

No. 26-

In the
Supreme Court of the United States

DENNIS HODGES,

Petitioner,

v.

TODD GLORIA, in his personal capacity
and in his official capacity as Mayor
of the City of San Diego,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

San Diego’s Mayor vetoed the reappointment of Dennis Hodges, an unpaid member of a municipal advisory board, because, nearly two years earlier and while serving on a different public body, he had explained a sincere Christian belief that God created human beings male and female. The Ninth Circuit held that once “commonality of political purpose” is established as an appropriate requirement for the position, the First Amendment inquiry ends. No *Pickering* balance is required. Religious motivation and expression change nothing.

The questions presented are:

1. Whether the *Elrod-Branti* exception—which permits consideration of political affiliation only when it is an appropriate requirement for the effective performance of a particular office—categorically forecloses the *Pickering-Connick-Garcetti* inquiry when an elected official denies reappointment to an unpaid advisory-board member solely because of the member’s prior speech on a matter of public concern, uttered outside the position and unrelated to its duties.

2. Whether the Free Speech Clause, together with the Free Exercise Clause, prohibits an appointing official from conditioning continued public service on disapproval of sincere religious speech about human sexuality when the First and Fourteenth Amendments forbid a religious test for state or municipal office. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

PARTIES TO THE PROCEEDINGS

Petitioner Dennis Hodges was the plaintiff in the United States District Court for the Southern District of California and the appellant in the United States Court of Appeals for the Ninth Circuit. Respondent Todd Gloria, sued in his personal capacity and in his official capacity as Mayor of the City of San Diego, was the defendant below and the appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual. No corporate disclosure statement is required under Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *Hodges v. Gloria*, No. 23-cv-2065-W (MSB), dkt. 13, 2024 WL 3153213 (S.D. Cal. June 24, 2024) — order granting motion to dismiss the first amended complaint without leave to amend Pet. App. B.
- *Hodges v. Gloria*, No. 23-cv-2065-W (MSB), dkt. 20, 2024 WL 4547009 (S.D. Cal. Oct. 22, 2024) — order denying motion for reconsideration Pet. App. C.
- *Hodges v. Gloria*, No. 24-7093 (9th Cir.) — memorandum affirming, entered February 26, 2026 (unpublished; available as 2026 WL 540374). Pet. App. A.

- *Hodges v. Gloria*, No. 24-7093, dkt. 41.1 (9th Cir. May 12, 2026) — order denying rehearing en banc. Pet. App. D.
- The extension application in this Court, No. 26A126, decided July 28, 2026.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case.

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OPINIONS BELOW

The order of the United States District Court for the Southern District of California granting respondent's motion to dismiss the first amended complaint without leave to amend is unpublished but available as *Hodges v. Gloria*, No. 23-cv-2065-W (MSB), dkt. 13, 2024 WL 3153213 (S.D. Cal. June 24, 2024), and is reproduced at Pet. App. B. The district court's order denying reconsideration is unpublished but available as *Hodges v. Gloria*, No. 23-cv-2065-W (MSB), dkt. 20, 2024 WL 4547009 (S.D. Cal. Oct. 22, 2024), and is reproduced at Pet. App. C. The Ninth Circuit's unpublished memorandum affirming (February 26, 2026) is available as *Hodges v. Gloria*, 2026 WL 540374, and is reproduced, with Judge Barker's concurrence, at Pet. App. A. The order denying rehearing en banc is available at *Hodges v. Gloria*, No. 24-7093, dkt. 41.1 (9th Cir. May 12, 2026).

JURISDICTION

The court of appeals entered judgment on February 26, 2026. Pet. App. A. Petitioner timely sought rehearing en banc on April 16, 2026. The court of appeals denied rehearing en banc on May 12, 2026. Pet. Ann. D. On July 28, 2026, Justice Kagan extended the time to file a petition for a writ of certiorari to and including October 9, 2026. *Hodges v. Gloria*, No. 26A126 (July 28, 2026). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment provides, in relevant part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech * * *.

U.S. Const. amend. I.

Article VI, Clause 3 of the Constitution, provides in relevant part:

[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S. Const. art. VI, cl. 3.

INTRODUCTION

The decision below converts a narrow exception for political affiliation into a categorical license to exclude a citizen from public service because of disfavored religious speech. Once the Ninth Circuit concluded that “commonality of political purpose” was an appropriate requirement for an advisory board, the First Amendment inquiry ended. No balance of interests. No examination of whether the speech was citizen speech on a matter of public concern. No free-exercise scrutiny. The label was enough.

