No. 24-965

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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

What is an adverse action? This is the $64,000 question that Respondent, for whatever reason, fails to answer.

Until this case, every regional circuit, including the Ninth Circuit, defined an adverse action—the second element of a First Amendment retaliation claim—as one that would chill a person of ordinary firmness from continuing to engage in protected speech, *i.e.* a chilling effect. The Ninth Circuit departed from this definition, declaring that "[a]ny potential chilling effect" is irrelevant in determining whether an action is adverse. In doing so, it created an unworkable two-part standard, in which a court must determine whether a government action is "adverse in the first place" *before* it decides whether it would chill a person of ordinary firmness. The obvious problem with the standard is that it leaves "adverse action" undefined, creating a circuit split. Rather than acknowledge this split, Respondent attempts to turn this case into something it is not—a case against YouTube, however, this case is squarely between Respondent and Petitioner.

Moreover, Respondent fails to refute this case's exceptional importance. The chilling effect serves the function of guarding the "ordinary" citizen's protected speech against government retaliation, the very purpose of a First Amendment retaliation claim. By deeming the chilling effect irrelevant, the Ninth Circuit's novel standard severely weakens this First Amendment protection.

Finally, this case is an ideal vehicle to address the question presented. Respondent's contentions to the contrary are uncompelling. Respondent's "standing"

argument relies on a fundamentally incorrect reading of Petitioner's complaint. Respondent also suggests that because the Court denied certiorari in *O'Handley v. Weber*, 62 F. 4th 1145 (9th Cir. 2023), that it should also deny it here. That too is unconvincing, as the two cases are materially different.

Accordingly, the Court should grant review.

REASONS FOR GRANTING THE PETITION

I. The Court Should Resolve The Circuit Split.

Every regional circuit, except for the Ninth Circuit, defines an adverse action as one that would chill a person of ordinary firmness from continuing to engage in protected speech. Pet. 10–11 (collecting cases). The Ninth Circuit departed from this definition, creating a two-part adverse action standard. App. 7a–8a. Under this standard, 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 have a chilling effect. *Id.* Only if both conditions are met does a retaliatory action exist. *Id.* This bifurcated standard is diametrically opposed to the standard followed by the other regional circuits.

Respondent insists the Ninth Circuit's decision is in sync with the other circuits because it stated "a plaintiff must establish that 'he was subject to adverse action by the defendant that would chill a person of ordinary firmness[.]'"[1] Respondent's Brief

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[1] *Savage v. Segura* (BIO 12) is inapposite, as the issue there was whether there was a substantial causal relationship

in Opposition (BIO) 7, citing App. 7a. But this recitation was simply that—a recitation. The Ninth Circuit not only failed to apply this recited standard but also departed from it.

Breaking from the other circuits, the Ninth Circuit declared "[a]ny potential chilling effect" is irrelevant to "whether the government action was adverse *in the first place*." App. 7a–8a (emphasis added). Put differently, if a plaintiff does not clear the undefined adverse action hurdle, then a court can avoid the chilling effect inquiry and close the door on the plaintiff. In juxtaposition, the other circuits place the "chilling effect" at the heart of the adverse action definition. Attempting to rectify this difference, Respondent avers that the Ninth Circuit simply clarified that the chilling effect bears on an adverse action's materiality. BIO 10. Again, this skips over the question of *what is an adverse action in the first place*.

Nor does Respondent cite to any case in which the chilling effect was independent from the adverse action determination. Respondent's attempt to align the Ninth Circuit's anomalous approach with precedent in other circuits highlights the circuit split. BIO 14–15. In *Bhattacharya v. Murray*, 93 F.4th 675 (4th Cir. 2024), and *VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151 (10th Cir. 2021), the Fourth and Tenth Circuits defined an adverse action as one that would chill a person of ordinary firmness. *Bhattacharya*, 93 F.4th at 689; *VDARE*, 11 F.4th at 1172. Both undertook a fact-intensive analysis to

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between the plaintiff's arrest and her protected conduct. No. 23–55812, 2025 U.S. App. LEXIS 6883, at *7 (9th Cir. Mar. 25, 2025).

determine whether the government conduct was objectively chilling and therefore adverse. *Bhattacharya*, 93 F.4th at 689–90; *VDARE*, 11 F.4th at 1172–75. There was no two-step determination in either case.

