APPENDIX TABLE OF CONTENTS

APPENDIX A

FILED

JAN 30 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDICIAL WATCH, INC., Plaintiff – Appellant, v. SHIRLEY WEBER, in her official capacity as Secretary of State of the State of California, Defendant – Appellee.	No. 23-3546 D.C. No. 2:22-cv-06894-MEM F-JC Central District of California, Los Angeles MANDATE

The judgment of this Court, entered October 24, 2024, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

APPENDIX B

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDICIAL WATCH, INC., Plaintiff – Appellant, v. SHIRLEY WEBER, in her official capacity as Secretary of State of the State of California, Defendant – Appellee.	No. 23-3546 D.C. No. 2:22-cv-06894-MEM F-JC Central District of California, Los Angeles ORDER

Before: OWENS, SUNG, and SANCHEZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and the petition for rehearing en

banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and en banc rehearing, Dkt. 39, is **DENIED**.

APPENDIX C

FILED

OCT 24 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDICIAL WATCH, INC., Plaintiff – Appellant, v. SHIRLEY WEBER, in her official capacity as Secretary of State of the State of California, Defendant – Appellee.	No. 23-3546 D.C. No. 2:22-cv-06894-MEM F-JC MEMORANDUM*

Appeal from the United States District Court
for the Central District of California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Maame Ewusi-Mensah Frimpong,
District Judge, Presiding

Submitted October 22, 2024**
San Francisco, California

Before: OWENS, SUNG, and SANCHEZ, Circuit Judges.

Appellant Judicial Watch, Inc. ("Judicial Watch") appeals the district court's order granting Dr. Shirley Weber's ("Secretary") motion to dismiss for failure to state a claim. We review a district court's decision to grant a motion to dismiss de novo. *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 849 (9th Cir. 2016). "In doing so, we accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff." *Doe v. Regents of the Univ. of Cal.*, 23 F.4th 930, 935 (9th Cir. 2022). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Judicial Watch alleges that the Secretary unconstitutionally retaliated against and regulated its speech in her capacity as the Secretary of State of California, overseeing the Office of Elections Cybersecurity ("OEC"). Following a communication from the OEC to a representative at YouTube, YouTube removed a video uploaded by Judicial Watch commenting on election integrity. This Court's decision in *O'Handley v. Weber* controls and disposes of Judicial Watch's retaliation and

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

regulation of speech claims. 62 F.4th 1145 (9th Cir. 2023).

2. To plead a First Amendment retaliation claim, a plaintiff must establish that "he was subjected to adverse action by the defendant that would chill a person of ordinary firmness from continuing to engage in the protected activity[.]" *Id.* at 1163 (quoting *Blair v. Bethel School District*, 608 F.3d 540, 543 (9th Cir. 2010)). In *O'Handley*, the plaintiff alleged that the Secretary committed an adverse action when the OEC flagged the plaintiff's Twitter post regarding California's election integrity as "disinformation," which led to the plaintiff's Twitter account being temporarily suspended. *Id.* at 1154-55. The Court in *O'Handley* rejected the plaintiff's argument, concluding that the Secretary did not "t[ake] any adverse action against [plaintiff]" because the Secretary's actions were "permissible government speech." *Id.* at 1163-64. The same is true here.

Judicial Watch's contention that the district court erred by failing to examine the chilling effect of the Secretary's conduct is misplaced. As the Supreme Court recently explained, "a plaintiff pursuing a First Amendment retaliation claim must show, among other things, that the government took an '*adverse action*' in response to his speech that 'would not have been taken absent the retaliatory motive.'" *Hous. Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 477 (2022) (emphasis added) (quoting *Nieves v. Bartlett*, 587 U.S. 391, 399 (2019)). Any potential chilling effect is relevant to whether an adverse action is "materially"

adverse, not whether the government action was adverse in the first place. *Id*.

Judicial Watch seeks to distinguish the facts of its case from those in *O'Handley* by contending that the Secretary engaged in a broader "course of action" that cannot be reduced to mere "government speech." None of the activities in the Secretary's "course of action" meaningfully distinguish Judicial Watch's case from *O'Handley*. As we held in *O'Handley*, "we have *refused*" to construe "[f]lagging a post that potentially violates a private company's content-moderation policy" as an adverse action. 62 F.4th at 1163 (emphasis added). "[W]e have set a high bar when analyzing whether speech by government officials is sufficiently adverse to give rise to a First Amendment retaliation claim." *Mulligan v. Nichols*, 835 F.3d 983, 989 (9th Cir. 2016). Judicial Watch cannot meet this high bar. Accordingly, we affirm the district court's dismissal of Judicial Watch's retaliation claim.

3. Judicial Watch's regulation claim is foreclosed by *O'Handley*. Judicial Watch argues that the Secretary's enforcement of California Elections Code § 10.5 ("Section 10.5") against Judicial Watch is an unconstitutional regulation of speech. As *O'Handley* made clear, Section 10.5 does not confer any enforcement authority. 62 F.4th at 1164. Judicial Watch also claims that the Secretary regulated its speech when she "labeled Judicial Watch's video as 'misleading'" and used a "close 'working relationship' and 'dedicated pathway'" with YouTube to have the video removed. As in *O'Handley*, the Secretary's

characterization of the video as misleading is protected government speech. *See id.* at 1163 (explaining that "California has a strong interest in expressing its views on the integrity of its electoral process"). It is well established that "government officials do not violate the First Amendment" when they persuade private intermediaries "not to carry content they find disagreeable." *Id.* at 1158, 1163 (citation omitted).

Finally, YouTube's decision to remove Judicial Watch's video cannot be ascribed to the Secretary because the Secretary did not coerce YouTube into taking that action. YouTube's removal of Judicial Watch's video is the result of YouTube applying its own content policies, not an instance of the Secretary regulating Judicial Watch's speech. *See id.* at 1163. We affirm the district court's dismissal of Judicial Watch's regulation claim.

AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT
for the
Central District of California

JUDICIAL WATCH, INC. *Plaintiff* v. SHIRLEY WEBER, in her official capacity *Defendant*	))))))	*Civil Action No. 2:22* -cv-6894-MEMF-JC

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

○ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus post judgment interest at the rate of _____ % per annum, along with costs.

○ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____.

