No. _____

In The

Supreme Court of the United States

JUDICIAL WATCH, INC.,
Petitioner,

v.

SHIRLEY WEBER, in her official capacity as the Secretary of State of the State of California,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL BEKESHA
Counsel of Record
KATHRYN BLANKENBERG
JUDICIAL WATCH, INC.
425 Third St., S.W., Ste 800
Washington, D.C. 20024
(202) 646-5172
mbekesha@judicialwatch.org
Counsel for Petitioner

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QUESTION PRESENTED

California Elections Code Section 10.5 requires the California Secretary of State to mitigate "false or misleading" online statements regarding the electoral process. Under this mandate, the Secretary pursued an extensive course of action against Judicial Watch: (1) she monitored Judicial Watch's online protected speech for months leading up to the 2020 election; (2) she falsely assessed as misleading Judicial Watch's YouTube video discussing election integrity; (3) she used her close, proactive relationship and state-created "dedicated pathway" with YouTube to have the video removed; and (4) she memorialized her actions in a "Misinformation Tracking Sheet."

Until this case, every regional circuit had held that an adverse action in the First Amendment retaliation context is one that would chill a person of ordinary firmness from continuing to engage in protected activity. The Ninth Circuit strayed from its sister circuits, excising the "chilling effect" inquiry from the universally accepted standard. It ruled that the Secretary's course of action was not adverse, and therefore not actionable, without defining "adverse action" or analyzing whether her course of action would chill a person of ordinary firmness.

The question presented is:

Did the Ninth Circuit undermine free speech protections when it found that a retaliatory action is independent from an action that could chill a person of ordinary firmness from engaging in protected speech?

PARTIES TO THE PROCEEDING

Petitioner, who was Plaintiff-Appellant below, is Judicial Watch, Inc.

Respondent, who was Defendant-Appellee below, is Dr. Shirley Weber, in her capacity as the Secretary of State of the State of California.

STATEMENT OF RELATED PROCEEDINGS

This case is directly related to the following proceedings:

Judicial Watch, Inc. v. Weber, 2023 U.S. Dist. LEXIS 91214, No. 2:22-cv-06894 (C.D. Cal. May 22, 2023)

Judicial Watch, Inc. v. Weber, 2024 U.S. App. LEXIS 26918, No. 23-3546 (9th Cir. Oct. 24, 2024)

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PETITION FOR WRIT OF CERTIORARI

Judicial Watch, Inc., through counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 5a–9a) is not reported but is available at 2024 U.S. App. LEXIS 26918, No. 23-3546 (9th Cir. Oct. 24, 2024). The order denying Petitioner's petition for panel rehearing and petition for rehearing *en banc* was issued on December 5, 2024. App. 3a–4a. The opinion and order of the district court (App. 10a–36a) is not reported but is available at 2023 U.S. Dist. LEXIS 91214, No. 2:22-cv-06894 (C.D. Cal. May 22, 2023).

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2024. App. 1a–2a, 5a–9a. The order denying Petitioner's petition for panel rehearing and petition for rehearing *en banc* was issued on December 5, 2024. App. 3a–4a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's claims involve the First and Fourteenth Amendments of the U.S. Constitution, which are reproduced at App. 37a–38a.

Section 10.5 of the California Election Code states, in relevant part:

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

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

* * *

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

* * *

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

* * *

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

INTRODUCTION

The First Amendment prohibits a government official from retaliating against a private individual for engaging in protected speech. *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474 (2022). Every regional circuit has honored this principle, recognizing that a retaliatory action is one that would chill a person of ordinary firmness from continuing to engage in protected speech.[1] That is, until this case.

The California Secretary of State, the chief elections officer for the largest state in the country, purportedly acting under a statutory mandate, took an extensive course of action against Judicial Watch for its protected speech on the electoral process. These actions included monitoring Judicial Watch's speech for months leading up to the 2020 Election, falsely assessing Judicial Watch's September 22, 2020 YouTube video on election integrity as "misleading," using a dedicated pathway that she established with YouTube to have the video removed, and recording details about her actions against the video in the Office's "Misinformation Tracking Sheet." That video was removed within 24 hours, as the Secretary intended. The Secretary specifically targeted a section of the video discussing Judicial Watch's lawsuits against the Secretary for her noncompliance with election law, lawsuits that resulted in favorable outcomes for Judicial Watch.