Petitioner Dennis Hodges is an ordained Christian pastor and a longtime public servant—a corrections officer, a captain and special agent with the California Department of Corrections, and a chaplain of the San Diego Police Department. In 2017

he was appointed, without pay, to the San Diego Citizens Advisory Board on Police/Community Relations. The Board studies, consults, and recommends. It does not implement policy, speak for the Mayor, supervise personnel, or exercise operational authority. Pet. App. at 10a-11a (summarizing First Amended Complaint, (“FAC”), 23-cv-2065-LL-MSB, dkt. 7, ¶¶ 23–27, 30).

Nearly two years before the action challenged here, while serving on an entirely separate county commission, Hodges abstained from a vote on an agenda item to “amplify transgender voices.” He explained that his faith holds that God created human beings male and female, that transgenderism is sinful in the same sense as adultery and fornication, and that Christians must nonetheless love and respect all people. A majority of that commission declined to remove him. On August 8, 2023, Mayor Todd Gloria vetoed Hodges’s reappointment to the City Board. The Mayor’s memorandum stated the reason in the following terms: because Hodges “has made repeated concerning public comments about LGBTQ people—specifically, the transgender community,” the Mayor could not “support [his] reappointment to a Board tasked with promoting a positive relationship between the Police Department and the community it serves.” Pet. App. at 13a.

Hodges sued under 42 U.S.C. § 1983 for violation of the Free Exercise Clause, violation of the Free Speech Clause, and First Amendment retaliation. Pet. App. at 14a. The district court dismissed all three claims without leave to amend. Pet. App. at 25a. Applying *Lathus v. City of Huntington Beach*, 56 F.4th 1238 (9th Cir. 2023), it

held that “commonality of political purpose” with the Mayor was an appropriate requirement for the Board, and that the label ended the case. Pet. App. at 23a-24a. The Ninth Circuit affirmed. Bound by *Lathus*, it held that where the *Branti* exception applies, an appointed volunteer “can be fired for purely political reasons” without *Pickering* balancing, and that he had not explained how a religious motive “changes the court’s evaluation of his claim.” Pet. App. at 4a.

Judge Barker, while siding with the majority as he was bound by *Lathus*, concurred to identify the constitutional problem. The policymaker exception “began as a simple, binary test to decide whether a public employee could be fired for political-party alignment.” Pet. App. at 6a (Barker, J., concurring). In the Ninth Circuit it has “evolved * * * to govern any First Amendment claim.” Pet. App. at 7a. Once the role passes the commonality test, “the First Amendment gives the officeholder no protection from dismissal based on his associations, his speech, or his religious practice—regardless of the weight or strength of those interests.” Pet. App. at 7a. That one-step rule, he explained, “may be in tension with” *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), and “differs from the approach used in other circuits.” Pet. App. at 7a (citing *Borzilleri v. Mosby*, 874 F.3d 187 (4th Cir. 2017), and *Curinga v. City of Clairton*, 357 F.3d 305 (3d Cir. 2004)). “Federal courts would benefit from clarification.” Pet. App. at 7a.

This Court has never held that an elected official may punish protected religious speech without any balancing of interests. *Pickering v. Board of Education*, 391 U.S. 563 (1968), requires a balance between the speaker’s interest in commenting on

matters of public concern and the government's interest in efficient public service. *Connick v. Myers*, 461 U.S. 138 (1983), and *Rankin v. McPherson*, 483 U.S. 378 (1987), require examination of content, form, and context, and of actual disruption. *Garcetti v. Ceballos*, 547 U.S. 410 (2006), withdraws protection only for speech made pursuant to official duties—and then expressly preserves balancing for citizen speech. *Kennedy* holds that religious expression is “doubly protected” and that free-exercise and free-speech claims, though overlapping, are analytically distinct. 597 U.S. at 523–28, 543. *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), recognized, yet failed to find applicable, a narrow exception for political affiliation where party loyalty is an appropriate requirement for effective performance of the office. They rejected labels. They did not authorize a religious-conformity requirement.

