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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,

Defendant.

Case No. 2:22-cv-6894 MEMF(JCx)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Date: May 11, 2023
Time: 10:00 a.m.
Place: Courtroom 8B (8th Floor)
First Street Courthouse
350 W. 1st Street
Los Angeles CA 90012

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Judicial Watch, Inc., a conservative, not-for-profit, tax-exempt educational organization that seeks to promote election integrity, brings this action to remedy Defendant's violation of Plaintiff's First Amendment rights and to have declared unconstitutional Defendant's misuse of her authority under California's Election Code. Plaintiff respectfully submits this opposition to Defendant's motion to dismiss.

I. INTRODUCTION.

This case is not about whether Defendant is free to use her office to educate and inform voters about election integrity issues in ways that are counter to or challenge Plaintiff's efforts to educate and inform voters about these same issues. This case is about whether Defendant is misusing her authority under Section 10.5 of California's Election Code to censor Plaintiff's speech.

Purportedly acting under Section 10.5, Defendant violated Plaintiff's right to freedom of speech by monitoring Plaintiff's speech on social media and erroneously assessing as "misleading" and "misrepresent[ing] the safety and security of mail-in ballots" a well-supported and factually accurate election integrity video Plaintiff posted on YouTube in September 2020. Defendant then used a close and proactive working relationship and "dedicated pathway" she had developed with YouTube to have the video taken down within 24 hours to "mitigate" Plaintiff's speech. In so doing, Defendant not only erroneously assessed the content of Plaintiff's speech but also ignored an express limitation in Section 10.5 and gave an overly expansive reading to the statute's use of the term "mitigate." She never even identified with particularity the statements in the 26-minute video with which she took issue, nor did she (or could she) find that Plaintiff knew the video was false or acted with reckless disregard for whether it was false.

There can be no real dispute – in fact, nowhere in Defendant's brief does she dispute – that Plaintiff's video was protected by the First Amendment, that the video was a substantial or motivating factor in Defendant's actions, or that Defendant intended the outcome she effected. Defendant's actions toward Plaintiff not only

would chill a person of ordinary firmness from continuing to engage in protected speech but also constitute unlawful retaliation against Plaintiff for its views expressed in the video. Defendant's interpretation and application of Section 10.5 to Plaintiff's video also was an unconstitutional, content- and viewpoint- based regulation of Plaintiff's protected speech and suffers from unconstitutional overbreadth.

In her response to the complaint, Defendant does not argue that Plaintiff did not or cannot plead an essential element of its constitutional claims. Rather Defendant mistakenly argues that Plaintiff lacks standing and that her communication with YouTube was "government speech." But Plaintiff plainly has standing: its video was taken down, and its protected speech elsewhere on YouTube and on other social media platforms remains at risk. Regarding "government speech," Defendant's communication with YouTube was only a part of Defendant's actions towards Plaintiff; Defendant also was erroneously interpreting and applying a statute. Because Plaintiff plainly has standing and its well-pled complaint clearly states claims for violation of the organization's First Amendment rights, Defendant's motion to dismiss should be denied.

II. BACKGROUND.

The allegations of Plaintiff's complaint can be summarized as follows:

- Plaintiff makes regular use of YouTube and other social media platforms to express its views about issues affecting election integrity and did so in a September 22, 2020 video Plaintiff posted on YouTube that criticized actions of California election officials. Compl., ¶¶ 3-9.
- The views expressed by Plaintiff in its September 22, 2020 video were neither false nor misleading and were based not only on Plaintiff's substantial experience but also on nonpartisan and bipartisan studies and reports and numerous other sources. *Id.*, ¶ 10.
- There was (and is) no evidence that the video "may suppress voter participation or cause confusion and disruption" of elections in California, and

Defendant never made any such finding despite the express requirement of the statute. *Id.*, ¶¶ 10, 24; *see also* Cal. Elec. Code §§ 10.5 (b)(2) and (c)(8).