Flying in the face of precedent in all 11 regional circuits, the Ninth Circuit embraced the novel proposition that "[a]ny potential chilling effect" is

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1 The Federal Circuit has not addressed this issue.

"irrelevant" in deciding whether a challenged government action is adverse. App. 7a–8a. Instead, it adopted a new rule out of whole cloth: a court must first decide whether a plaintiff has alleged an adverse action—a term it did not define—before it decides whether that action would chill a person of ordinary firmness. Only if both conditions are met, the Ninth Circuit held, does a retaliatory action exist. Applying this new standard to this case, the Ninth Circuit found that Judicial Watch had failed to plead an adverse action without ever analyzing whether the Secretary's entire conduct would chill a person of ordinary firmness from continuing to engage in protected speech.

The Court should grant review to repair the consequential circuit fracture created by the Ninth Circuit's extraction of the "chilling effect" inquiry from the "adverse action" standard. The "chilling effect" is not, as the Ninth Circuit puts it, "irrelevant." It is fundamental, serving to protect those of ordinary firmness from retaliatory government action.

STATEMENT OF THE CASE

A. Statutory Background.

California Secretary of State Dr. Shirley Weber is California's chief elections officer and is responsible for administering provisions of the Election Code. Cal. Elec. Code § 10; App. 41a, ¶ 4. In this capacity, the Secretary oversees the Office of Elections Cybersecurity ("OEC"), which was created by section 10.5 of the California Elections Code. *Id.*; Cal. Elec. Code § 10.5. Section 10.5 requires the Secretary, acting through OEC, to "assess" "false or misleading" information published online that "may suppress

voter participation or cause confusion and disruption of the electoral process"; to "mitigate" such information; and to "educate voters" with "valid information from elections officials." Cal. Elec. Code §§ 10.5(b)(2), (c)(8). To satisfy these statutory obligations, the Secretary "work[s] closely and proactively with social media companies to keep misinformation from spreading, take[s] down sources of misinformation as needed, and promote[s] [the Secretary's] accurate, official election information at every opportunity." App. 47a–48a, ¶ 27. In addition to OEC staff, the Secretary relied on SKDKnickerbocker LLC—a partisan public affairs and consulting firm that specialized in working with Democratic Party politicians and, in September 2020, was advising the Biden campaign—to monitor social media activity of private citizens. App. 48a, ¶ 29. SKDK also regularly sent "Misinformation Daily Briefings" to the Secretary. *Id.* The Secretary in turn maintained a "Misinformation Tracking Sheet" to track speech for removal, as well as outcomes. App. 43a–45a, ¶¶ 13–18.

B. Factual Background.

1. Judicial Watch's Protected Speech.

Judicial Watch is an educational nonprofit that seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. App. 40a, ¶ 3. As an integral part of its mission, Judicial Watch monitors developments in election law and brings lawsuits to promote election integrity and protect voter rights. *Id.* For example, in 2017, Judicial Watch sued the Secretary and Los Angeles County to compel the State and the county to

comply with their voter list maintenance obligations under National Voter Registration Act. App. 42a–43a, ¶ 9. The lawsuit resulted in a Consent Decree that compelled the Secretary and Los Angeles County to implement several new practices and procedures to clean up state and county voter registration rolls. *Id*. In 2020, Judicial Watch sued the Secretary and Governor Gavin Newsom to challenge the Governor's attempt to change the State's 2020 election procedures by executive order instead of going through the Legislature. *Id*. The Legislature subsequently adopted the changes. *Id*.

