

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TIMOTHY-ALLEN ALBERTSON,
Plaintiff,
v.
GOOGLE LLC,
Defendant.

Case No. [23-cv-03998-AMO](#)

**ORDER GRANTING MOTION TO
DISMISS**

Re: Dkt. Nos. 19, 53

This case is about the First Amendment right to post comments on YouTube. Before the Court is Google LLC’s motion to dismiss. The motion is fully briefed and suitable for decision without oral argument. Accordingly, the hearing set for February 15, 2024, is **VACATED**. *See* Civil L.R. 7-6. This Order assumes familiarity with the facts of the case, the parties’ arguments, and the relevant law. Having read the parties’ papers and carefully considered their arguments and the relevant legal authority, the Court hereby **GRANTS** the motion to dismiss for the following reasons.

I. BACKGROUND

Plaintiff Timothy-Allen Albertson is a YouTube user who created at least one YouTube Channel and subscribes to Premium YouTube. First Amended Complaint (“FAC”) (ECF 14) ¶¶ 9-10.¹ Albertson “has serious legal and political issues with the LGBTQIA+ Identity Group . . . [.]” *Id.* ¶ 18 (listing some of Albertson’s “legal and political issues” with this group). He has “an acerbic and caustic style and wit in expressing his opinions” about that community, which he has

¹ As it must, the Court accepts Albertson’s allegations in the complaint as true and construes the pleadings in the light most favorable to him. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) (citation omitted).

1 done in comments he posted to YouTube. *Id.* ¶¶ 19, 27. In the past two years, YouTube
2 “block[ed] or partially block[ed]” one or more of those comments from appearing on “some areas
3 of [the service],” by “delisting and downranking” them. *Id.* ¶ 27. Albertson alleges that this
4 “shadow banning” was based on YouTube’s prohibition against “Hate Speech.” *Id.* ¶¶ 23, 26-27.

5 Albertson brings two claims against Google (d/b/a YouTube) for violating his First
6 Amendment rights to free speech and to peaceably assemble. Google moves to dismiss the claims
7 for lack of state action and because the claims are barred by the First Amendment. ECF 19.

8 **II. DISCUSSION**

9 Albertson alleges that Google violated his free speech rights under the First Amendment of
10 the United States Constitution.² Google argues that the First Amendment claims must be
11 dismissed because it is a private entity and not a state actor. The Court agrees with Google and
12 finds that the First Amendment claims are precluded by controlling Supreme Court and Ninth
13 Circuit precedent.

14 Generally, “the Free Speech Clause prohibits only *governmental* abridgment of speech.
15 [It] does not prohibit *private* abridgment of speech.” *Manhattan Cmty. Access Corp. v. Halleck*,
16 139 S. Ct. 1921, 1928 (2019) (“*Halleck*”) (emphasis in original). However, in a limited set of
17 circumstances, a private party’s actions may amount to state action. *Tsao v. Desert Palace, Inc.*,
18 698 F.3d 1128, 1139-40 (9th Cir. 2012). The Ninth Circuit recognizes four tests for determining
19 whether a private party is a state actor under Section 1983: “(1) the public function test; (2) the
20 joint action test; (3) the state compulsion test; and (4) the governmental nexus test.” *Id.* at 1140.
21 Albertson argues that YouTube has become “so intertwined with the Executive Branch of the
22 United States” that it has become a state actor. FAC ¶ 20. The Court liberally construes
23 Albertson’s allegations to implicate the public function, joint action, and governmental nexus
24 tests. Accordingly, the Court examines YouTube’s conduct under each, and cannot agree.

25 Any suggestion that YouTube performs a public function is foreclosed by both the
26

27 ² Liberally construing the complaint, *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th
28 Cir. 1988), the Court understands Albertson to bring his First Amendment claims under
42 U.S.C. § 1983.