- Defendant falsely labeled the video as "misleading" and "misrepresent[ing] the safety and security of mail-in ballots" and, utilizing a close, proactive working relationship and "dedicated pathway" she had developed with YouTube, caused the video to be taken down. *Id.*, ¶¶ 11-23, 26, 27-28.
- Defendant did not identify with any particularity the statements in the video with which she took issue and did not determine that Plaintiff knew the video was false or acted with reckless disregard for whether it was false. *Id.*, ¶ 20.
- Plaintiff's video was removed within 24 hours of Defendant emailing YouTube. *Id.*, ¶¶ 20-21.
- The senior public information officer at OEC later admitted, "We worked closely and proactively with social media companies to keep misinformation from spreading [and] take down sources of information." *Id.*, ¶ 27.
- The fact that YouTube did not take down the same content in another video posted by Plaintiff confirms that it was Defendant that caused the September 22, 2020 video to be taken down. *Id.*, ¶ 25.
- Defendant appears to have coordinated with an outside consulting firm advising then-presidential candidate Joe Biden's 2020 election campaign, SKDKnickerbocker LLC, in taking down Plaintiff's video. *Id.*, ¶ 29.
- The video had only 5,531 views at the time of its removal, which prevented Plaintiff from reaching tens of thousands of viewers with its message.[1] *Id.*, ¶ 26.
- Defendant continues to monitor and assess Plaintiff's postings on YouTube and other social media. *Id.*, ¶ 30.
- YouTube and other social media remain important means for Plaintiff to

[1] The average number of views for a video posted by Plaintiff on YouTube in 2020 was 34,824. In 2021, the average was 49,921.

communicate with followers and supporters and disseminate information to the public, and Plaintiff intends to continue to post content on YouTube and other social media platforms, including content that comments on and criticizes election procedures and actions of governmental officials that, in Plaintiff's view, undermine election integrity. *Id.*, ¶ 31.

III. ARGUMENT.

A. Legal Standards.

Defendant challenges the four corners of Plaintiff's complaint under both Rule 12(b)(1) and (b)(6). The standards governing such challenges are well known and require little explication. The truthfulness of the complaint's factual allegations is assumed. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). A complaint need only contain sufficient factual allegations to state a claim that is "plausible on its face." *Iqbal*, 556 U.S. at 678.

B. Plaintiff Has Standing.[2]

To establish standing under Article III, a plaintiff must have "(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). At the motion to dismiss stage, a plaintiff need only "show that the facts alleged, if proved, would confer standing." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003). In addition, when First Amendment rights are at issue, the standing "inquiry tilts dramatically toward a finding of standing," *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1172 (9th Cir. 2018), because "it is patently absurd to suggest that one whose expression has been censored by the government lacks standing to complain of that censorship." *Keene v. Meese*, 619 F. Supp. 1111, 1118 (E.D. Cal. 1985).

[2] In light of the Ninth Circuit's recent ruling upholding standing in *O'Handley v. Weber*, 2023 U.S. App. LEXIS 5729 (9th Cir. Mar. 10, 2023), Plaintiff has doubts as to whether Defendant will continue to challenge Plaintiff's standing.

1. Plaintiff Pleads a Concrete Injury-In-Fact.

A speaker suffers a concrete injury when the government limits the speaker's audience size or impairs his ability to communicate his message. *See O'Handley*, 2023 U.S. App. LEXIS 5729, *26; *see also Meyer v. Grant*, 486 U.S. 414, 422-424 (1988); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 522 (9th Cir. 1989); *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 426 (9th Cir. 2008). Plaintiff plainly pled just that. Compl., ¶ 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."). Plaintiff therefore has satisfied the first prong of the standing analysis.