The social media giant YouTube plays a vital role in how Judicial Watch communicates with its followers and educates the public about election integrity and other issues. App. 40a–41a, ¶¶ 3, 6. Judicial Watch has made use of its YouTube channel since May 2006. App. 41a, ¶ 6. As of September 23, 2022, Judicial Watch had posted over 4,200 videos on its YouTube channel and garnered nearly 94 million views. App. 41a–42a, ¶ 7. Over 502,000 YouTube users subscribe to Judicial Watch's YouTube channel. *Id.*

Just weeks before the 2020 General Election, on September 22, 2020, Judicial Watch posted on its YouTube channel a 26-minute video entitled "**ELECTION INTEGRITY CRISIS** Dirty Voter Rolls, Ballot Harvesting & Mail-in-Voting Risks!" App. 42a, ¶ 8. In the video, Judicial Watch President Tom Fitton discussed a multitude of controversial changes to states' election procedures, including changes to vote-by-mail and ballot collection processes and states' failures to clean up their voter rolls. App. 42a–43a, ¶ 9. Fitton also highlighted and

relied upon Judicial Watch's successful lawsuits against the Secretary and other California officials. *Id.* Fitton's comments were neither false nor misleading. App. 43a, ¶ 10. Nor could any of Fitton's comments be considered capable of "suppress[ing] voter participation or caus[ing] confusion or disruption of the orderly and secure administration of elections." *Id.*

2. The Secretary's Course of Action.

Since at least August 31, 2020, the Secretary has monitored Judicial Watch's social media activity, including its YouTube channel, in part through SKDK. App. 48a, ¶ 29. On September 22, 2020, the same day Judicial Watch posted its video, the Secretary placed the video on the "Misinformation Tracking Sheet." App. 42a–45a, ¶¶ 8, 13-19. She included details such as that Judicial Watch is a "conservative" organization and noted a section in the video that referenced and relied upon successful lawsuits brought by Judicial Watch against the Secretary for her noncompliance with election law. App. 14a, 42a–44a, ¶¶ 9-14.

Two days later, the Secretary reported Judicial Watch's video to YouTube through an email to several YouTube representatives. App. 45a, ¶¶ 19-20. No introduction between the representatives and the Secretary was necessary, as the Secretary had developed a "dedicated pathway" with YouTube to perform her interpreted statutory duties under Section 10.5. *Id.* Within 24 hours, a YouTube representative responded and informed the Secretary that YouTube would "look into this and get back to you as soon as we can." App. 46a, ¶ 21. Later that

same day and within 24 hours of the Secretary's email to YouTube, Judicial Watch's video had been removed. *Id.*, ¶ 22. Afterwards, a YouTube representative emailed the Secretary, thanked her "for raising this content to our attention," and informed the Secretary that the video had been removed. *Id.*, ¶ 23.

Notably, the September 24, 2020 video is a portion of a longer video also posted by Judicial Watch on its YouTube channel that addresses issues beyond election integrity. App. 47a, ¶ 25. The longer video, which the Secretary did not report to YouTube, remains available on YouTube. *Id.*

The Secretary made no evidence-based finding that the video removed from YouTube was "false or misleading" or "may suppress voter participation or cause confusion and disruption," nor would any such findings have been warranted or supported by evidence. App. 46a, ¶ 24; Cal. Elec. Code §10.5(c)(8) (citing Cal. Elec. Code §10.5(b)(2)).

C. Proceedings Below.

On September 23, 2022, Judicial Watch sued the Secretary, in her official capacity, for violating its First Amendment free speech rights. App. 39a–52a. Judicial Watch's lawsuit asserts two separate claims: a retaliation claim (Count I) and a claim challenging the Secretary's policy for enforcing Section 10.5 (Count II). App. 49a–51a. The Secretary subsequently moved to dismiss both claims for lack of standing and for failure to state a claim. *See* App. 14a. After briefing and a hearing on the motion, the district court found that although Judicial Watch had established standing, the complaint failed to state a

cause of action under the First Amendment. App. 20a, 26a–31a. The district court granted the Secretary's motion to dismiss both claims under Fed. R. Civ. P. 12(b)(6) without leave to amend. App. 33a.

Judicial Watch appealed, challenging the district court's failure to analyze the second element, *i.e.* whether the Secretary's actions would chill a person of ordinary firmness from continuing to engage in protected speech, and the district court's finding that the Secretary's entire course of conduct constituted permissible government speech that could not form the basis of either of Judicial Watch's claims.