The decision below conflicts with those cases and with the approaches of the Second, Third, Fourth, Eighth, Tenth, and D.C. Circuits, which preserve a distinct speech analysis even after finding that political compatibility is relevant to a position. The Eleventh Circuit mapped the competing approaches in 2013 and described the Ninth Circuit—then in *Fazio v. City & County of San Francisco*, 125 F.3d 1328 (9th Cir. 1997), and *Biggs v. Best, Best & Krieger*, 189 F.3d 989 (9th Cir. 1999)—as treating the policymaker inquiry as dispositive of any First Amendment retaliation claim. *Leslie v. Hancock County Board of Education*, 720 F.3d 1338, 1346–49 (11th Cir. 2013). Judge Barker has now brought that description current to *Lathus*. The conflict is outcome-determinative: under the Ninth Circuit's

rule the complaint was dismissed on the pleadings; under the other approaches the court would still ask whether this speech, made in a different capacity years earlier, impaired the effective performance of this unpaid advisory role.

The case is a clean vehicle. It was decided on a motion to dismiss, so the well-pleaded facts are taken as true. The Mayor identified the speech as the reason for the veto. The complaint alleges that the speech was unrelated to the City Board, caused no disruption, and did not impair Hodges's ability to make recommendations regarding police-community relations. Indeed, Hodges's speech in question occurred two years prior and in a different position. If the Ninth Circuit's rule stands, "commonality of political purpose" becomes a religious test for public trust. People desiring to hold public positions can be disqualified due to their religious beliefs with no further balancing of interests. The petition should be granted.

STATEMENT OF THE CASE

A. Factual background

Petitioner Dennis Hodges has been involved in law enforcement since 1976, when he began as a corrections officer in Chicago. Pet. App. at 10a. He moved to California in 1979, rose through the California Department of Corrections, and retired in 2008 as a special agent and captain. Pet. App. at 10a. He has also devoted his life to ministry. In 2001 he was appointed chaplain of the San Diego Police Department. He served as an associate pastor from 2005 to 2011 and, in May 2011, planted the Church of Yeshua Ha Mashiach. Pet. App. at 10a. He believes

that God defines human sexuality, that men and women are created in the image of God, and that God created two sexes, male and female. Pet. App. at 11a. He has said, without apology, that transgenderism is a sin in the same sense as adultery and fornication, and that Christians must love and respect all people regardless of sexual orientation. Pet. App. at 11a.

On July 25, 2017, Hodges was appointed to the Citizens Advisory Board on Police/Community Relations. Pet. App. at 11a. Members serve a two-year term and “until his or her successor is duly appointed and qualified.” Pet. App. at 11a. The Board’s purpose is to “study, consult and advise the Mayor, City Council and City Manager on Police/Community Relations crime prevention efforts.” Pet. App. at 11a. It “recommend[s] and review[s] policies, practices and programs designed to make law enforcement sensitive, effective and responsive to the needs of the City,” and it promotes “open communication and cooperation between the Police Department and residents.” Pet. App. at 11a. Its enumerated duties are recommendatory: specific recommendations on police-community relations, review of academy and in-service human-relations training, strategies for crime prevention and citizen participation, public education on rights and responsibilities in police encounters, and recommendations on community-oriented policing. Pet. App. at 24a. Members do not implement policy, speak for the Mayor, supervise personnel, or exercise operational authority. Pet. App. at 33a-34a. Hodges served without pay.

In March 2021, San Diego County Supervisor Joel Anderson asked Hodges to join the County

Human Relations Commission, citing the diversity he would bring as an African American. Pet. App. at 11a. Hodges agreed and was appointed. On November 9, 2021, during Transgender Awareness Month, the Commission considered an agenda item to amplify the voices of the San Diego transgender community. Pet. App. at 12a. Pursuant to the Commission’s Rules of Order, Hodges abstained because of his sincerely held belief that human beings are to embrace their biological and creational differences as men and women. Pet. App. at 12a. He later explained that position publicly: his faith led him to regard transgenderism as sinful, and the same faith required him to love and respect all people. *See* FAC, ¶¶ 40-41.

The claims in this case arise from a different body and a later act. On August 8, 2023—nearly twenty-one months after the abstention—Mayor Gloria exercised his veto under Section 280 of the San Diego City Charter and vetoed Hodges’s reappointment to the City Advisory Board. Pet. App. at 13a. The Mayor’s memorandum stated that because Hodges “has made repeated concerning public comments about LGBTQ people—specifically, the transgender community,” the Mayor could not “support [his] reappointment to a Board tasked with promoting a positive relationship between the Police Department and the community it serves.” Pet. App. at 13a. Hodges alleges that the veto was not based on credentials or performance. He has a lengthy background in public service and law enforcement and was well suited to the Board. Pet. App. at 13a. His abstention and related comments did not interfere with the efficient operation of the Advisory Board. Pet. App. at 13a. The Commission and the Advisory

Board are separate entities, and the statements related solely to the Commission. Pet. App. at 14a. His beliefs about human sexuality are unrelated to police-community relations; or related in any way to the policies the Board reviews. Pet. App. at 13a-14a.