Arguing to the contrary, Defendant contorts Plaintiff's claims into something unrecognizable.[3] Defendant seeks to isolate and focus the Court on three actions in a series of acts and omissions undertaken by Defendant, then argues that, individually, those three actions do not establish an injury. But Plaintiff did not bring such a claim. As is evident from the complaint, Plaintiff alleges that Defendant injured Plaintiff by monitoring Plaintiff's speech; falsely assessing that speech as misleading; misreading and misapplying her authority under Section 10.5 by failing to make required findings and giving an overly broad interpretation of her authority to "mitigate" others' speech; then maintaining and utilizing a close working relationship with and "dedicated pathways" at YouTube to have the video removed within 24 hours of seeking its removal. Compl., ¶¶ 8-30. In addition, the complaint makes clear that Plaintiff continues to maintain and post content similar to that in the video Defendant censored (Compl., ¶ 31) and that Defendant continues to misuse her authority under

[3] It is axiomatic that a plaintiff is the master of his complaint. *Teutscher v. Woodson*, 835 F.3d 936, 956 (9th Cir. 2016).

Section 10.5. *See Id.*, ¶ 30; *see also* Def's Mem. at 15.[4] Accordingly, Plaintiff's injury is both concrete and ongoing.

Defendant's attempt to diminish Plaintiff's allegations by asserting that other avenues are available to review Plaintiff's video is also misguided. The First Amendment protects the right not only to freedom of speech but also to choose the most effective means for doing so. *See Meyer*, 486 U.S. at 422-424 (1988); *see also Schneider v. State*, 308 U.S. 147, 163 (1939); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1047-1048 (9th Cir. 2006); *Preferred Communications, Inc. v. Los Angeles*, 754 F.2d 1396, 1410 (9th Cir. 1985). Plaintiff's inability to reach its over 502,000 YouTube subscribers and other members of the public in a format of Plaintiff's choosing – the video Defendant caused to be removed – undermines Plaintiff's mission to educate its YouTube subscribers and other YouTube users. Compl., at ¶¶ 7, 25, 26, and 30. For example, the longer video, cited by Defendant, discusses topics unrelated to the content in the censored shorter video. *Id*. Plaintiff posted the shorter video for a reason – to present an undiluted, pointed message. *Id*. As the Ninth Circuit has said, a speaker's "ability to communicate a particular message in a particular location can significantly contribute to the effectiveness of that communication." *Santa Monica Food Not Bombs*, 450 F.3d at 1047. Defendant's misuse of her authority under Section 10.5 has prevented Plaintiff from doing just that.

2. Plaintiff's Injury is Fairly Traceable to Defendant's Conduct.

"[P]laintiffs must establish a 'line of causation' between defendants' action and their alleged harm that is more than 'attenuated.'" *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (quoting *Allen v. Wright*, 468 U.S. 737, 757 (1984). Importantly, "[this] requirement is less demanding than proximate causation" and "the causation chain does not fail solely because there are several links or because a

[4] This "failure to disavow 'is an attitudinal factor the net effect of which would seem to impart some substance to the fears of [plaintiff].'" *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) (citations omitted).

single third party's actions intervened." *O'Handley*, 2023 U.S. App. LEXIS 5729, *27 (citation and internal quotation marks omitted). Causation is satisfied when a plaintiff shows that a defendant's actions have or will have a predictable effect on the decisions of third parties. *Department of Commerce v. New York*, 588 U.S. __, 139 S. Ct. 2551, 2566 (2019).

Defendant's misuse of her authority under Section 10.5 caused Plaintiff's injury. Defendant applied Section 10.5 to Plaintiff with the intent to censor Plaintiff's speech. Defendant used her "working relationship" with and "dedicated pathways" at YouTube to report to YouTube what she believed to be misleading speech to "take down" Plaintiff's speech within 24 hours. Compl., at ¶ 27. Had Defendant not assessed Plaintiff's video as misleading and caused the video to be removed from YouTube, the video would have not been taken down. *Id.* at ¶ 26.[5]

3. Plaintiff's Injury Is Redressable.

Plaintiff's burden in demonstrating redressability at this stage is "relatively modest." *Renee v. Duncan*, 623 F.3d 787, 797 (9th Cir. 2010) (citation and quotation omitted). Plaintiff seeks a declaration that Defendant's use of Section 10.5 to infringe Plaintiff's First Amendment rights is unconstitutional and a permanent injunction against Defendant to prevent her from continuing to infringe Plaintiff's First Amendment rights by continuing to use Section 10.5 to censor Plaintiff's speech.

