.4th at 950 (IMDB). Here, there is no dispute that Twitter is one of the world’s largest  
14 social media websites and that Twitter is generally open to the public. *See FAC* ¶ 16.<sup>4</sup>

15 *Third*, “an issue of public interest *is any issue in which the public is interested.*” *Cross*, 14  
16 Cal.App.5th at 199 (quotation marks omitted). Courts “construe[] broadly” whether “something is  
17 an issue of public interest” and focus their analysis on “the principal thrust or gravamen of the  
18 plaintiff’s cause of action.” *Id.* (quotation marks and emphases omitted). There can be no dispute  
19 that Twitter’s ability to control content on its platform in order to ensure its users have a safe place  
20 to express diverse perspectives is an issue of great interest to the millions who use Twitter’s services.  
21 *See FAC* ¶¶ 16-17; *Kronemyer*, 150 Cal.App.4th at 949-950 (IMDB’s policy about who was listed as  
22 an executive producer for the movie “My Big Fat Greek Wedding” was a matter of public interest).

## 23 **II. Plaintiffs Cannot Show A Probability Of Prevailing On Any Of Their Claims**

24 Because the Amended Complaint arises from Twitter’s protected activity, Plaintiffs must  
25 establish there is a “reasonable probability [they] . . . will prevail on the merits at trial . . . [by  
26

27 <sup>4</sup> That a private-sector platform is a public forum for anti-SLAPP purposes does not render it a  
28 public forum for purposes of the California Constitution’s free speech provisions. *See hiQ Labs Inc.*  
*v. LinkedIn Corp.*, 273 F.Supp.3d 1099, 1116 (N.D. Cal. 2017).

1 showing] both that the [complaint] is legally sufficient and there is admissible evidence that, if  
2 credited, would be sufficient to sustain a favorable judgement.” *McGarry v. Univ. of San Diego*, 154  
3 Cal.App.4th 97, 108 (2007). They cannot do so.

4 **A. All Of Plaintiffs’ Claims Are Barred Under The Communications Decency Act**

5 Under well-developed federal law, as recognized by the California Supreme Court, Twitter is  
6 immune from all of Plaintiffs’ claims because they impermissibly seek to impose liability on Twitter  
7 for publishing and declining to publish content created by third parties, in violation of 47 U.S.C.  
8 § 230(c)(1). Section 230(c)(1) prohibits “treat[ing]” an “interactive computer service” provider “as  
9 the publisher or speaker of any information provided by another information content provider.” *Id.*  
10 § 230(c)(1). This provision “precludes courts from entertaining claims that would place a computer  
11 service provider in a publisher’s role” and thus bars “lawsuits seeking to hold a service provider  
12 liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to  
13 publish, withdraw, postpone or alter content” created by third parties. *Barrett v. Rosenthal*, 40  
14 Cal.4th 33, 43 (2006) (quoting *Zeran v. Am. Online, Inc.* 129 F.3d 327, 331 (4th Cir. 1997)). As the  
15 Ninth Circuit has explained, “any activity that can be boiled down to deciding *whether to exclude*  
16 *material* that third parties seek to post online is perforce immune under section 230.” *Fair Hous.*  
17 *Council v. Roommates.com*, 521 F.3d 1157, 1170-1171 (9th Cir. 2008) (en banc) (emphasis added).

18 Congress enacted § 230(c)(1) “to promote active screening by service providers of online  
19 content provided by others.” *Barrett*, 40 Cal.4th at 53. “[C]ontemplating self-regulation, rather than  
20 regulation compelled at the sword point of tort liability,” Congress sought to encourage active  
21 screening “by broadly shielding *all* providers from liability for ‘publishing’ information received  
22 from third parties.” *Id.* Such a robust immunity, Congress explained, would “remove disincentives  
23 for the development and utilization of blocking and filtering technologies”—technologies which  
24 could be used to block “objectionable or inappropriate online material.” 47 U.S.C. § 230(b)(4).