✓ other: Secretary Weber's motion to dismiss is GRANTED as to all claims. Judicial Watch's Complaint is dismissed without leave to amend

pursuant to Rule 12(b)(6). Both the First and Second Requests for judicial notice are GRANTED.

This action was *(check one)*:

○ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

○ tried by Judge _____ without a jury and the above decision was reached.

✓ decided by Judge ___Maame Ewusi-Mensah Frimpong___ on a motion for Motion to Dismiss (ECF No. 14) and two Requests for Judicial Notice (ECF Nos. 14-2 and 20-2).

Date: February 2, 2024__ *CLERK OF COURT*

_____

APPENDIX E

UNITED STATES DISTRICT COURT
CENTERAL DISTRICT OF CALIFORNIA

JUDICIAL WATCH, INC., Plaintiff, v. SHIRLEY WEBER, in her official capacity as Secretary of State of the State of California, Defendant.	Case No.: 2:22-cv-06894-MEMF(JCx) **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS [ECF NO. 14]**

Before the Court are a Motion to Dismiss (ECF No. 14) and two Requests for Judicial Notice (ECF Nos. 14-2 and 20-2) filed by Defendant Shirley Weber. For the reasons stated herein, the Court hereby GRANTS the Motion to Dismiss and GRANTS both Requests for Judicial Notice.

I. Factual Background[1]

Plaintiff Judicial Watch, Inc. ("Judicial Watch") is a not-for-profit organization which seeks to

[1] All facts stated herein are taken from the allegations in Plaintiff Judicial Watch's Complaint unless otherwise indicated. ECF No. 1.

promote transparency, accountability and integrity in government as well as fidelity to the rule of law. ¶ 1. As part of its public education mission, Judicial Watch regularly monitors election law and comments on and criticizes government actions that, in its view, undermine election integrity. *Id*. Judicial Watch maintains a channel on YouTube, where it has posted "over 4,200 videos" since 2006. ¶¶ 6-7.

On September 22, 2020, Judicial Watch posted a 26-minute video on YouTube which is central to the allegations in this case (the "September 22 Video"). ¶ 8. The September 22 Video discussed numerous purported issues with various states' election procedures, including a discussion of California in particular. ¶ 9. YouTube removed the September 22 Video from YouTube on September 25, 2020. ¶ 11. The September 22 Video remains unavailable on YouTube. *Id*. At the time it was removed, the September 22 Video had 5,531 views. ¶ 26.

Defendant Dr. Shirley Weber ("Secretary Weber") is the Secretary of State of California. ¶ 4. Secretary Weber is California's chief elections officer. *Id*. Among other responsibilities, Secretary Weber oversees the Office of Elections Cybersecurity ("the OEC"), and acts through its officials and employees. *Id*. The OEC was established pursuant to California Elections Code § 10.5 ("Section 10.5"). *See* Cal. Elec. Code § 10.5. The OEC's primary mission includes monitoring and counteracting "false or misleading information regarding the electoral process . . . that may suppress voter participation or cause confusion and disruption" of elections. Cal. Elec. Code §

10.5(b)(2). As part of this, the OEC maintains a "Misinformation Tracking Sheet" and "Misinformation Tracker." ¶ 13.

The OEC has an interconnected relationship with YouTube and other social media companies. ¶ 27. The OEC has explained that it maintains close "working relationships" and "dedicated pathways" at each major social media company, and that it works closely and proactively with these companies to "keep misinformation from spreading, take down sources of misinformation as needed, and promote our accurate, official election information at every opportunity." *Id*.

On September 22, 2020, the OEC identified the September 22 Video and added it to the OEC's "Misinformation Tracking Sheet" and "Misinformation Tracker," alongside brief notes describing certain claims in the video. ¶¶ 13-14. These notes were not predicted on a finding of fact based on Section 10.5. ¶ 24. One note in particular described Judicial Watch as a "conservative group" and noted how many views the video had at the time of the note. ¶ 14.

On September 24, 2020, an OEC employee emailed YouTube to report the September 22 Video. ¶ 20. The employee explained that she was reporting the video because "it misleads community members about elections" and "misinterprets the safety and security of mail-in ballots." *Id*. She then thanked the recipients for their "time and attention on this matter." *Id*. YouTube responded the next day (September 25, 2020) and wrote "[w]e will look into

this and get back to you as soon as we can." ¶ 21. That same day, Judicial Watch noticed that the September 22 Video had been removed from YouTube. ¶ 22. Two days later, YouTube wrote again to the OEC employee, thanking the OEC from "raising this content to [YouTube's] attention" and explaining that it had been removed "for violating [YouTube's] policies." ¶ 23. The email concluded with "Please do not hesitate to reach out if there are any other questions or concerns you may have." *Id.* The OEC had been monitoring Judicial Watch's social media activity since at least August 2020, and continues to do so. ¶¶ 29-30. This monitoring has in part been done through SKDKnickerbocker LLC (SKDK), a consulting firm that was also advising the Biden campaign in September 2020. ¶ 29.

Judicial Watch intends to continue using YouTube as an important means of communicating to the public regarding election integrity. ¶ 31.

I. Procedural History

Judicial Watch filed its Complaint on September 23, 2023. ECF No. 1. The Complaint alleges three causes of action: (1) a claim pursuant to 42 U.S.C. § 1983 for violations of the First and Fourteenth Amendments to the United States Constitution, (2) a claim pursuant to 42 U.S.C. § 1983 for Unconstitutional Regulation of Speech in violation of the First and Fourteenth Amendments to the United States Constitution, and (3) a claim for violations of the California Constitution. Compl. ¶¶ 32-45.

Secretary Weber filed her Motion to Dismiss ("Motion") on November 18, 2022. ECF No. 14. She filed her first Request for Judicial Notice ("First Request") alongside that Motion, also on November 18, 2022. ECF No. 14-2. Judicial Watch filed an Opposition to Secretary Weber's Motion ("Opposition") on March 23, 2023. ECF No. 19. Secretary Weber filed a Reply in support of her Motion ("Reply") on April 20, 2023. ECF No. 20. She filed her second Request for Judicial Notice ("Second Request") on April 20, 2023 as well. ECF No. 20-2.