Contrary to Defendant's assertion, redressability of Plaintiff's injury does not require YouTube to re-post Plaintiff's video. Plaintiff's injury – namely its ability to communicate a particular message in a specific way to advance its public education mission – would be redressed by such a declaration and injunction. Were the Court to prevent Defendant from using Section 10.5 in the manner she currently intends, Plaintiff would be able to continue sharing its content on YouTube without fear of

[5] Standing "relies [] on the predictable effect of Government action on the decisions of third parties." *Department of Commerce*, 588 U.S. __, 139 S. Ct. at 2566 (citation omitted).

retaliation by Defendant. Plaintiff plainly has satisfied the redressability clause. *See O'Handley*, 2023 U.S. App. LEXIS 5729, *28; *see also Missouri v. Biden*, 450 F.3d 1022, *8 (W.D. La. Jul. 12, 2022).

C. Count I States a Valid Retaliation Claim.

To prevail on a First Amendment retaliation claim, a plaintiff must demonstrate that "(1) he was engaged in a constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct." *O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016) (citation omitted). Plaintiff has pled ample facts under each element to prevail on its retaliation claim, which Defendant does not dispute. She only disputes whether the action she took is government speech and therefore outside the ambit of the First Amendment.[6]

1. Plaintiff's Video Was Constitutionally Protected Speech.

At all relevant times, Plaintiff was engaged in constitutionally protected speech. Compl. ¶¶ 8-10, 34. "The First Amendment affords the broadest protection to . . . political expression in order 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam)). "The constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered." *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (internal quotations and citations omitted). Nor does it discriminate against speech conveying "sharp attacks on government and public officials." *Id.* at 270; *see also 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."). Plaintiff's video is quintessential

[6] In other words, if the Court were to conclude – as Plaintiff asserts it should – that Defendant's actions were not "government speech" when she censored Plaintiff's video, Defendant's motion must be denied.

protected speech. Compl. ¶¶ 8-10. And, Defendant does not dispute it.

2. Plaintiff Amply Pled a Chilling Effect.

While some iterations of this element of a retaliation claim refer to a "chilling effect," a plaintiff "need only show that the defendant 'intended to interfere' with the plaintiff's First Amendment rights and that it suffered some injury as a result; the plaintiff is not required to demonstrate that its speech was actually suppressed or inhibited." *Ariz. Students' Ass'n*, 824 F.3d at 867 (quoting *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999)). A defendant's intent to inhibit speech can be shown through either direct or circumstantial evidence. *Mendocino Envtl. Ctr.*, 192 F.3d at 1300-1301 (citation omitted); *Ariz. Students' Ass'n* , 824 F.3d at 870-871. Moreover, "[o]therwise lawful government action may nonetheless be unlawful if motivated by retaliation for engaged in activity protected under the First Amendment." *O'Brien*, 818 F.3d at 932.

Plaintiff amply alleges facts demonstrating both that Defendant's actions would likely chill a person of ordinary firmness from posting further speech on social media concerning election integrity issues and that Defendant intended to interfere with Plaintiff's well-supported and factually accurate speech. Here, Defendant not only monitored Plaintiff's speech on social media, apparently with the assistance of a Biden campaign consultant, but falsely assessed Plaintiff's speech as misleading, ignored an express limitation on her authority (the requirement that the speech "may suppress voter participation or cause confusion and disruption" to the administration of elections) while giving an overly broad interpretation to other authority ("mitigat[ing]" false or misleading information), and then used her close working relationship with and "dedicated pathways" at YouTube to have the video removed within approximately 24 hours. Compl., ¶¶ 8-24, 27-29. Plaintiff also plainly alleges that Defendant intended to interfere with Plaintiff's speech. In fact, the admitted purpose of Defendant's actions was "to keep information from spreading" and "take down sources of misinformation as needed." *Id.*, ¶ 27. As with the protected speech

element of Plaintiff's retaliation claim, again, Defendant does not argue Plaintiff did not satisfy the "chilling effect" prong of the claim.