1 Supreme Court and the Ninth Circuit. *See Halleck*, 139 S. Ct. at 1930 (“merely hosting speech by
 2 others is not a traditional, exclusive public function and does not alone transform private entities
 3 into state actors subject to First Amendment constraints”); *Prager Univ. v. Google LLC*, 951 F.3d
 4 991, 995 (9th Cir. 2020) (“[d]espite YouTube’s ubiquity and its role as a public-facing platform, it
 5 remains a private forum, not a public forum subject to judicial scrutiny under the First
 6 Amendment.”). This Court is bound by that precedent and must conclude that YouTube does not
 7 perform a public function.

8 For a private entity to be held liable under the joint action test, courts consider whether
 9 “the state has so far insinuated itself into a position of interdependence with the private entity that
 10 it must be recognized as a joint participant in the challenged activity.” *Kirtley v. Rainey*, 326 F.3d
 11 1088, 1093 (9th Cir. 2003) (citation omitted). “A plaintiff may demonstrate joint action by
 12 proving the existence of a conspiracy or by showing that the private party was ‘a willful
 13 participant in joint action with the State or its agents.’” *Franklin v. Fox*, 312 F.3d 423, 445 (9th
 14 Cir. 2002) (citation omitted). Under the nexus test, the plaintiff must show that there is “such a
 15 close nexus between the State and the challenged action that the seemingly private behavior may
 16 be fairly treated as that of the State itself.” *Kirtley*, 326 F.3d at 1095 (citation omitted).

17 Albertson alleges that there is such a nexus or interdependence because Congress has
 18 investigated Google and Google has permitted the Center for Disease Control to “censor and
 19 suppress core speech . . . [.]” FAC ¶¶ 20-21. Albertson points to no authority to support the
 20 proposition that Congressional investigations make a private entity a state actor, and the Court
 21 declines to make such a finding. Indeed, Albertson has “failed to show any link between [the
 22 investigations] and YouTube’s decision to remove” Albertson’s content. *See Doe v. Google LLC*,
 23 No. 21-16934, 2022 WL 17077497, at *3 (9th Cir. Nov. 18, 2022). Albertson offers only a
 24 conclusory assertion that Google acted “in concert and participation with and for the Executive
 25 Branch of the United States . . . [.]” FAC ¶ 27. Albertson offers no factual allegations that
 26 support the theory that there was an “agreement” or a “meeting of the minds” as required to show
 27 a conspiracy between Google and the government. *See Fonda v. Gray*, 707 F.2d 435, 438 (9th
 28 Cir. 1983) (citation omitted). Similarly, Albertson has not alleged that Google was a “willful

1 participant in joint action” with the government. *See Tsao*, 698 F.3d at 1140; *see, e.g., Fed.*
2 *Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1312 (N.D. Cal. 2019) (no joint
3 action where Facebook allegedly supplied the government with information related to the
4 government’s investigation of election interference).

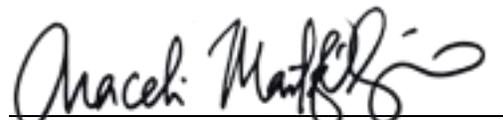
5 Without any factual allegations to support his conclusory assertions, the Court cannot find
6 that Google is a state actor. Therefore, Google cannot be responsible under the First Amendment
7 for its actions in removing or blocking Albertson’s YouTube comments. *See Halleck*, 139 S.Ct. at
8 1928.

9 **III. CONCLUSION**

10 For the foregoing reasons, the Court **GRANTS** Google’s motion to dismiss without
11 prejudice. Should Albertson elect to file an amended complaint curing the deficiencies identified
12 herein, he shall do so by no later than **March 8, 2024**. Albertson may not add new causes of
13 action or parties without leave of Court or stipulation of the parties pursuant to Federal Rule of
14 Civil Procedure 15.

15
16 **IT IS SO ORDERED.**

17 Dated: February 7, 2024

18
19 
20 **ARACELI MARTÍNEZ-OLGUÍN**
21 **United States District Court**

22
23
24
25
26
27
28