II. Applicable Law

Secretary Weber brings her Motion pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The standards for each Rule are discussed below, as is the standard for a request for judicial notice.

a. Request for Judicial Notice

A court may take judicial notice of facts not subject to reasonable dispute where the facts "(1) [are] generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed R. Evid. 201(b). Under this standard, courts may take judicial notice of "undisputed matters of public record," but generally may not take judicial notice of "disputed facts stated in public records." *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001), overruled on other grounds by *Galbraith v. County of Santa Clara*, 307 F.3d 1119,

1125–26 (9th Cir. 2002). Moreover, even when documents are not physically attached to the complaint, courts may nonetheless consider such documents if: "(1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." *United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011); *Lee*, 250 F.3d at 688.

b. Rule 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) ("Rule 12(b)(1)") allows a party to seek to dismiss a complaint for lack of subject-matter jurisdiction. "[S]tanding and ripeness pertain to federal courts' subject matter jurisdiction" and so "they are properly raised in a Rule 12(b)(1) motion to dismiss." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). In the context of a 12(b)(1) motion, the plaintiff bears the burden of establishing Article III standing to assert the claims. *Id.*

Rule 12(b)(1) jurisdictional challenges can be either facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). When a motion to dismiss attacks subject-matter jurisdiction on the fact of the complaint, the court assumes the factual allegations in the complaint are true and draws all reasonable inferences in the plaintiff's favor. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009). Moreover, the standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), apply with equal force

to Article III standing when it is being challenged on the face of the complaint. *See Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012) (applying *Iqbal*). Thus, in terms of Article III standing, the complaint must allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

c. Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") allows a party to seek to dismiss a complaint for "failure to state a claim upon which relief can be granted." "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Labels, conclusions, and "formulaic recitation of a cause of action's elements" are insufficient. *Twombly*, 550 U.S. at 545.

The determination of whether a complaint satisfies the plausibility standard is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. Generally, a court must accept the factual allegations in the pleadings as true and view them in the light most favorable to the plaintiff. *Park*

v. Thompson, 851 F.3d 910, 918 (9th Cir. 2017); *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001). But a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

As a general rule, leave to amend a dismissed complaint should be freely granted unless it is clear the complaint could not be saved by any amendment. Fed. R. Civ. P. 15(a); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

III. The First and Second Requests for Judicial Notice are Granted

Secretary Weber requested that the Court take judicial notice of: (1) a transcript of a publicly-available video that appears to be a duplicate of the September 22 Video (*see* ECF No. 14-1; ECF No. 14-2); and (2) the plaintiff's complaint in *O'Handley v. Padilla*, the district court case that led to the Ninth Circuit's ruling in *O'Handley v. Weber* (*see* ECF No. 20-2). Judicial Watch has not objected to either request. The Court finds that judicial notice is appropriate for each of these items, and so will grant both Requests.

First, the video transcript is appropriate for judicial notice. A court may take judicial notice of documents not attached to a complaint if: "(1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." *Corinthian Colleges*, 655 F.3d at 999. Here, there can

be little doubt that the content of the September 22 video is referred to in Judicial Watch's complaint, and that the content of the September 22 video is central to Judicial Watch's claim. *See, e.g.*, Compl. ¶ 12. The only issue is whether a party might question whether the transcript is accurate, or whether the transcript is indeed of a duplicate of the September 22 video. All indications—including the title, the fact that it came from a Vimeo account associated with Judicial Watch, the length, and the content—suggest it is the same video. The transcript is from a reputable company and is authenticated. And Judicial Watch had an opportunity and opted not to oppose the First request or otherwise object. Accordingly, the Court finds no party questions the authenticity, and will take judicial notice of the transcript, which is Exhibit A to ECF No. 14-1.[2] The First Request is GRANTED.

Second, the complaint from *O'Handley v. Padilla* is also appropriate for judicial notice. A court may take judicial notice of "undisputed matters of public record," *Lee*, 250 F.3d at 690. The complaint in question is an undisputed matter of public record, and

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[2] As counsel for Secretary Weber acknowledged at the hearing, however, the *content* of the September 22 Video is largely irrelevant given the well-pleaded allegations in the Complaint about the nature of the video and the nature of the Secretary's assessment of the video as well as the fact that the content does not appear to *contradict* any of the allegations in the Complaint. At best, the content supports Judicial Watch's allegation of a possible retaliatory motive, given the implicit criticisms of the Office of the Secretary of State, the assertions that "the left wants to be able to steal elections," and the warning that the video might be "censored . . . by YouTube." *See generally* Exhibit A to ECF No. 14-1.

so the Court will take judicial notice of it.[3] That document is Exhibit A to ECF No. 20-1. The Second Request is GRANTED.

IV. The Motion to Dismiss is Granted

Secretary Weber's Motion raises two principal arguments. First, Secretary Weber argues that Judicial Watch does not have standing, and so the federal claims in the Complaint should be dismissed pursuant to Rule 12(b)(1). *See* Motion at 8-14. Second, Secretary Weber argues that the alleged conduct did not constitute a violation of the First Amendment, and so the Complaint should be dismissed pursuant to Rule 12(b)(6). *See* Motion at 14-18.

A recent Ninth Circuit decision—*O'Handley v. Weber*—is on all fours with the issues presented in the Motion to Dismiss and dictates this Court's result, namely, that Judicial Watch's Complaint cannot survive. 62 F.4th 1145 (9th Cir. 2023). In *O'Handley*, the OEC flagged the plaintiff's Twitter account to Twitter. *Id.* at 1154. Twitter then took actions to limit other users' ability to see the plaintiff's posts, and then suspended the account, before eventually reinstating it. *Id.* at 1154, 1162. O'Handley alleged that he suffered an injury in the form of "inability to communicate with his followers and pursue his chosen profession as a social media influencer." *Id.* at

[3] The only significance of the complaint in *O'Handley* is that it demonstrates whether the facts alleged by O'Handley in his complaint can be distinguished from the facts alleged by Judicial Watch in its Complaint—and therefore whether the Ninth Circuit decision in *O'Handley* controls.

1161. Secretary Weber moved to dismiss on the same two grounds as she does here: standing pursuant to Rule 12(b)(1), and failure to state a claim pursuant to Rule 12(b)(6). *Id*. at 1155. The Ninth Circuit held that O'Handley had standing to pursue a cause of action against Secretary Weber. *Id*. at 1162. However, the court held that O'Handley failed to allege that the defendants "engage[d] in any unconstitutional acts," and so dismissed the claim based on Rule 12(b)(6). *Id*. at 1164.

Because *O'Handley* is factually analogous, recent, and binding, its reasoning controls.