3. Plaintiff's Protected Speech Was a Substantial or Motivating Factor.

Finally, Plaintiff also amply pleads that its protected speech "was a substantial or motivating factor" for Defendant's suppression of the video. Compl., ¶ 36. Not only does Defendant not argue to the contrary, but there is no plausible claim otherwise under the circumstances. *See id.*, ¶¶ 8-10, 13-23.

4. Defendant's Application of Section 10.5 Is Not Government Speech.

Instead of challenging whether Plaintiff sufficiently pled the elements of a First Amendment retaliation claim, Defendant argues that her application of Section 10.5 against Plaintiff's speech was merely "an expression of the Secretary's views," and therefore constitutes "government speech." Def's Mot. at 15. Such an assertion is rooted neither in fact nor law.

When Defendant monitored Plaintiff's speech, assessed the video as misleading, misinterpreted and misapplied her authority under Section 10.5, and reported Plaintiff's video to YouTube with the expectation that YouTube would remove the video, Defendant was not expressing a particular viewpoint; she was regulating Plaintiff's speech. As Defendant herself admits in her brief, Section 10.5 requires her to monitor election-related speech, assess whether such speech is false or misleading, and, if found to be false or misleading, mitigate such information. Def's Mem. at 3. Or, as Defendant has described such authority: working closely and proactively with social media companies to keep misinformation from spreading by taking it down. Compl., ¶ 27. Nothing about that statutory authority, the application of it, or its misuse by Defendant to take down Plaintiff's video is expressive communication, let alone government speech. Defendant's argument is contrary to the facts currently before the Court.

Defendant's argument also is not supported by case law. In fact, every case Defendant relies upon illustrates this point. She asks this Court to extend the government speech doctrine to encompass "virtually every government action that regulates private speech" (*Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1599 (2022) (Alito, J., concurring)), which, undoubtedly, would swallow the First Amendment. *Eagle Point Educ. Assoc./SOBC/OEA v. Jackson Cty. Sch. Dist. No. 9*, 880 F.3d 1097, 1102-1105 (9th Cir. 2016).[7]

American Family v. City & County of San Francisco does not support Defendant's position. In that case, the city council sent a public letter and passed two non-binding resolutions that did no more than criticize the plaintiffs' speech and urge television stations not to air the speech. 277 F.3d 1114, 1119, 1120, 1125 (9th Cir. 2002). The city council did not monitor, assess, or mitigate the plaintiffs' speech pursuant to a statute or misinterpret and misapply that statute. Nor did it use "close and proactive" relationships with or "dedicated pathways" at the television stations to "take down" within 24 hours the plaintiffs' speech. In fact, it was not alleged and it is not entirely clear whether the tv stations actually took any action at the urging of the council. *Id.* at 1127 (Noonan, J., dissenting). Here, not only did Defendant use her purported authority under Section 10.5 to censor Plaintiff's speech, but she did so using the mechanism her office established with YouTube to take down within 24 hours speech she did not like. Obviously, Defendant's actions are "actual or

[7] Plaintiff has not located a single Supreme Court case in which a plaintiff has alleged that a government official was using her purported statutory authority to monitor speech on social media, assess whether such speech is misleading, and use her close working relationship with and "dedicated pathways" at a social media company to have a plaintiff's speech removed within approximately 24 hours. *See, e..g.*, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *Shurtleff*, 142 S. Ct. 1583; *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990).

threatened imposition[s] of government power." *Am. Family*, 277 F.3d at 1125.