After briefing, the Ninth Circuit affirmed the district court's dismissal of both claims. In a cursory opinion lacking sufficient analysis, the Ninth Circuit held that the district court did not err in failing to analyze whether the Secretary's course of conduct would chill a person of ordinary firmness and that the Secretary's conduct amounted to permissible government speech. App. 6a–8a. Relatedly, because it determined that the Secretary's course of conduct constituted permissible government speech, Judicial Watch's unconstitutional regulation of speech claim failed as well. App. 8a–9a.

Judicial Watch's petition for panel rehearing and rehearing *en banc* pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure was denied on December 5, 2024. App. 3a–4a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Review To Resolve The Consequential Circuit Split Caused By The Ninth Circuit's Decision.

A. The Ninth Circuit's "Adverse Action" Standard Conflicts With The Standard Followed By Every Regional Circuit.

Until this case, there was uniformity among all the regional circuits in addressing the second element of a First Amendment retaliation claim, whether the plaintiff had pled a retaliatory government action, or what is commonly referred to as an "adverse action." The Ninth Circuit's sister circuits recognize that an adverse action is an action that would have a chilling effect on a person of ordinary firmness from continuing to engage in protected speech. *See Barton v. Clancy*, 632 F.3d 9, 29 (1st Cir. 2011) ("a plaintiff need not suffer an 'adverse employment action' as that term ordinarily is used in the employment discrimination context"; instead, the action must be one that "would have a chilling effect"); *Connelly v. Cnty. of Rockland*, 61 F.4th 322, 325 (2d Cir. 2023) (an action is adverse "if it 'would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights.'") (citations omitted); *Mirabella v. Villard*, 853 F.3d 641, 650 (3rd Cir. 2007) (a retaliatory action is an act that would "deter a person of ordinary firmness"); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005) ("a plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter 'a person of ordinary firmness'"); *Keenan v. Tejeda*, 290 F.3d 252, 261 (5th Cir. 2002)

(an adverse action is one that caused the plaintiff to "suffer an injury that would chill a person of ordinary firmness"); *Reguli v. Russ,* 109 F.4th 874, 881 (6th Cir. 2024) (an adverse action is one that would deter an "ordinary citizen" from engaging in protected expression); *Bart v. Telford*, 677 F.2d 622, 624–25 (7th Cir. 1982) (an actionable retaliation claim must be based on an action that would deter a person of ordinary firmness); *Garcia v. City of Trenton,* 348 F.3d 726 (8th Cir. 2003) (same); *Eaton v. Meneley*, 379 F.3d 949, 954 (10th Cir. 2004) ("For there to have been a violation of First Amendment rights, the defendant's action must have had a deterrent, or 'chilling' effect"); *Bennett v. Hendrix*, 423 F.3d 1247, 1254 (11th Cir. 2005) ("A plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights."); *Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996), *vacated on other grounds*, 523 U.S. 574 (1998) (the inquiry is whether an "official's acts 'would chill or silence a 'person of ordinary firmness' from future First Amendment activities.'").

Departing from the universally accepted test, the Ninth Circuit adopted a restrictive, novel standard, describing the "chilling effect" as entirely "irrelevant" to deciding whether a plaintiff has pled an adverse action. App. 7a–8a. The Ninth Circuit held that a court must first determine whether the plaintiff has pled an adverse action—without defining the term—*before* it decides whether the action would have a chilling effect. *Id.* For good reason, none of the circuits splice the retaliatory action component of a First Amendment retaliation claim into two parts.

Because there is no exhaustive list of adverse actions, the "chilling effect" inquiry is the heart of the second element of a retaliation claim. It is not an afterthought. The Ninth Circuit's decision guts the heart out of the element, leaving simply an undefined label of "adverse action."