25 Section 230(c)(1)’s protection is triggered here. *First*, Twitter is an “Interactive Computer  
26 Service[]” under the statute. *See Fields v. Twitter, Inc.*, 217 F.Supp.3d 1116, 1121 (N.D. Cal. 2016).  
27 *Second*, the content at issue is Plaintiffs’: Tweets that Plaintiffs, not Twitter, allegedly wish to create  
28 in the future that Twitter believes would risk chilling the speech of other users. Their claims thus

1 concern content “provided by *another* information content provider.” 47 U.S.C. § 230(c)(1)  
2 (emphasis added); *accord Sikhs for Justice (SFJ) v. Facebook, Inc.*, 144 F.Supp.3d 1088, 1094 (N.D.  
3 Cal. 2015) (“‘third-party content’ ... refer[s] to content created entirely by individuals . . . other than  
4 the interactive computer service provider”), *aff’d*, 697 F. App’x 526 (9th Cir. 2017).

5 *Finally*, all of Plaintiffs’ claims challenge Twitter’s decision to prevent them from posting  
6 content and so impermissibly seek to impose liability on Twitter for performing “a publisher’s  
7 traditional editorial functions.” *Barrett*, 40 Cal.4th at 43. “[W]hat matters is not the name of the  
8 cause of action,” but “whether the duty that the plaintiff alleges the defendant violated derives from  
9 the defendant’s status or conduct as a ‘publisher or speaker.’” *Cross*, 14 Cal.App.5th at 207 (quoting  
10 *Barnes v. Yahoo!, Inc.* 570 F.3d 1096, 1102 (9th Cir. 2009)). “[P]ublication involves reviewing,  
11 editing, and deciding *whether to publish or to withdraw from publication* third-party content.”  
12 *Barnes*, 570 F.3d at 1102 (emphases added). Applying these principles, courts have repeatedly held  
13 that blocking or removing a plaintiff’s posts or—as is alleged here—suspending a plaintiff’s account  
14 qualifies as “publisher conduct immunized by the CDA.” *SFJ*, 144 F.Supp.3d at 1095; *see also*  
15 *Riggs v. MySpace, Inc.*, 444 F. App’x 986, 987 (9th Cir. 2011) (§ 230(c)(1) immunizes “decisions to  
16 delete [plaintiff’s] user profiles”); *Lancaster v. Alphabet Inc.*, 2016 WL 3648608, at \*7-8 (N.D. Cal.  
17 July 8, 2016) (dismissing claims based on removal of plaintiff’s videos). Because Plaintiffs’ claims  
18 seek to hold Twitter liable for precisely these decisions, they are all barred by § 230(c)(1).

19 **B. All Of Plaintiffs’ Claims Are Barred Under The First Amendment**

20 Plaintiffs’ claims all arise from the same act: Twitter’s editorial decision, in its capacity as  
21 the operator of a private-sector communications platform, to ban Plaintiffs from posting on the  
22 Twitter platform. *See supra* at 8-9. While Plaintiffs cite the First Amendment in support of their  
23 own position, *e.g.*, FAC ¶¶ 25, 76-77, in reality they seek to invert its protection. The First  
24 Amendment does not give Plaintiffs the right to strip a private-sector content distributor like Twitter  
25 of its rights to engage in editorial control, any more than the Amendment could be used to require a  
26 newsstand owner to sell *Penthouse* simply because she already carries *Cosmopolitan* or to compel a  
27 children’s bookstore to carry *A Clockwork Orange*. Such a rule would be premised on the  
28 unsustainable notion of allowing one speaker to trump the speech rights of another. Even if the

1 average passerby would not assume that the newsstand wholeheartedly supports pornography or that  
2 the children’s bookstore encourages violence, simply distributing (or not distributing) the magazine  
3 or the novel shapes how the newsstand or bookstore is perceived. No less than any would-be author,  
4 the bookstore and newsstand—and Twitter—are entitled to choose what and whose speech they  
5 disseminate and what perceptions they convey to the world.