A. Judicial Watch Alleged Facts Sufficient for Standing

To establish standing, a plaintiff must allege that he or she has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), *as revised* (May 24, 2016). The plaintiff bears the burden of establishing standing. *Id*.

The Ninth Circuit's *O'Handley* decision, which significantly clarified the issue of standing, was published after Secretary Weber filed her Motion, but before Judicial Watch filed its Opposition or Secretary Weber filed her Reply. *See* Motion (filed November 18, 2022); *O'Handley*, 62 F.4th 1145 (published March 10, 2023); Opp. (filed March 23, 2023); Reply (filed April 20, 2023). Judicial Watch argued in its opposition that

O'Handley controlled standing, and suggested that Secretary Weber should no longer contest the issue in light of *O'Handley*. *See* Opp. at 4 n.2. Secretary Weber did not address standing at all in her reply. *See* Reply.

Secretary Weber does not concede standing, as her counsel explained at the hearing on the Motion on May 11, 2023. But Secretary Weber only has concerns with respect to one of the three requirements: redressability. Specifically, Secretary Weber argues that Judicial Watch has not plausibly alleged facts showing it has a fear of future actions by Secretary Weber or the OEC. But despite this, Secretary Weber's counsel acknowledged that *O'Handley* appears to control the issue. In light of this acknowledgement, and Secretary Weber's failure to rebut Judicial Watch's arguments on standing in her Reply, the Court finds that Secretary Weber has effectively conceded standing. *See John-Charles v. California*, 646 F.3d 1243, 1247 n.4 (9th Cir. 2011) (deeming issue waived where party "failed to develop any argument"). Even if she had not, *O'Handley* controls—given Judicial Watch's allegations regarding its goals and activities, *see, e.g.*, Compl. ¶ 31, it has plausibly alleged a fear of future actions. *See* 62 F.4th at 1162.

Thus, Judicial Watch has established standing.

B. Judicial Watch Has Not Validly Alleged Any Violation of the First or Fourteenth Amendments

As the *O'Handley* court explained, there are several ways a plaintiff might validly allege a constitutional violation based on a government actor causing a social media company to act. *O'Handley*, 62 F.4th at 1162. First, a government actor could in some circumstances be held liable for the *company's* actions. *Id*. This could occur if the government "coerce[d]" the company in to "performing a particular act" by threats of "adverse action," or if the government provided "positive incentives" so powerful that the incentives "essentially compel[led]" the action. *Id*. at 1158. Alternatively, the government actor could be liable if the government and the company entered into a conspiracy with a shared "specific intent" to "violate constitutional rights." *Id*. at 1159; 1163. Second, the government actor could be liable for *its own* conduct. *Id*. at 1162. This could occur if the government coerced the company into censoring disfavored speech. *Id*. at 1163. Or, a government actor could be liable if the government actor took adverse action in retaliation against protected speech. *Id*.

The *O'Handley* court analyzed all of these possibilities, and found that none applied.[4] *Id*. at 1164. For the same reasons, none apply to Judicial Watch's Complaint: Under the controlling authority of *O'Handley*, Judicial Watch has simply failed to allege any facts that could show a constitutional violation.

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[4] The *O'Handley* court also examined other theories that Mr. O'Handley alleged, including an equal protection claim and unconstitutional vagueness. *See O'Handley*, 62 F.4th at 1164. Judicial Watch has not alleged these theories or any facts that might support them, so this Court need not examine them.

i. Secretary Weber is not Liable for YouTube's Decision to Remove the September 22 Video

The *O'Handley* court held that "Secretary Weber is not responsible for any of Twitter's content-moderation decisions with respect to O'Handley." *Id*. at 1162. First, the court found that the OEC had not coerced Twitter. *Id*. at 1157-58. Crucially, the court found that O'Handley failed to allege that OEC made threats against Twitter. *Id*. at 1157. At most, the OEC "requested" that Twitter take action, and Twitter "was free to ignore" this request. *Id*. at 1158. Second, the court found that O'Handley's allegations were not sufficient for a conspiracy between Twitter and the government. At most, the allegations suggested a "meeting of the minds to promptly address election misinformation, not a meeting of the minds to violate constitutional rights as would be required." *Id*. at 1159.

The same is true here: Secretary Weber and the OEC are not responsible for any of YouTube's content moderation decisions with respect to Judicial Watch, including YouTube's decision to remove the September 22 Video. First, there is no allegation that would support a finding that the OEC coerced YouTube. Judicial Watch has not alleged that the OEC made any threats against YouTube. The emails between YouTube and the OEC quoted in the complaint do not show any such threats. *See* Compl. ¶¶ 20-23. The "interconnected relationship" that Judicial Watch alleges exists between the OEC and

YouTube is not coercion either. *See* Compl. ¶ 27. No allegations support an inference of coercion, all facts alleged rather appear to be "persuasion" of the sort that the Ninth Circuit held was permissible. *See O'Handley*, 62 F.4th at 1164. Nor is there any allegation of "positive incentives" that "essentially compel[led]" YouTube to act as it did. *See O'Handley*, 62 F.4th at 1158. And second, there is no allegation of a conspiracy, or of any meeting of the minds with the intent to deprive Judicial Watch of its constitutional rights. In sum, Judicial Watch has made no allegations that could make Secretary Weber or the OEC liable for YouTube's removal of the video.

ii. The OEC's Conduct was not Unconstitutional

As explained in *O'Handley*, even if Secretary Weber is not liable for YouTube's acts, this "does not preclude [a plaintiff] from challenging the Secretary's own conduct." *O'Handley*, 62 F.4th at 1162. However, in analyzing her conduct, the *O'Handley* court found Secretary Weber not liable. *Id*. at 1163.

1. There are no Allegations of Unconstitutional Coercion

First, the court found that O'Handley's allegations did not amount to unconstitutional coercion by Secretary Weber or the OEC.[5] *Id*. The

[5] This is closely related to the coercion analysis above, but distinct in that it focuses on the government's own conduct, rather than inquiring as to whether the government should be liable for the coerced conduct of another actor.