Under the Ninth Circuit's standard, because the chilling effect is "irrelevant," there is no consideration of the factual context in determining whether an action is adverse. This is clearly at odds with the position embraced by the other circuits. For instance, the Fourth Circuit has explained that whether an action is adverse requires a "fact intensive inquiry" where "[c]ontext matters" precisely because "the significance of any given act of retaliation will often depend upon the particular circumstances." *Williams v. Mitchell,* 122 F.4th 85, 89–90 (4th Cir. 2024). Similarly, the Second Circuit has recognized that the "test is highly context-specific" and the factual circumstances specific to a claim "are likely to be relevant to this assessment." *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 273 (2d Cir. 2011); *Connelly*, 61 F.4th at 325. The Eleventh Circuit has noted that there are different interests at stake in a case brought by a private citizen versus a case brought by a public employee, pointing to the Sixth Circuit's explanation in *Thaddeus-X v. Blatter*, 175 F.3d 378, 398 (6th Cir. 1999), that "[p]ublic employees . . . may be required to tolerate more than average citizens, before an action taken against them is considered adverse." *Bennett*, 423 F.3d at 1252. "[T]he definition of adverse action is not static across contexts." *Thaddeus-X*, 175 F.3d at 398. Turning to the Seventh Circuit, Judge Posner declared in *Bart v.*

Telford, 677 F.2d 622 (7th Cir. 1982) that "[t]he effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable." 677 F.2d at 625. Applying this principle to the facts, the Seventh Circuit held that petty harassments such as an employer ridiculing an employee for bringing a birthday cake to the office and groundless reprimands could form the basis of actionable First Amendment retaliation claim. *Id.* Yet, under the Ninth Circuit's rule, any factual context is "irrelevant."

For this reason alone, the Court should grant review.

B. The Ninth Circuit's Undefined Standard Undermines The First Amendment, Raising An Issue of Exceptional Importance.

The "chilling effect" inquiry serves a protective function, guarding the free speech rights of the "ordinary" private citizen. *See Bennett*, 423 F.3d at 1252. The "chilling effect" inquiry is fundamental to deciding whether an action is adverse because "[t]he goal is to prevent, or redress, actions by a government employer that 'chill the exercise of protected' First Amendment rights." *Coszalter v. City of Salem*, 320 F.3d 968, 974–75 (9th Cir. 2003). The Ninth Circuit's extraction of the "chilling effect" inquiry from the "adverse action" standard is highly consequential.

The U.S. Constitution is obviously national in scope and therefore it should not matter if a plaintiff brings a claim in the Ninth Circuit or, say, the

Eleventh Circuit. But now, because of the Ninth Circuit's decision, it *does*. Again, the "chilling effect" inquiry in other regional circuits requires a fact-based analysis that is integral in establishing an adverse action. Plaintiffs in the Ninth Circuit are deprived of this fact-based inquiry if they cannot clear the Ninth Circuit's undefined first hurdle, whether the action is "adverse." Many actions that have been found "adverse" due to the specific facts in a case in other regional circuits would likely not be actionable in the Ninth Circuit because there would be no factual analysis. For example, the Second Circuit has recognized that "lesser actions" like a "reprimand," "negative evaluation letters," and "express accusations of lying" can be adverse under certain circumstances. *Connelly*, 61 F.4th at 325; *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 226 (2d Cir. 2006). These actions, depending on the context, could chill a person of ordinary firmness. *Id.* The First Circuit also has observed that "relatively minor events" like "verbal harassment and humiliation" can be actionable depending on the facts of the case. *Barton*, 632 F.3d at 29–30. These actions could have an objectively chilling effect. *Id.* To focus its "adverse action" analysis, the Eighth Circuit asks questions such as "What would a person of 'ordinary firmness' have done in reaction to the [government action]? Would he or she have simply ignored them, or would he or she have been slowed down, at least to some degree?" *Garcia,* 348 F.3d at 729. The Ninth's Circuit standard does not permit these factual considerations.

Again, the "chilling effect" inquiry is necessary to determine whether a government action is adverse

because there is no exhaustive list of "adverse actions." Without the "chilling effect" as the focus, the standard for evaluating a retaliatory action turns into one akin to the "clearly established" standard in qualified immunity cases. The Ninth Circuit now only considers those actions that have previously been considered by the courts to be "adverse" as actionable.[2] This, in turn, incentives governments to create nuanced ways to retaliate against its citizens. Inevitably, this will prevent plaintiffs from having their day in court if they allege a government action that is objectively chilling but that is atypical or involves a course of conduct that must be viewed in its entirety, as Judicial Watch has alleged here.