6 This common sense understanding of the First Amendment has deep roots in the doctrine.  
7 The First Amendment safeguards the “choice of material . . . [that]—whether fair or unfair—  
8 constitute[s] the exercise of editorial control and judgment.” *Hurley v. Irish-Am. Gay, Lesbian &*  
9 *Bisexual Grp.*, 515 U.S. 557, 575 (1995). Relatedly, the guarantee of free speech “necessarily  
10 compris[es] the decision of both what to say and what *not* to say.” *Riley v. National Fed’n of the*  
11 *Blind of N.C.*, 487 U.S. 781, 796-797 (1988). Thus, “[t]here can be no disagreement” that cable-TV  
12 operators, “by exercising editorial discretion over which stations or programs to include in [their]  
13 repertoire, . . . engage[] in and transmit speech” within the meaning of the First Amendment. *Turner*  
14 *Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994). A newspaper cannot be required to publish op-eds  
15 with which it disagrees or simply wishes to exclude. *Miami Herald*, 418 U.S. at 258. Even private  
16 citizens organizing a parade on city streets cannot be compelled “to include among the marchers a  
17 group imparting a message that the organizers do not wish to convey.” *Hurley*, 515 U.S. at 559.

18 These precedents state a clear rule: A private-sector actor cannot be compelled to present a  
19 message it finds objectionable solely because exclusion deprives another of a potential platform on  
20 which to speak. *See Hurley*, 515 U.S. at 569-570 (a private speaker “does not forfeit constitutional  
21 protection simply by combining multifarious voices, or by failing to edit their themes to isolate an  
22 exact message as the exclusive subject matter of the speech”).

23 The cases discussed above largely predate the Internet age, but courts have routinely applied  
24 them to websites. *See, e.g., La’Tiejira v. Facebook, Inc.*, 272 F.Supp.3d 981, 991 (S.D. Tex. 2017)  
25 (holding that “Facebook[ has a] First Amendment right to decide what to publish and what not to  
26 publish on its platform” and collecting cases). Particularly instructive is *Zhang v. Baidu.com, Inc.*,  
27 10 F.Supp.3d 433 (S.D.N.Y. 2014). There, plaintiffs sought to hold a website “liable for, and thus  
28 punish Baidu for, a conscious decision to design its search-engine algorithms to favor a certain

1 expression on core political subjects over other expression on those same political subjects.” *Id.* at  
2 440. The court rejected that claim because allowing the suit “to proceed would plainly ‘violate the  
3 fundamental rule of protection under the First Amendment, that a speaker has the autonomy to  
4 choose the content of his own message.’” *Id.* (quoting *Hurley*, 515 U.S. at 573). This right applies  
5 “whether or not a speaker articulates, or even has, a coherent or precise message, and whether or not  
6 the speaker generated the underlying content in the first place.” *Id.* at 437.

7 The Amended Complaint contends that forcing Twitter to disseminate speech from sources it  
8 deems objectionable implicates no “free speech or expressive interest” because Tweets “reflect the  
9 viewpoints of the user who posted the Tweet, and not Twitter itself.” FAC ¶¶ 23-24. That is  
10 mistaken. The *New York Times* does not adopt the views espoused by the op-eds it publishes,<sup>5</sup> but it  
11 certainly may decline to print even a technically well-written op-ed from an author who affiliates  
12 with organizations that advocate for something like cannibalism or slavery—whether because those  
13 causes are morally repugnant to the *Times* or because, in its view, featuring the author would upset  
14 its readers and discourage readership. As the Supreme Court has explained, “[t]he choice of material  
15 to go into a newspaper, and the decisions made as to limitations on the . . . content of the paper” *as*  
16 *well as* the paper’s own views on “public issues and public officials” require the “exercise of  
17 editorial control and judgment.” *Miami Herald*, 418 U.S. at 258.