United States Supreme Court has held that the government may not compel an intermediary to censor disfavored speech. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68-72 (1963). But as the *O'Handley* court explained, there is "a line between coercion and persuasion," and mere persuasion is "permissible government speech." *O'Handley*, 62 F.4th at 1163. The OEC's communications with Twitter were mere persuasion, and "Twitter then decided how to respond." *Id*. Although O'Handley argued that "intimidation is implicit," the court explained that this is not the case because "the OEC's mandate gives it no enforcement power," and even if the OEC had enforcement power over Twitter, "[a]gencies are permitted to communicate in a non-threatening manner with the entities they oversee without creating a constitutional violation." *Id*.

The same is true here; as discussed above, there is no allegation in Judicial Watch's complaint that would support the inference that the OEC coerced YouTube to censor disfavored speech. The emails cited in the Complaint, and the allegations regarding an "interconnected relationship" amount at most to persuasion. *See* Compl. ¶¶ 20-23; ¶ 27. These allegations are a far cry from the facts of *Bantam Books*, where the government officers made "thinly veiled threats" of prosecution to coerce a private actor. *See* 372 U.S. at 68. The persuasion alleged here is permissible government speech. *See O'Handley*, 62 F.4th at 1163.

2. The Retaliation Claim Fails Because There was no Adverse Action

Second, the *O'Handley* court held that O'Handley did not sufficiently allege impermissible retaliation. *Id*. Retaliation requires that a plaintiff show: "(1) he engaged in constitutionally protected activity; (2) as a result, he was subjected to adverse action by the defendant that would chill a person of ordinary firmness from continuing to engage in the protected activity; and (3) there was a substantial causal relationship between the constitutionally protected activity and the adverse action." *Id*. (quoting *Blair v. Bethel School District*, 608 F.3d 540, 543 (9th Cir. 2010)). The court held that O'Handley failed on the second prong, because the OEC's communications to Twitter expressing concerns about a post are not an adverse action. *Id*. As the court explained, California has "a strong interest in expressing its views on the integrity of its election process" and sharing those views directly, rather than speaking publicly, "does not dilute [California's] speech rights or transform permissible government speech into problematic adverse action." *Id*. at 1163-64.

In the hearing on Mary 11, 2023, Judicial Watch argued that a combination of four activities by the OEC amounted to an adverse action. Those activities were: (1) monitoring Judicial Watch's speech (*see* Compl. ¶¶ 29, 35); (2) making a "false assessment" that the September 22 video was misleading (*see* Compl. ¶¶ 10, 12-15; 26; 28; 25); (3)

failing to make a finding required by law (*see* Compl. ¶ 24); and (4) using a "close working relationship" and "dedicated pathways" to cause YouTube to remove the September 22 Video (*see* Compl. ¶¶ 20-23, 27).

The *O'Handley* holding controls here and requires this Court to find that the OEC's conduct was not an adverse action. As the *O'Handley* court explained, "[t]he most familiar adverse actions are exercise[s] of governmental power that are regulatory, proscriptive, or compulsory in nature and have the effect of punishing someone for his or her speech." *O'Handley*, 62 F.4th at 1163 (quoting *Blair v. Bethel School District*, 608 F.3d 540, 544 (9th Cir. 2010)). "[F]or adverse, retaliatory actions to offend the First Amendment, they must be of a nature that would stifle someone from speaking out." *Blair*, 608 F.3d at 544. Examples of adverse actions include loss of a job, revocation of a business license, retaliation against a prisoner by prison officials, or targeting of citizens by law enforcement. *Id.*

Even considered in combination, the four activities Judicial Watch points to do not constitute an adverse action. The combined activities are significantly different from the prototypical examples listed above, and do not punish Judicial Watch for its speech. *See O'Handley*, 62 F.4th at 1163. The *O'Handley* court made clear that California communicating its views directly to a social media company "does not dilute its speech rights or transform permissible government speech into problematic adverse action." *Id.* at 1164. And although this communication was only the final

activity, the additional activities of monitoring social media posts and making allegedly "false" assessments do not change the fundamental character of the OEC's actions. The sum total of the behavior was that California formed views and then expressed those views in a permissible way. *Id*. at 1164. As to the third activity, even if Judicial Watch is correct that the OEC violated California law by failing to make a finding—a claim this Court cannot hear for the reasons discussed below—no authority suggests this violation of the law would transform conduct that does not otherwise qualify into an adverse action. Based on the reasoning of the O'Handley court, the OEC's conduct was not an adverse action. *See id*. And for the same reasons, no individual activity alleged amounts to adverse action.

Thus, the retaliation claim fails on the second prong, because—as dictated by O'Handley—no adverse action against Judicial Watch occurred. The Court need not reach the remaining prongs.

3. O'Handley *is not Distinguishable*

Judicial Watch attempted in its Opposition to distinguish from *O'Handley*. *See* Opp. at 14-15. These arguments fail, and the Court finds *O'Handley* controlling on all issues except where explicitly stated otherwise.

Judicial Watch argues first that the allegations here suggest a more direct link between the OEC's and YouTube's actions with respect to Judicial Watch

than between the OEC's and Twitter's actions with respect to *O'Handley*. *See* Opp. at 14. This purported distinction makes no difference, because in both cases a causal line can be drawn sufficient for standing, and the holding in *O'Handley* did not rest on a lack of causation.

Next, Judicial Watch argues that the specific actions the OEC took here are different from those in *O'Handley*. *See* Opp. at 14-15. Here, Judicial Watch argues, it has alleged more than just that the OEC flagged a video, but also alleged that the OEC monitored speech, made a "false assessment," and violated California law by failing to make a finding. But O'Handley involved nearly identical allegations made in different words. O'Handley alleged that the OEC set out on a program to "quash politically-disfavored or inconvenient speech" including "speech implicating [the Secretary of State's] administration of elections." ECF No. 20-1 ¶ 72-77. This is similar to the allegation of monitoring. Although Judicial Watch alleges that it specifically was monitored (Compl. ¶ 29), while *O'Handley* involved monitoring of a broad category of speakers, the Court sees no distinction, particularly because the O'Handley allegations make clear that O'Handley's tweets specifically were caught up in the monitoring. *See* ECF No. 20-1 ¶¶ 72-77. O'Handley also alleged that his tweet was labeled "misinformation" despite not actually being misinformation. *See* ECF No. 20-1 ¶ 74. This is very similar to Judicial Watch's allegation of a "false assessment." The Ninth Circuit did not find this allegation relevant to whether there was adverse action. *See O'Handley*, 62 F.4th at 1162-63. And

although O'Handley did not make the argument that the OEC was required to make a finding of fact, he raised other allegations regarding purported violations of law by the OEC. *See* ECF No. 20-1 ¶ 52 ("[the secretary of state] awarded this contract [to SKDK] despite having no budgetary authority"). And in any case, if there was any cause of action based on these purported violations of the law, it would be a state law claim, which the Court cannot hear for the reasons described below. Finally, O'Handley too—like Judicial Watch—alleged and complained of a "close working relationship" between the social media company and the OEC. In sum, the purported differences between O'Handley's allegations and Judicial Watch's, to the extent they are differences at all, do not change the outcome.