The Ninth Circuit's novel "adverse action" standard is also unworkable. Without defining what exactly is "adverse," the Ninth Circuit stated that a court must first determine whether a government action is "adverse in the first place." App. 7a–8a. The answer to this circular question, in the Ninth Circuit's view, is not affected by whether the action is objectively chilling. Consequently, this means that if the court determines under some undefined standard that the government action is not "adverse," then it does not matter whether that same action would chill a person of ordinary firmness. But how does a court determine if a government action is adverse if the "chilling effect" inquiry is, as the Ninth Circuit put it,

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[2] Some adverse actions, like those cited by the district court, are easily recognizable: discipline, suspension, or dismissal from government employment, revocation of a license, or an arrest. App. 29a.

"irrelevant"? The Ninth Circuit's decision provides no answer.

This case exemplifies the First Amendment problems with the Ninth Circuit's standard. As Judicial Watch pled, the Secretary, purportedly acting under Section 10.5, pursued an extensive, multi-part course of action against Judicial Watch that would chill a person of ordinary firmness from continuing to engage in protected speech. The Ninth Circuit mischaracterized this course of action as simple "flagging" of a post that potentially violated YouTube's policies, which is fundamentally at odds with what Judicial Watch pled in its complaint. App. 7a–8a.[3] Because the Ninth Circuit determined that "flagging" is not an adverse action, it did not inquire into the chilling effect of the Secretary's course of action, ignoring critical facts in Judicial Watch's complaint that add necessary context to the Secretary's course of conduct. *See Nat'l Rifle Assoc. v. Vullo*, 144 S. Ct. 1316, 1330 (2024) (explaining that the Second Circuit was obligated to draw all reasonable inferences in the plaintiff's favor and consider the allegations as a whole). Further, the First Amendment's protection of the right to free speech against retaliatory government action is at its apex when it concerns speech on public issues.

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[3] The Ninth Circuit's "government speech" finding was based entirely on its erroneous conclusion that the facts in this case are analogous to those presented in *O'Handley v. Weber*, 62 F.4th 1145 (9th Cir. 2023). App. 6a–9a. Recently, the Court denied review of the Ninth Circuit's opinion in *O'Handley*. *O'Handley v. Weber*, 141 S. Ct. 2715 (2024). Notably, the questions presented in that case are starkly different from the question presented here. Neither question even references the "adverse action" standard.

Connick v. Myers, 461 U. S. 138, 145 (1983). Here, that speech is about the electoral process, the "essence of self-government." *Garrison v. La.*, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."). This sort of speech is deserving of the most protection against retaliation, not subject to an undefined standard like the one imposed by the Ninth Circuit.

The Court should correct the Ninth Circuit's decision to prevent entrenchment and further proliferation of this consequential circuit split.

II. This Case Presents an Ideal Vehicle For Addressing The Question Presented.

This case presents an ideal vehicle to review the question presented for several reasons.

First, because this case arises out of a motion to dismiss, it is limited to the four corners of the complaint, and the truthfulness of the complaint's factual allegations is assumed. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Second, with respect to Judicial Watch's retaliation claim, only the retaliatory component of Judicial Watch's retaliation claim is at issue. To this day, the Secretary has never disputed that Judicial Watch's speech was protected by the First Amendment, that its speech was a substantial or motivating factor in her actions, or that she intended the outcome she effected.

Finally, this is not a coercion case. The coercion line of cases does not apply to either of Judicial Watch's claims. Therefore, the retaliation claim does

not depend on the actions or motivations of a third party. This is a case squarely between the Secretary and Judicial Watch.

For these reasons, the case is an excellent vehicle for addressing the question presented.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

MICHAEL BEKESHA
Counsel of Record
KATHRYN BLANKENBERG
JUDICIAL WATCH, INC.
425 Third St., S.W., Ste 800
Washington, D.C. 20024
(202) 646-5172
mbekesha@judicialwatch.org
Counsel for Petitioner

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