18 Plaintiffs further argue that Twitter has “[n]o [r]ight” under the First Amendment to control  
19 the content it disseminates because it is the equivalent of “the private owner of a public forum who  
20 has fully opened its property to the general public.” FAC ¶¶ 20-26. The Amended Complaint fails  
21 to establish the factual premise of this contention. While it identifies a handful of broad statements  
22 regarding Twitter’s general commitment to promoting free speech, *e.g.*, *id.* ¶¶ 2, 16, all four versions  
23 of the Twitter Terms of Service attached to the Amended Complaint expressly reserve to Twitter the  
24 right to unilaterally suspend users and remove content, *see* FAC, Ex. G at 4; Ex. K at 5; Ex. L at 5;  
25 Ex. M. at 6. Similar language appeared in Twitter’s first Terms of Service, *see* Sprankling Decl., Ex.  
26 D, and was in effect when Plaintiffs joined the platform in 2011, *see supra* n.1.

27  
28 <sup>5</sup> *See, e.g.*, *New York Times, More information about opinion articles*, Dec. 29, 2005 (“The [op-ed] articles are contributed by people from outside the paper and represent their own views.”).

1 More fundamentally, Plaintiffs are legally wrong—and grievously so—as the case law above  
2 makes clear. They incorrectly contend that the U.S. Supreme Court “*expressly rejected*” the position  
3 that private-sector communications platforms like Twitter have First Amendment rights in  
4 *Pruneyard Shopping Center*. FAC ¶ 23. But that case dealt with a privately-owned “shopping  
5 center owner’s . . . free speech rights,” where the shopping center was “open to the public for the  
6 purpose of encouraging the patronizing of its commercial establishments.” *Pruneyard Shopping Ctr.*  
7 *v. Robins*, 447 U.S. 74, 76-77 (1980); accord FAC ¶ 62 (“shopping centers . . . are mostly used for  
8 functional, non-expressive purposes”). By contrast, “Twitter’s *primary purpose* is to enable  
9 members of the public to engage in speech, self-expression and the communication of ideas.” FAC  
10 ¶ 62 (emphasis in original).

11 This fact—that “Twitter’s purpose is entirely to facilitate expression,” FAC ¶ 64—makes all  
12 the difference for the First Amendment analysis. Twitter’s rights are implicated here *precisely*  
13 *because*—like a newspaper, a bookstore, a cable company, or a parade organizer—it has created a  
14 platform for expression and thus enjoys First Amendment protection when it comes to deciding  
15 which speakers and messages to exclude from that platform. *See Pruneyard*, 447 U.S. at 88  
16 (distinguishing *Miami Herald* on the grounds it involved an “intrusion into the function of editors”).  
17 The Supreme Court made this distinction clear in *Hurley*, where it explained that *Pruneyard* “did not  
18 involve ‘any concern that access to th[e shopping center] might affect the shopping center owner’s  
19 exercise of his own right to speak.’” *Hurley*, 515 U.S. at 581. Because the First Amendment gives  
20 Twitter—like bookstores, newspapers, and parade organizers—the freedom to decide what content  
21 and which speakers to allow on its platform, the Amended Complaint must be dismissed.<sup>6</sup>

22 **C. Plaintiffs Have Not—And Cannot—Adequately Allege Any Viable Claims**

23 1. *Plaintiffs Cannot State A Claim Under The California Constitution*

24 Plaintiffs allege that Twitter is subject to the California Constitution’s freedom of speech  
25 provisions. *See* FAC ¶¶ 58-84. This assertion is meritless. It is fundamental that “the constitutional

26 \_\_\_\_\_  
27 <sup>6</sup> Plaintiffs identify no specific conduct or statements by Twitter demonstrating it suspended  
28 their accounts for ideological reasons, *see supra* at 8-9, but even if they could support that allegation,  
that would only strengthen Twitter’s First Amendment defense because such “political expression”  
is core First Amendment speech. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995).