4. Judicial Watch's As-Applied Challenge Fails

Judicial Watch raises one additional legal argument not specifically addressed in *O'Handley*: that California Election Code Section 10.5 is an unconstitutional regulation of speech. *See* Opp. at 15-17. Judicial Watch argues that Section 10.5, "as interpreted and enforced by Defendant here" "suffers from overbreadth" and is "an unconstitutional content- and/or viewpoint-based regulation of speech that cannot satisfy strict scrutiny." Opp. at 15. This appears to be part of Judicial Watch's second cause of action. *See* Compl. ¶¶ 40-42. Judicial Watch made clear in its Opposition that the challenge against Section 10.5 "focuses on the validity of how Defendant has understood and applied her authority under

Section 10.5 in this instance." Opp. at 15. In other words, this is an as-applied challenge, not a facial challenge, as Judicial Watch has not alleged or argued that Section 10.5 is unconstitutional in all cases.

Although *O'Handley* did not address these specific arguments, it nonetheless controls. O'Handley argued that Section 10.5 was void for vagueness. *O'Handley*, 62 F.4th at 1164. The court construed this in part as an as-applied challenge, and concluded that "O'Handley's as-applied challenge also fails because Elections Code § 10.5 was never applied against him." *Id*. The same is true here. The OEC took extremely similar actions in *O'Handley* as it did here, by messaging a social media company with concerns about one specific post. At the hearing on May 11, 2022, Judicial Watch pointed to the allegations in paragraph 28 of its complaint in an attempt to show that Section 10.5 was applied against Judicial Watch. The relevant part of that paragraph is the allegation that the "OEC was acting under Section 10.5 of the California Election Code." *See* Compl. ¶ 28. O'Handley made a nearly identical allegation, that the defendants "used California Election Code § 10.5" against O'Handley. The Ninth Circuit nevertheless held that the OEC had not applied Section 10.5 against the plaintiff, and that this foreclosed any as-applied challenge. *See O'Handley*, 62 F.4th at 1164. The Court makes the same finding here: The Complaint fails to plausibly allege that Section 10.5 was applied against Judicial Watch, so Judicial Watch's as-applied challenge fails.

C. Sovereign Immunity Bars the State Law Claims

Judicial Watch alleges that Secretary Weber's conduct "violated Plaintiff's rights under article I., sections 2(a) and 3(a) of the California Constitution. Compl. ¶ 44. Both parties agree that this claim is barred by sovereign immunity under the Eleventh Amendment to the United States Constitution.

Sovereign immunity generally bars federal courts from hearing suits against states. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-102 (1984). This also applies to suits against state officials where "relief sought nominally against an officer" "would operate against" the state itself. *Id.* at 101. Here, that is exactly what this suit is; Judicial Watch sued Secretary Weber, but the relief it seeks would operate to limit the actions of the State of California. Thus, sovereign immunity applies.

There is a limited exception for suits alleging that a state official's actions violate the federal constitution. *Id.* at 102; *see also Ex parte Young*, 209 U.S. 123, 159-160 (1908). This exception would allow this Court to hear Judicial Watch's federal constitutional claims. But it does not apply to state constitutional claims. *Pennhurst*, 465 U.S. at 102 (explaining that *Ex Parte Young* only applies to "suits alleging conduct contrary to 'the supreme authority of the United States.'"). Thus, this Court is barred from considering Judicial Watch's claim pursuant to the California Constitution, and it must be dismissed.

D. Dismissal Will Be Without Leave to Amend

Courts generally grant leave to amend dismissed claims, unless "it is clear the complaint could not be saved by any amendment." *Manzarek*, 519 F.3d at 1031.

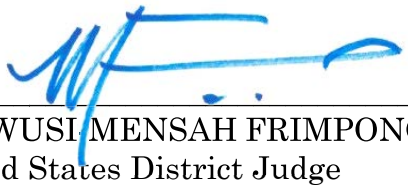
Here, the Court finds that amendment would be futile, and sees no way that Judicial Watch could amend sufficiently to state a claim upon which relief could be granted. The actions Secretary Weber and OEC allegedly took did not violate the United States Constitution or any other federal law, and Secretary Weber is immune from state law claims. The Court notes that the District Court in *O'Handley* took this same approach, for similar reasons. *O'Handley v. Padilla*, 579 F. Supp. 3d 1163, 1203. (N.D. Cal. 2022), *aff'd sub nom. O'Handley v. Weber*, 62 F.4th 1145 (9th Cir. 2023). All claims will be dismissed without leave to amend.

CONCLUSION

For the reasons stated above, Secretary Weber's Motion is GRANTED as to all claims. Judicial Watch's Complaint is dismissed without leave to amend pursuant to Rule 12(b)(6). Both the First and Second Requests for judicial notice are GRANTED.

IT IS SO ORDERED.

Dated: May 22, 2023



MAAME EWUSI-MENSAH FRIMPONG
United States District Judge

APPENDIX F

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT
Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

ROBERT PATRICK STICHT (SBN 138586)
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JUDICIAL WATCH, INC., Plaintiff, v. SHIRLEY WEBER, in her official capacity as Secretary of State of the State of California, Defendants.	Case No. 2:22-cv-6894 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff JUDICIAL WATCH, INC. ("JUDICIAL WATCH") brings this action against Defendant SHIRLEY WEBER ("WEBER"), in her

official capacity as Secretary of State of the State of California, for violating Plaintiff's rights under the First and Fourteenth Amendments to the Constitution of the United States and article I, sections 2(a) and 3(a) of the California Constitution. As grounds therefor, Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over Plaintiff JUDICIAL WATCH's federal civil rights claims pursuant to 28 U.S.C. §§ 1331 and 1343(a). The Court has jurisdiction over Plaintiff JUDICIAL WATCH's California Constitution claim pursuant to 28 U.S.C. § 1367.