Respondent's suggestion that the Ninth Circuit followed *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468 (2022), is also wrong. BIO 10. The definition of an adverse action was not at issue in *Houston*. The question was whether an elected member of a public college's board of trustees could bring a First Amendment retaliation claim based on a verbal censure by his fellow elected members. 595 U.S. at 471. After considering history and factors unique to the political process of a public body censuring a fellow elected member, the Court concluded that the specific verbal censure was not actionable. *Id.* at 474–83. Notably, *Houston* left open the door to other circumstances where the same action—a verbal censure—could be actionable if carried out by a government official against a private citizen. *Id.* at 479–80. This makes sense only if the label of "adverse action" *per se* is not dispositive. Rather, whether conduct is actionable is a fact-intensive inquiry aimed at ascertaining the conduct's chilling effect. It is a determination that cannot be skipped as the Ninth Circuit suggests.

Perhaps recognizing that the Ninth Circuit left "adverse action" undefined, Respondent attempts to turn this case into something it is not—a case dependent on a third party's motivations. Wrongfully shifting the focus to YouTube, Respondent contends it is implausible that her conduct would chill a person of ordinary firmness because users of online platforms

"agree to abide by content-moderation policies and know that platforms suppress content that violates those policies." BIO 9. This argument misses the mark, as this case is squarely between Respondent and Petitioner. The source of the "chilling effect"—the adverse action—is Respondent's conduct, not YouTube's response. It was Respondent, not YouTube, that (1) monitored Petitioner's online speech for months leading up to the 2020 election, with the aid of a partisan firm; (2) falsely assessed as misleading Petitioner's election integrity video; (3) used her state-created "dedicated pathway" to have the video removed; and (4) memorialized her actions in a government document.[2] App. 43a–49a, ¶¶ 12–24, 27–30. This distinction renders inapposite Respondent's cited cases in which the First Amendment claims depended on third-party motivations for acting against the plaintiffs. *Cf. Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (government's coercion of distributors to prevent the circulation of certain publications violated the publisher's First Amendment rights); *Nat'l Rifle Ass'n of America v. Vullo*, 602 U.S. 175 (2024) (department of financial services superintendent violated the NRA's First Amendment rights by coercing regulated third parties to dissociate from the NRA in order to

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[2] Respondent also posits that YouTube removed Petitioner's video according to YouTube's policies. BIO 16. Not so. The video at issue is a portion of a longer video also posted by Petitioner on its YouTube channel. App. 47a, ¶ 25. The longer video, which Respondent did not report, remains available on Petitioner's YouTube channel. *Id.* The logical explanation for this differential treatment is that Respondent's actions, not YouTube's, caused the removal of the video at issue. *Id.*

suppress the NRA's advocacy); *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56 (2d Cir. 1999) (legislators' efforts to convince private and government decisionmakers to deny a contract to an independent contractor did not violate the contractor's First Amendment rights); *VDARE*, 11 F.4th 1151 (organization's retaliation claim against mayor failed because it did not plausibly allege that the mayor's generalized public statement on the city's refusal to provide services for events that promoted "hate speech" was the proximate cause of a resort's cancellation of its contract with the organization).

II. The Ninth Circuit Undermines The First Amendment.

The Ninth Circuit explicitly deemed the "chilling effect" irrelevant in determining whether an action is adverse. App. 7a–8a. Effectively, it gutted the second element of a First Amendment retaliation claim. Without the chilling effect as the center of the adverse action definition, the First Amendment's protective function against government retaliation is severely undermined.

The chilling effect inquiry's purpose is twofold: to protect the free speech rights of the "ordinary" private citizen and to weed out unmeritorious actions. *See e.g. Bennett v. Hendrix*, 423 F.3d 1247, 1251–52 (11th Cir. 2005). Determining whether an action is objectively chilling is a "fact intensive inquiry" 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); Pet. 12–14 (collecting cases). Under the Ninth Circuit's standard, though, whether

a court will address the chilling effect depends on whether it finds that a plaintiff has alleged an adverse action under some undefined standard. Consequently, in many cases, like the one here, the chilling effect's protective function will be nullified.