Nunez v. City of Los Angeles does not apply. In *Nunez*, the plaintiff was a government employee who alleged that because of his speech, his employer retaliated against him by scolding him and threatening to transfer or to dismiss him. 147 F.3d 867, 874 (9th Cir. 1998). In dismissing the First Amendment retaliation case, the Ninth Circuit concluded that the plaintiff did not suffer an adverse employment action because all that happened to the plaintiff was "that he was bad-mouthed and verbally threatened" at work. *Id*. at 875. He was not transferred or dismissed. *Id.* Here, Plaintiff is not a government employee. Nor is Plaintiff alleging that Defendant took an adverse employment action against it. Instead, Plaintiff has alleged that Defendant has misused her authority under Section 10.5 with the intention to interfere with Plaintiff's speech by monitoring Plaintiff's speech on social media, falsely assessing Plaintiff's speech as misleading, ignoring an express limitation on her authority while giving an overly broad interpretation to other authority, and using her close working relationship with and "dedicated pathways" at YouTube to have Plaintiff's video removed within approximately 24 hours. Compl., ¶¶ 8-24, 27-29.

Mulligan v. Nichols is also inapposite. 835 F.3d 983 (9th Cir. 2016). In that case, the plaintiff, an arrested citizen, asserted that the police department retaliated against him by issuing a press release accusing the plaintiff of using bath salts and by leaking a recorded conversation between the plaintiff and the police department in which the plaintiff admitted to using bath salts approximately 20 times. *Id*. at 987. Based on these facts, the Ninth Circuit concluded that the police department did not violate the plaintiff's First Amendment rights because reputational harm alone is not enough. *Id*. at 989. Again, this is very different than what Plaintiff claims here. Plaintiff does not allege that its reputation has been harmed. Plaintiff alleges that Defendant used her purported authority under Section 10.5 to censor Plaintiff's speech.

Gini v. Las Vegas Metro. Police Dep't has little bearing here. There, the

plaintiff, a federal employee, sued the Las Vegas Police Department because a police department employee informed the plaintiff's employer about a complaint she had filed with the police department, resulting in her termination. *Gini*, 40 F.3d 1041, 1043-1044 (9th Cir. 1994). The Ninth Circuit concluded such action did not rise to the level of a constitutional violation because the plaintiff failed to show – let alone allege – "that it was reasonably foreseeable to [the police department employee] that his statement to [the plaintiff's] federal employer would cause [plaintiff] to be terminated without a pre-termination, or name-clearing, hearing." *Id*. at 1044. Plaintiff here plainly pled that Defendant intended to interfere with Plaintiff's speech. Compl., ¶¶ 8-24, 27-29.

Downs v. Los Angeles Unified Sch. Dist. is not applicable. 228 F.3d 1003 (9th Cir. 2000). In that case, a teacher sought to post his own message on a school bulletin board. *Id*. at 1007-08. The school took down the message because it was contrary to its interests. *Id*. at 1014. In ruling that the plaintiff's First Amendment rights were not violated, the Ninth Circuit held that bulletin boards "are not free speech zones." *Id*. at 1017. They "are vehicles for conveying a message from the school district." *Id*. Therefore, the school had the authority to "formulate that message without the constraint of viewpoint neutrality." *Id*. Obviously, the circumstances of the instant matter are distinct.

Defendant's out-of-circuit cases fare no better. In fact, it is not at all clear why Defendant cites to them. In *Baltimore Sun Co. v. Ehrlich*, the Fourth Circuit concluded that "no actionable retaliation claim arises when a government official denies a reporter access to discretionarily afforded information or refuses to answer questions." 437 F.3d 410, 418 (4th Cir. 2006). *Benningfield v. City of Houston* concerns a government employee who alleged that because of his speech his employer retaliated against him. 157 F.3d 369 (5th Cir. 1998). In *Goldstein v. Galvin*, the First Circuit concluded that the use of "the plaintiff's name in a run-of-the-mill website announcement did not sink to the level of actionable retaliatory

conduct." 719 F.3d 16, 30 (1st Cir. 2013). It goes without saying – none of these cases concern a government official misusing her statutory authority to develop "close and proactive" relationships with or "dedicated pathways" at third-party entities to "take down" protected speech within 24 hours.