2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because Defendant WEBER resides in this judicial district.

PARTIES

3. Plaintiff JUDICIAL WATCH, INC. is a not-for-profit, educational organization incorporated under the laws of the District of Columbia and headquartered at 425 Third Street SW, Suite 800, Washington, DC 20024. Plaintiff seeks to promote transparency, accountability, and integrity in government and fidelity to the rule of law. As part of this public education mission, Plaintiff regularly monitors developments in election law, brings lawsuits to promote election integrity, and publicly comments on and criticizes government actions that, in Plaintiff's view, undermine election integrity.

4. Defendant SHIRLEY WEBER is the Secretary of State of the State of California. As Secretary of State, Defendant is California's chief elections officer and is responsible for administering provisions of the Election Code, including section 10.5 of the California Election Code. Cal. Gov. Code § 12172.5; Cal. Elec. Code § 10.5. As the Secretary of State, Defendant also oversees the Office of Elections Cybersecurity ("OEC") and acts through OEC officials and employees. Cal. Elec. Code § 10.5(a). She is being sued in her official capacity.

STATEMENT OF THE FACTS

5. It is not the role of the state to police the opinion of citizens, yet OEC did just that when she monitored Plaintiff's YouTube channel, purportedly assessed the contents of a video Plaintiff posted on the channel as being "misleading," and caused the video to be removed from YouTube's video sharing and social media platform.

6. Plaintiff has maintained a YouTube channel since May 16, 2006. Among Plaintiff's other social media presences, Plaintiff's YouTube channel is an important means of communicating with its followers and supporters and disseminating information to the public in furtherance of the organization's public education mission.

7. Plaintiff has posted over 4,200 videos on its YouTube channel that, as of the date of this complaint, have garnered nearly 94 million views.

Plaintiff's YouTube channel has more than 502,000 subscribers.

8. On September 22, 2020, Plaintiff posted on its YouTube channel a video entitled "**ELECTION INTEGRITY CRISIS** Dirty Voter Rolls, Ballot Harvesting & Mail-in-Voting Risks!"

9. The 26-minute video featured Judicial Watch President Tom Fitton discussing vote-by-mail processes, changes to states' election procedures, ballot collection (sometimes referred to as "ballot harvesting"), and states' failures to clean up their voter rolls, among other topics. Mr. Fitton's comments were informed by successful lawsuits brought by Plaintiff against Los Angeles County and Defendant in 2017 to compel the county and State to comply with the National Voter Registration Act's voter list maintenance requirements (*Judicial Watch, Inc., et al. v. Logan, et al.*, Case No. 2:17-08948 (C.D. Cal. Dec. 13, 2017)), and against Governor Gavin Newsom and Defendant in 2020 challenging the Governor's attempt to unilaterally change the State's 2020 election procedures to an all vote-by-mail system (*Issa, et al. v. Newsom, et al.*, Case No. 2:20-cv-01044) (C.D. Cal. May 21, 2020). The former resulted in a Consent Decree that compelled Defendant and Los Angeles County to implement several new practices and procedures to clean up state and county voter registration rolls. The latter compelled the State of California to comply with the Elections Clause (art. I, sec. 4) and the Electors Clause (art. II, sec. 1) of the U.S. Constitution to change its 2020 voting

procedures to an all vote-by-mail system. Plaintiff received a substantial fee award in *Issa*.

10. The views that Mr. Fitton shared in the September 22, 2020 video were supported not just by Judicial Watch's own substantial experience advancing election integrity and successful litigation against Defendant, but also by nonpartisan and bipartisan studies and reports and numerous other sources. Mr. Fitton's comments were neither false nor misleading, nor was there any evidence that Mr. Fitton's comments "may suppress voter participation or cause confusion and disruption of the orderly and secure administration of elections." Cal. Elec. Code § 10.5(b)(2).

11. On or about September 25, 2020, YouTube informed Plaintiff that it had removed Plaintiff's video. The video has not been available on YouTube since that date.

12. Plaintiff subsequently learned through a California Public Records Act ("PRA") request directed to Defendant's office that OEC had purportedly assessed Plaintiff's video to be misleading and caused the video to be removed from YouTube's video sharing platform.

13. Specifically, according to records obtained by Plaintiff in response to Plaintiff's December 30, 2020 PRA request, on or about September 22, 2020, OEC listed the video on its "Misinformation Tracking Sheet" or "Misinformation Tracker."

14. Under the column entitled "Screenshots/Text/Link," followed by a link to Plaintiff's video on YouTube, OEC wrote:

> The states are taking reasonable steps to clean up the rolls and that led in part to a settlement with Los Angeles county in Californian Michigan they chant the court uh one court judge changed the rules to allow them to count ballots 14 days after the election and mandated ballot harvesting and what is ballot harvesting it basically means anybody can take anyone's ballot and bring it to the polling place again more opportunity (sic).

15. Under the column entitled "Misinformation," OEC copied the text under the "Screenshots/Text/Link" column, then wrote:

> Ballot Collection/Harvesting; Voter Rolls. Head of conservative group Judicial Watch hosts video alleging Democrats benefit from incorrect voter rolls and ballot collection. Has 2,398 views as of 4:07pm 9/22.

16. Under the column entitled "Indicator," OEC wrote, "Ballot Collection."

17. Under the column entitled "Social Media Action Taken," OEC wrote, "Video was removed from YouTube."

18. Under the column entitled "Result," OEC wrote, "Removed."

19. Also according to records obtained through the PRA, OEC communicated with YouTube and/or Google, which are subsidiaries of Alphabet, Inc., to have Plaintiff's video taken down.

20. Specifically, on or about on September 24, 2020, OEC Social Media Coordinator Akilah Jones emailed civics-outreach@google.com and copied four YouTube employees with the subject line, "REPORT VIDEO: **ELECTION INTEGRITY CRISIS** Dirty Voter Rolls, Ballot Harvesting & Mail-in-Voting Risks!" In the email, Jones wrote:

> Hi YouTube Reporting Team,
>
> I am reporting the following video because it misleads community members about elections or other civic processes and misrepresents the safety and security of mail-in ballots. Thank you for your time and attention to this matter.
>
> All the best, Akilah.

21. At or about 11:16 a.m. (ET) on September 25, 2020, YouTube and/or Google representative Andrea Holtermann replied to Jones:

> Hi Akilah,
>
> Thank for reaching out. We will look into this and get back to you as soon as we can.