If the chilling effect does not determine whether an action is adverse, then it must be that only those actions previously deemed adverse are actionable. Pet. 15; *contra* BIO 10. Therefore, the Ninth Circuit's standard risks premature dismissal of cases where the challenged government conduct strays from the "familiar adverse actions" but is nevertheless objectively chilling based on the facts. *See e.g. Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) (conduct "trivial in detail" but "substantial in gross" may be actionable). Inevitably, government officials will be incentivized to employ novel forms of retaliation to avoid scrutiny under the fact-intensive chilling effect inquiry.

For instance, with the protection of the Ninth Circuit's decision, Respondent can continue to retaliate against protected online speech under the guise of pursuing her statutory mandates under Cal. Elec. Code § 10.5, which is still law and has nationwide application. With no need under the novel standard to conduct a fact-intensive chilling effect inquiry, the Ninth Circuit wrongly minimized Respondent's extensive course of action against Petitioner as simple "flagging" and ignored other critical facts that directly point to the chilling nature of Respondent's conduct. Pet. 16. Respondent implausibly claims that the Ninth Circuit "expressly considered the facts." BIO 10. However, it simply mentioned Respondent's "broader 'course of action'"

against Petitioner, and nothing more. App. 8a. This is hardly a fact-intensive inquiry.

Finally, Respondent's "government speech" argument dances past the question presented and turns the First Amendment on its head. Although the Court has warned against extending the government speech doctrine because it is "susceptible to dangerous misuse," Respondent's argument, as well as the Ninth Circuit's decision, broadens it to encompass her entire course of action against Petitioner. *Matal v. Tam*, 582 U.S. 218, 235 (2017). This expansion exceeds anything approved by the Court and is untethered to any textual or historical basis. Nothing about Respondent's application or misuse of her statutory authority to retaliate against Petitioner for its video is expressive communication, *i.e.* government speech. [3]

That a course of action might include some action constituting literal "speech" does not shield it from the chilling effect inquiry. *See e.g. Greisen v. Hanken*, 925 F.3d 1097, 1113–14 (9th Cir. 2019). Respondent's purported speech—an email to YouTube—is only a part of Respondent's "concerted effort to burden" Petitioner's protected speech. *See id.* Indeed, most of Respondent's actions cannot be categorized as "mere speech" communicating any view to anyone. Moreover, unlike the plaintiffs in Respondent's cited cases, Petitioner alleges far more than criticism and reputational harm. *Cf. Goldstein v. Galvin*, 719 F.3d 16, 30 (1st Cir. 2013) (use of "the plaintiff's name in a

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[3] Section 10.5 is not a statute simply permitting the Office of Elections Cybersecurity, overseen by Respondent, to engage in government speech; it gives a mandate. Cal. Elec. Code § 10.5(c)(8).

run-of-the-mill website announcement" was not actionable); *Mirabella v. Villard*, 853 F.3d 641 (3d Cir. 2017) (town officials' statement that they would motion for litigation sanctions if the plaintiffs sued the town was not actionable); *Shutt v. Miller*, 724 F. App'x 112, 114 (3d Cir. 2018) (due to the "timeline" of events, the court could not find that a government official's demand at press conference for plaintiff's prosecution was an adverse action); *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676 (4th Cir. 2000) (government attorneys' defamatory statements about the plaintiff and their true statements to the Better Business Bureau regarding plaintiff's membership were not actionable); *Bhattacharya*, 93 F.4th 675 (neither the university's documentation of medical student's threatening behavior nor the university's letter to the student expressing concern over that behavior was actionable); *Novoselsky v. Brown*, 822 F.3d 342 (7th Cir. 2016) (official's statements accusing plaintiff of being an unscrupulous attorney were not actionable); *Hutchins v. Clarke*, 661 F.3d 947 (7th Cir. 2011) (government employer's disclosure of plaintiff-employee's disciplinary history to a radio show in response to plaintiff's disparaging comments about the employer was not actionable).

Ironically, Respondent's government speech argument offers another reason to *grant* certiorari. The Ninth Circuit based its "government speech" finding on the idea that the State "has a strong interest in expressing its views on the integrity of its electoral process." App. 9a. Respondent's "interest," therefore, trumped Petitioner's First Amendment rights, which the Ninth Circuit did not bother considering. This reasoning ignores that the

government speech doctrine is not based on the view that governmental entities have speech rights. *Shurtleff v. City of Boston*, 596 U.S. 243, 269 (2022) (Alito, J., concurring). Application of this blanket statement to excuse "virtually every government action" involving literal "speech" will undermine the First Amendment. *See id.*

III. This Case Is an Ideal Vehicle.

Constantly conjuring *O'Handley v. Weber* and resurrecting her standing argument, Respondent contends this case is an improper vehicle to address the question presented.[4] Neither contention is compelling.

