NOT FOR PUBLICATION

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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-MEMF-JC MEMORANDUM[*]

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

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

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

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 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.