22. Later that same day, Plaintiff noticed that the video had been taken down.

23. On September 27, 2020, YouTube and/or Google's Holtermann confirmed to Jones that Plaintiff's video had been removed:

> Hi Akilah,
>
> Circling back on this. Thank you for raising this content to our attention, this has been removed from the platform for violating our policies. Please do not hesitate to reach out if there are any other questions or concerns you may have.

24. On information and belief, OEC did not make a finding that Plaintiff's video "may suppress voter participation or cause confusion and disruption of the orderly and secure administration of elections" (Cal. Elec. Code § 10.5(b)(2)), nor would any such finding have been warranted or otherwise supported by evidence.

25. Notably, the censored video is a portion of a longer video posted by Plaintiff on Plaintiff's YouTube channel that addressed issues in addition to election integrity. The longer video, which OEC did not bring to YouTube's attention, remains available on Plaintiff's YouTube channel.

26. By assessing Plaintiff's video to be misleading and causing the video to be removed from YouTube, OEC injured Plaintiff's public education mission. When Plaintiff's video was removed on September 25, 2022, it had only 5,531 views. OEC's actions prevented Plaintiff from reaching tens of thousands of viewers with Plaintiff's message.

27. In an email from OEC Senior Public Information Officer Jenna Dresner to CalMatters reporter Freddy Brewster, Dresner detailed the interconnected relationship between OEC and YouTube and other social media companies, stating, ". . . our priority is working closely with social media companies to be proactive so when there's a source of misinformation, we can contain it." Dresner further explained:

> We have working relationships and dedicated pathways at each social media company. When we receive a report of misinformation on a source where we don't have a pre-existing pathway to report, we find one. . . . We worked closely and proactively with social media companies to keep misinformation from

> spreading, take down sources of misinformation as needed, and promote our accurate, official election information at every opportunity.

28. On information and belief, OEC was acting under Section 10.5 of the California Election Code, which among other things purportedly requires it to "assess" and "mitigate" "false or misleading information regarding the electoral process" that "may suppress voter participation or cause confusion and disruption of the orderly and secure administration of elections." Cal. Elec. Code §§ 10.5(b)(2) and (c)(8).

29. Before purportedly assessing Plaintiff's video to be misleading and causing the video to be removed from YouTube, OEC and perhaps other officials in Defendant's office, had been monitoring Plaintiff's social media activity since at least August 31, 2020, in part through a partisan public affairs and consulting firm SKDKnickerbocker LLC ("SKDK"). During this time period, SKDK regularly sent Dresser, Jones, and other OEC officials "Misinformation Daily Briefings." SKDK specialized in working for Democratic Party politicians and employed notable figures like former Obama White House Communications Director Anita Dunn, and Hilary Rosen. In September 2020, the firm was advising the Biden campaign.

30. On information and belief, OEC continues to assess and mitigate citizens' allegedly false and misleading information, including Plaintiff's

postings on its YouTube channel and other social media activity.

31. YouTube and other social media platforms remain an important means for Plaintiff to communicate with followers and supporters and disseminate information to the public in furtherance of its public education mission. Plaintiff intends to continue to maintain and post content on its YouTube channel and other social media platforms for the foreseeable future, including content that comments on and criticizes election procedures and actions of government officials that, in Plaintiff's view, undermine election integrity.

COUNT I
(42 U.S.C. § 1983 – Violation of the 1st and 14th Amendments)

32. Plaintiff realleges paragraphs 1 through 31 as if full stated herein.

33. Plaintiff enjoys the right to Freedom of Speech, as protected by the First Amendment to the United States Constitution, which has been made applicable to the States through the Fourteenth Amendment to the United States Constitution.

34. Plaintiff was engaged in constitutionally protected speech when it posted its September 22, 2020 video on YouTube's video sharing platform.

35. Defendant's actions against Plaintiff, including (i) Defendant's monitoring of Plaintiff's

protected speech; (ii) erroneous if not knowingly false assessment that Plaintiff's speech as misleading or otherwise subject to regulation under Cal. Elec. Code §§ 10.5; and (iii) reporting Plaintiff's protected speech to YouTube with the expectation that YouTube would remove the speech from its video sharing platform would chill a person of ordinary firmness from continuing to engage in the protected speech.

36. Plaintiff's protected speech was a substantial or motivating factor in Defendant's conduct.

37. At all relevant times Defendant acted under color of law, including but not limited to Cal. Elec. Code §§ 10.5(b)(2) and (c)(8).

38. Defendant's adverse action caused Plaintiff to suffer an injury, namely harm to Plaintiff's ability to carry out its public education mission.

39. Plaintiff's injury is irreparable, and Plaintiff has no adequate remedy at law.

COUNT II
(42 U.S.C. § 1983 – Unconstitutional Regulation of Speech; 1st and 14th Amendments)

40. Plaintiff realleges paragraphs 1 through 39 as if fully stated herein.

41. Defendant's actions towards Plaintiff and application of Cal. Elec. Code § 10.5 to Plaintiff's

protected speech constitute content-based and/or viewpoint-based regulation of Plaintiff's speech.

42. Defendant's content-based and/or viewpoint-based regulation of Plaintiff's speech is presumptively unconstitutional and cannot satisfy strict scrutiny as it is not narrowly tailored to further a compelling government interest.

COUNT III
(Violation of the Free Speech Clause of the California Constitution Cal. Const. art. I, §§ 2(a) and 3(a))

43. Plaintiff realleges paragraphs 1 through 42 as if fully stated herein.

44. Defendant's conduct violated Plaintiff's rights under article I, sections 2(a) and 3(a) of the California Constitution.

45. Defendant's actions entitle Plaintiff to equitable relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court (1) declare Defendant's actions to be unconstitutional; (2) permanently enjoin Defendant from violating Plaintiff's constitutional rights and/or unconstitutionally regulating Plaintiff's speech; (3) award Plaintiff costs of suit, including attorney's fees and costs under 42 U.S.C. § 1988 and all other

applicable law; and (4) grant any and all further relief to which Plaintiff may be justly entitled.

September 23, 2022

Respectfully submitted,

JUDICIAL WATCH, INC.

By: */s/ Robert Patrick Sticht*
ROBERT PATRICK STICHT

Attorneys for Plaintiff