Respondent heavily relies on the Ninth Circuit's decision in *O'Handley*, pointing to the Court's denial of certiorari in that case. BIO 4, 5. However, neither question presented in *O'Handley* referenced "adverse action."[5] There are also material differences between the retaliation claim in *O'Handley* and the retaliation claim here. In *O'Handley*, the plaintiff alleged that

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[4] Respondent also mentions the Ninth Circuit decision is unpublished. BIO 5, 12. The Court has granted certiorari in cases where the lower court opinion is unpublished, most recently in *McLaughlin Chiropractic Associates, Inc. v. McKesson Corp., et al.*, 606 U.S. 146 (2025).

[5] The questions presented were: "(1) Whether the complaint plausibly alleged that state officials acted under color of state law in violation of the First Amendment when a state agency, which exists to police online speech, singled out Petitioner's disfavored political speech for Twitter to punish and Twitter complied;" and "(2) Whether the government speech doctrine empowers state officials to tell Twitter to remove political speech that the State deems false or misleading." Pet. for Writ of Cert. at i, *O'Handley v. Weber*, 144 S. Ct. 2715 (2024) (No. 22–1199).

Respondent retaliated against him by "flagging" on Twitter's public "Partner Support Portal" one of the plaintiff's tweets. 62 F.4th at 1153–54, 1163. Twitter had created the portal because it "was unable to review every tweet for compliance with its Civic Integrity Policy." *Id*. at 1153. The plaintiff, who sued Twitter, Respondent, and others, alleged that after Respondent flagged plaintiff's tweet through Twitter's portal, Twitter labeled it as "disputed" and added a "strike" to his account. *Id*. at 1154. After the plaintiff received four additional "strikes" from Twitter—for subsequent posts that Respondent was not alleged to have flagged—Twitter suspended his account. *Id.* at 1155. The only action attributable to Respondent was a single, isolated act—Respondent's flagging of one tweet through Twitter's portal. *Id.* at 1161, 1163. Therefore, the court limited its analysis to that single act. *Id.*

Unlike in *O'Handley*, Petitioner alleges an extensive course of action directly taken by Respondent, amounting to more than the flagging of a post. App. 43a–49a, ¶¶ 12–31. Additionally, Petitioner's video was removed—not merely labeled "disputed"—within 24 hours of the Respondent's communication with YouTube. App. 45a–46a ¶¶ 19–23. Respondent's message was sent directly to four YouTube employees—not submitted through a public, preexisting portal—as part of the Respondent's "dedicated pathway" to "take down sources of misinformation." *Id.*, App. 47a, ¶ 27. Also, Respondent had ample motive to retaliate against Petitioner—Petitioner's two election-related lawsuits against her. App. 42a–43a, ¶ 9. Simply put, nothing in *O'Handley* provides reason to deny certiorari.

As to standing, the Ninth Circuit did not disturb the district court's finding that Petitioner has standing to bring this case. App. 22–23a. Respondent never disputed this finding on appeal. Contrary to Respondent's hypothesis, it is plausible that she will continue to retaliate against Petitioner because Section 10.5 is still law, Respondent believes her actions are lawful, and Petitioner continues to post election-related online content and has filed two more lawsuits against California government officials, including Respondent, for their noncompliance with election law. *See Judicial Watch, Inc. et al. v. Weber et al.*, No. 2:24–cv–03750 (C.D. Cal. May 6, 2024); *Issa v. Weber*, No. 3:25–cv–00598 (S.D. Cal. March 13, 2025).

Lastly, Petitioner's burden in demonstrating redressability at this stage is "relatively modest." *Bennett v. Spear*, 520 U.S. 154, 171 (1997). Petitioner seeks a declaration that Respondent's course of action against Petitioner is unconstitutional, and a permanent injunction against Respondent to prevent her from continuing her retaliatory campaign against Petitioner. If granted, Petitioner could continue to post election-related social media content without fear of Respondent's retaliation.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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