Decided after Defendant filed her motion, the Ninth Circuit's opinion in *O'Handley* is not detrimental to Plaintiff's claim.[8] In *O'Handley*, the plaintiff alleges that the Secretary retaliated against him by sending through a previously established public "Partner Support Portal," a message to Twitter, flagging one of the plaintiff's tweets. The portal was established by Twitter because it "was unable to review every tweet for compliance with its Civic Integrity Policy." 2023 U.S. App. LEXIS 5729, *7. The plaintiff did not allege that Twitter took any direct action in response to the Secretary's message. *O'Handley v. Padilla*, 579 F. Supp. 3d 1163, 1175 (N.D. Cal. 2022). The plaintiff only alleged that, at some unknown duration after the Secretary sent the message to Twitter, Twitter "applied a label to the tweet, adding text immediately below it that said: 'This claim about election fraud is disputed.'" *Id*. at 1175-1176. In addition, the plaintiff alleged that "Twitter then added a strike to" his account. *Id*. The plaintiff did not allege that as a result of the Secretary's message, his tweet was taken down or the public was prevented from viewing the tweet. Nor did the plaintiff allege his tweet contained factually accurate information. Based on these facts, the Ninth Circuit concluded that the plaintiff's claim failed because merely "[f]lagging a post that potentially violates a private company's content-moderation policy" would not chill a person of ordinary firmness from continuing to engage in the protected activity. *O'Handley*, 2023 U.S. App. LEXIS 5729, **31-32.

Here, Plaintiff has done more than allege that Defendant flagged Plaintiff's YouTube video using a public portal. Plaintiff has alleged that the information

[8] In addition to the cases above, the *O'Handley* Court also cited to the Second Circuit's opinion in *Hammerhead Enters. v. Brezenoff*, 707 F. 2d 33 (2nd Cir. 1982) and *NRA of Am. v. Vullo*, 49 F. 4th 700 (2nd Cir. 2022). Neither case adds to the analysis. They are no different than *American Family*.

contained in the video were neither false nor misleading (Compl., ¶ 10); there is no evidence that the video "may suppress voter participation or cause confusion and disruption" of elections in California (*id.*); Defendant never made any such finding despite the express language of the statute (*id*., ¶ 24); Defendant falsely labeled the video as "misleading" and "misrepresent[ing] the safety and security of mail-in ballots" (*id*., ¶¶ 11-23); Defendant utilized a close, proactive working relationship and "dedicated pathway" she had developed with YouTube to cause the video to be taken down within 24 hours (*id*., ¶¶ 20-21, 2, 27-28). *O'Handley* is inapposite.

D. Count II States a Valid Unconstitutional Regulation of Speech Claim.

Plaintiff separately challenges Defendant's actions under Section 10.5 as an unconstitutional content- and/or viewpoint-based regulation of speech that cannot satisfy strict scrutiny. This alternate claim focuses on the validity of how Defendant has understood and applied her authority under Section 10.5 in this instance. *See*, *e.g.*, *Hoye v. City of Oakland*, 653 F.3d 835, 849-59 (9th Cir. 2010). As interpreted and enforced by Defendant here, Section 10.5 is not narrowly tailored to further a compelling governmental interest. In addition to failing strict scrutiny, Plaintiff also submits that, as interpreted and enforced by Defendant, the regulation suffers from unconstitutional overbreadth because it unnecessarily sweeps a substantial amount of protected speech within its prohibiting language.[9] *See*, *e.g.*, *Acosta v. City of Costa Mesa*, 718 F.3d 800, 816 (9th Cir. 2013).

It is readily apparent from Defendant's actions as alleged in the complaint and in Defendant's own motion that she believes Section 10.5 gives her unbridled authority to monitor core First Amendment speech, unilaterally assess whether that speech is false or misleading, and use her governmental influence to eliminate (*i.e.*,

[9] This overbreadth includes rejecting any reading of Section 10.5(c)(8) as being limited to speech that "may suppress voter participation or cause confusion and disruption" to the administration of elections and expansively interpreting the term "mitigate" in Section 10.5(c)(8) to mean working to remove protected speech from social media sites.