1 guarantee of free speech is a guarantee only against abridgment *by government*, federal or state.”  
2 *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (emphasis added). This principle serves important  
3 purposes—it “preserves an area of individual freedom” and “ensures that the prerogative of  
4 regulating private businesses remains with the States and the representative branches, not the  
5 courts.” See *Roberts v. AT&T Mobility*, 877 F.3d 833, 837 (9th Cir. 2017).<sup>7</sup>

6 California’s Constitution largely tracks this rule. Certainly, “[n]either the text of California’s  
7 free speech clause nor [California] case law reveals an intent to depart from the bedrock principle”  
8 of requiring state action. See *Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 26 Cal.4th  
9 1013, 1031 (2001) (plurality op.). The California Supreme Court has identified only one narrow  
10 exception: In *Pruneyard*, the Court extended free speech protection to a shopping mall’s common  
11 areas. *Robins v. Pruneyard Shopping Ctr.*, 23 Cal.3d 899 (1979); see also 13 Larsen et al.,  
12 *California Jurisprudence 3d* § 275 (2018) (listing “shopping centers” as the only specific application  
13 of the *Pruneyard* doctrine).

14 Twitter’s alleged conduct did not violate the California Constitution. *First*, there is no state  
15 action. The test is whether “it can be said that the State is *responsible* for the specific conduct of  
16 which the plaintiff complains.” *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Assoc.*, 531  
17 U.S. 288, 295 (2011). Plaintiffs have not alleged that the government is responsible for banning  
18 users generally or them in particular, or even that the State has *any* control over Twitter’s platform.  
19 And “property [does not] lose its private character merely because the public is generally invited to  
20 use it for designated purposes.” *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 569 (1972).

21 Although it dedicates scores of paragraphs to legal argument and cites numerous cases, the  
22 Amended Complaint identifies no case categorizing an Internet company as a state actor. This is  
23 unsurprising, given that courts have uniformly reached the opposite conclusion. *E.g.*, *Howard v.*  
24 *AOL*, 208 F.3d 741, 754 (9th Cir. 2000) (AOL not subject to the First Amendment); *Prager Univ. v.*  
25

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26 <sup>7</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), is not to the contrary. Although that  
27 opinion contains broad language about the importance of the Internet and Twitter, the Court “did  
28 not, and had no occasion to, address whether *private social media corporations . . .* are state actors  
that must regulate the content of their websites according to the strictures of the First Amendment.”  
*Prager Univ. v. Google LLC*, 2018 WL 1471939, at \*8 (N.D. Cal. Mar. 26, 2018).

1 *Google LLC*, 2018 WL 1471939, at \*8 (N.D. Cal. Mar. 26, 2018) (same for YouTube); *Langdon v.*  
2 *Google, Inc.*, 474 F.Supp.2d 622, 631-632 (D. Del. 2007) (same for Google); *see also Shulman v.*  
3 *Facebook.com*, 2017 WL 5129885, at \*4 (D.N.J. Nov. 6, 2017) (collecting cases holding Facebook  
4 is not a state actor). As the *Prager* court explained, the First Amendment cannot be “extended to” to  
5 make an online service provider a “state actor[] ... merely because [it] hold[s] out and operate[s] its  
6 private property as a forum for expression of diverse points of view.” 2018 WL 1471939, at \*8.

7 *Second*, the narrow *Pruneyard* exception does not apply here. That exception is exceedingly  
8 limited. *See Albertson’s, Inc. v. Young*, 107 Cal.App.4th 106, 117-118 (2003) (rejecting “wishful  
9 thinking” that *Pruneyard* applies to “any large business ... simply because it is ‘freely and openly  
10 accessible to the public’”). Even the case law Plaintiffs invoke—FAC ¶¶ 59-60, 66—suggests the  
11 exception is limited to “the peculiar facts of th[at] case.” *See Golden Gateway*, 26 Cal.4th at 1028.  
12 And Twitter is aware of no court that has expanded the exception to social media or any other kind  
13 of Internet company. *See hiQ Labs Inc. v. LinkedIn Corp*, 273 F.Supp.3d 1099, 1116 (N.D. Cal.  
14 2017) (“No court has expressly extended *Pruneyard* to the Internet generally.”). For good reason:  
15 “The analogy between a shopping mall and the Internet is imperfect, and there are a host of potential  
16 ‘slippery slope’ problems that are likely to surface were *Pruneyard* to apply to the Internet.” *Id.*

17 Most notably, such a ruling would have the profound consequence of stripping Twitter—and  
18 any other private-sector social media platform—of the ability to provide a platform where its users  
19 feel safe. For example, were Twitter subject to the same strictures regarding speech as a  
20 government, it would be hard pressed to prohibit content from violent extremist groups or hateful  
21 content that harasses others on the basis of race or other immutable characteristics. *R.A.V. v. St.*  
22 *Paul*, 505 U.S. 377 (1992); *Brandenberg v. Ohio*, 395 U.S. 444 (1969). Much of this speech is  
23 protected under the First Amendment, but is hardly conducive to creating a social media  
24 environment in which diverse perspectives and beliefs can be shared.

25 This is no theoretical concern. In Plaintiffs’ view, Twitter cannot bar users who “advocate  
26 ‘the use of violence as the means to advance [a] cause.’” FAC ¶ 76; *see also id.* ¶ 80 (“Twitter’s  
27 policy on ‘Violent Extremist Groups’ is remarkably similar to the statute struck down in  
28 *Brandenberg*[.]”). And rather than the mere “25,000 persons” a day who congregated at a California

1 shopping mall when *Pruneyard* was decided, Plaintiffs’ rule would expose “330 million people from  
2 all over the world” on the Twitter platform alone—and billions more on all other major social media  
3 sites—to a firehose of hateful and/or violent speech. FAC ¶ 63. Such an earthshattering expansion  
4 of the *Pruneyard* exception could not be squared with the limited scope of that doctrine.<sup>8</sup>

5 **2. Plaintiffs Cannot State A Claim Under The Unruh Act<sup>9</sup>**

6 Three defects defeat Plaintiffs’ Unruh Act claim. *First*, “the Unruh Civil Rights Act does not  
7 protect against discrimination based on political affiliation”—the kind of discrimination alleged  
8 here. *Williams v. City of Bakersfield*, 2015 WL 1916327, at \*5 (E.D. Cal. Apr. 27, 2015). *Second*,  
9 “Unruh Act issues are often decided on demurrer or motion for summary judgment when the  
10 [challenged] business practice appears to be valid on its face as bearing a reasonable relation to  
11 appropriate commercial objectives for a public enterprise.” *Semler v. Gen. Elec. Capital Corp.*, 196  
12 Cal.App.4th 1380, 1387 (2011). And here, Twitter has a legitimate business interest in protecting its  
13 reputation and avoiding chilling the speech of its millions of users by banning from its platform  
14 those who are affiliated with a violent extremist group. *See id.* at 1393 (“maintaining order” and  
15 “protecting a business reputation” are interests that “justify distinctions among ... customers”).  
16 *Finally*, because Plaintiffs’ Unruh Act claim implicates Twitter’s First Amendment rights, they must  
17 demonstrate that there is a “compelling interest to justify application of the Act,” *e.g.*, *Ingels v.*  
18 *Westwood One*, 129 Cal.App.4th 1050, 1072 (2005)—which Plaintiffs do not and cannot do.

19 **3. Plaintiffs Cannot State A Claim For Unfair Competition**

20 Plaintiffs claim for Unfair Competition fails for four reasons. *First*, Plaintiffs cannot satisfy  
21 the threshold requirement to adequately allege a “loss or deprivation of money or property sufficient  
22 to qualify as injury in fact.” *See Kwikset Corp v. Superior Ct.*, 51 Cal.4th 310, 322 (2011).

23 *Second*, they have not alleged a viable claim against Twitter for any unlawful act. *See*

24  
25 <sup>8</sup> In fact, the exception’s continuing validity is in doubt. *E.g.*, *Fashion Valley Mall, LLC v.*  
26 *NLRB*, 42 Cal.4th 850, 874 (2007) (Chin, Baxter, Corrigan, JJ., dissenting) (“*Pruneyard* ... was  
27 controversial when decided [and i]n the three decades since then, it has received scant support and  
overwhelming rejection around the country.”). Twitter reserves the right to argue on appeal that  
*Pruneyard* should be overruled in its entirety, should this Court take Plaintiffs’ view on its scope.