"mitigate") speech she deems false or misleading from social media platforms. *See*, *e.g.*, Def's Mem. at 15. Defendant does not even believe she is required to make a finding, plainly required from subsection (c)(8)'s express reference to subsection (b)(2) of Section 10.5, that the speech at issue "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). Nor, apparently, does Defendant believe she is required to have evidence of or make a finding that speech she determines is false or is knowingly false or made with reckless disregard for whether it was false before she can "mitigate" the speech. *See*, *e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) (applying *New York Times v. Sullivan*'s malice standard to a First Amendment retaliation claim involving allegedly false statements in a teacher's letter to the editor).

There can be no doubt that Section 10.5 is content-based. To categorize Plaintiff's speech for purposes of determining whether it is false or misleading and therefore must be "mitigated," Defendant necessarily had to refer to the content of Plaintiff's video. *See Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) ("laws that cannot be 'justified without reference to the content of the regulated speech,'" are content-based). Likewise, Defendant also targeted Plaintiff's particular views. *Rosenberger*, 515 U.S. at 829 ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."). Because Defendant regulated Plaintiff's speech on the basis of its content and viewpoint, her regulation is presumptively unconstitutional and must be narrowly tailored to further a compelling governmental interest. *Reed*, 576 U.S. at 163. Defendant does not even try to argue that she satisfies strict scrutiny. Her citation to *Am. Family Ass'n, Inc.* is inapposite in this regard because the case does not purport to address whether a government regulation of speech, either on its face or as applied, satisfied strict scrutiny.

Like with Count I, Defendant does not assert that Plaintiff has not pled the

requisite elements of its claim but instead argues that Count II fails because her actions were "government speech." Defendant's "government speech" defense fails here for the same reasons it fails in Count I. Defendant did not merely write a letter or pass a resolution expressing a viewpoint as in *Am. Family Ass'n, Inc.* She did not issue a simple press release, as in *Mulligan*. Her actions are not "[m]ere threats and harsh words," as in *Nunez*. In fact, Defendant was not expressing a viewpoint at all, but instead was purportedly performing mandatory duties required of her by statute, a statute Plaintiff claims she has misinterpreted and misapplied in a manner that violates the First Amendment. *See Hoye*, 653 F.3d at 859-60 (explaining that even when the government embarks on a course of action pursuant to fulfilling a constitutional content-neutral enactment, that action is unconstitutional when the government understands and enforces its powers in a content-discriminatory manner.) Plaintiff also submits that, despite her claim to the contrary, Defendant's actions clearly constitute an imposition of government power. No private party enjoys such targeted access, close working relationship, or dedicated pathways to social media companies such that speech disfavored by the government is removed within 24 hours of falsely being designated "misleading."

E. Count III.

A defendant must assert Eleventh Amendment immunity in a timely manner, or the immunity is waived. *Johnson v. Rancho Santiago Cmty. College Dist.*, 623 F.3d 1011, 1021-22 (9th Cir. 2010). When Plaintiff chose to include its California Constitution claim – Count III – in its complaint, it had no way of knowing whether Defendant would choose to litigate the state law claim in federal court or timely invoke Eleventh Amendment immunity. Because Defendant has now invoked immunity, Plaintiff does not dispute that its state law claim should proceed in a California court rather than in federal court.

VI. CONCLUSION.

Defendant is free to criticize Plaintiff's views. She also is free to use her office

to educate and inform voters about election integrity issues in ways that are counter to or challenge Plaintiff's efforts to educate and inform voters about these same issues. Defendant is not free to do the totality of the following: monitor and assess speech; falsely label well-supported, factually accurate speech as "misleading" and containing "misrepresentations;" ignore Section 10.5's express limitations while giving overly broad interpretations to other provisions in the statute; and develop and utilize her close and proactive relationships and "dedicated pathways" with social media companies, which she obviously enjoys due to her unique governmental status, to remove protected speech with which she disagrees. Doing so is prohibited by the First Amendment. For the reasons stated above, Defendant's motion to dismiss should be denied.

March 23, 2023

Respectfully submitted,

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