28 <sup>9</sup> Each of Plaintiffs’ remaining state law claims is discussed in greater detail in Twitter’s  
memorandum supporting its demurrer. Those arguments are incorporated here by reference.

1 *Graham v. Bank of Am., N.A.*, 226 Cal.App.4th 594, 610 (2014). The only purported unlawful act is  
2 an alleged violation of the Consumer Legal Remedies Act (CLRA), FAC ¶ 99, but the CLRA applies  
3 only to transactions “in the sale or lease of goods or services to any consumer,” Cal. Civ. Code  
4 §1770(a), and Plaintiffs do not allege that they paid for access to Twitter’s website. FAC ¶ 16. *See*  
5 *Shin v. BMW of N. Am.*, 2009 WL 2163509, at \*3 (C.D. Cal. July 16, 2009).

6 *Third*, Plaintiffs have not stated a viable claim under the UCL’s “fraud” prong because the  
7 Amended Complaint fails to identify any specific announcements by Twitter indicating that  
8 Twitter’s general support for free speech meant that the company would never ban specific users.  
9 Nor have Plaintiffs shown that Twitter falsely pledged not to make any changes to policy  
10 “retroactive.” FAC ¶ 109. Exhibit N—the Twitter blog post discussing the new policy against  
11 violent extremism—makes clear that the rule was announced the month *before* it went into effect.  
12 *See* FAC, Ex. N at 1 (change “*announced last month*”); *see also supra* at 8.

13 *Finally*, Plaintiffs have not stated a viable claim under the UCL’s “unfair” prong because  
14 such a claim must be “‘tethered’ to specific constitutional, statutory, or regulatory provisions,”  
15 *Gregory v. Albertson’s Inc.*, 104 Cal.App.4th 845, 854 (2002); *see also Schnall v. Hertz Corp.*, 78  
16 Cal.App.4th 1144, 1166 (2000), and Plaintiffs have identified no “legislatively declared policy”  
17 violated by Twitter other than the California Constitution’s free speech provisions, the Unruh Act,  
18 and the CLRA—none of which Plaintiffs have established were violated, *see supra* at 11-19.

### 19 **III. Twitter Should Be Awarded Its Attorney’s Fees And Costs**

20 “[A] prevailing defendant on a special motion to strike shall be entitled to recover [its]  
21 attorney’s fees and costs.” Cal. Civ. Proc. Code § 425.16(c). The award is “mandatory” if the  
22 defendant wins. *Vargas v. City of Salinas*, 200 Cal.App.4th 1331, 1340 (2011). Because Twitter has  
23 established that Plaintiffs’ suit arises from its own protected expressive activity and because  
24 Plaintiffs cannot establish a probability of success on any of their claims, Twitter is entitled to  
25 attorney’s fees and costs under § 425.16(c).

### 26 **CONCLUSION**

27 For these reasons, Twitter requests that the Amended Complaint be struck in its entirety  
28 under Cal. Civ. Proc. Code § 425.16 and that Twitter be awarded its attorney’s fees and costs.

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Dated: April 24, 2018

WILMER CUTLER PICKERING HALE  
AND DORR LLP

/s/ Patrick J. Carome  
Patrick J. Carome (*pro hac vice*)  
Ari Holtzblatt (*pro hac vice*)  
1875 Pennsylvania Ave, NW  
Washington, DC 20006  
Telephone: (202) 663-6000  
Facsimile: (202) 663-6363  
patrick.carome@wilmerhale.com


Mark D. Flanagan (SBN 130303)  
Thomas G. Sprankling (SBN 294831)  
950 Page Mill Road  
Palo Alto, CA 94304  
Telephone: (650) 858-6000  
Facsimile: (650) 858-6100  
mark.flanagan@wilmerhale.com

*Attorneys for Defendant*



1 I declare under penalty of perjury under the laws of the State of California that the foregoing  
2 is true and correct.

3 Executed on April 24, 2018 at Los Angeles, California.

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