B. Procedural history

Hodges filed this action on November 8, 2023, and a first amended verified complaint on December 28, 2023. Pet. App. at 14a. He asserted three claims under 42 U.S.C. § 1983: deprivation of the free exercise of religion, deprivation of the freedom of speech, and First Amendment retaliation. Pet. App. at 14a. All three rest on the theory that the veto, because of his religious speech, violated the First Amendment.

The Mayor moved to dismiss, relying on *Lathus*. Hodges opposed. He argued that the veto was based on religious belief rather than qualifications, *See* Plaintiff's Opposition to Defendant's Motion to Dismiss ("Response"), 23-cv-2065-LL-MSB, dkt. 9, at 4–6; that the speech was citizen speech motivated by faith and unrelated to the Board, *id.* at 4–6; that he was not a policymaker because he neither implemented policy nor spoke for the Mayor, *id.* at 8–9; and that the Mayor's motion had not separately challenged the free-exercise and free-speech claims. *Id.* at 6. The district court granted the motion on June 24, 2024, and dismissed without leave to amend. Pet. App. at 25a.

The court treated the three claims as one theory of retaliation and applied *Lathus* and *Blair v. Bethel School District*, 608 F.3d 540 (9th Cir. 2010). Pet. App. at 16a. It read *Branti* to permit removal of

an appointed official for otherwise protected activity when political affiliation is an appropriate requirement for the office, and it treated the municipal code as “the best foundation” for that classification. Pet. App. at 20a (quoting *Lathus*, 56 F.4th at 1241). Comparing the Board to the citizen-participation board in *Lathus*, the court found commonality appropriate because the Mayor appoints members and may veto reappointment, the Board advises on policy and seeks public participation, and the Board is a “conduit” between the community and the Mayor’s office on police-community relations. Pet. App. at 20a (discussing S.D.M.C. §§ 26.0801–26.0803 and Charter §§ 250, 280). It did not balance interests, did not ask whether the speech was made pursuant to Board duties, and did not separately analyze free exercise. It denied leave to amend as futile. Pet. App. at 25a.

Hodges moved for reconsideration. He argued that the court had misconstrued religious belief as political rhetoric and had failed to address the free-exercise and free-speech claims as distinct causes of action. The court denied the motion on October 22, 2024. Pet. App. at 38a. It held that the statements were political as well as religious because they arose from work on the Commission, that the religious-belief distinction was a new theory not raised against *Lathus* and *Blair* in the original opposition, and that the policymaker exception applied categorically to all three claims. Pet. App. at 34a. An individual in a “policymaker position,” the court reiterated, “can be removed for engaging in otherwise protected First Amendment activity.” Pet. App. at 29a (citing *Lathus*, 56 F.4th at 1241).

The Ninth Circuit affirmed. Pet. App. at 4a. It held that “a consistent line of cases running from *Elrod* ... through *Branti* ... to *Blair* ... and most recently to *Lathus*” permits dismissal of an appointed volunteer for otherwise protected statements when commonality of political purpose is an appropriate requirement. Pet. App. at 2a-3a. The district court, it said, correctly found that requirement here, so the Mayor “may decline to reappoint a member based on his public comments.” Pet. App. at 3a. It added that *Blair* and *Lathus* concerned removal from an existing position, and that Hodges had offered no authority extending a right to serve to reappointment; he did not deny the Mayor’s discretion to appoint without cause. Pet. App. at 3a. As for balancing, the panel held itself bound by *Lathus*: “where the *Branti* exception applies the employee can be fired ‘for purely political reasons’ without any *Pickering* balancing.” Pet. App. at 3a-4a (quoting *Lathus*, 56 F.4th at 1243 n.2, and *Hobler v. Brueher*, 325 F.3d 1145, 1150 (9th Cir. 2003)).

The panel addressed Hodges’s free-exercise claim on reconsideration, rejecting the merits of the motion. The panel noted that the claim appeared to have been raised first in the motion for reconsideration, and that the district court had not abused its discretion in finding no legal error. Pet. App. at 4a. The panel determined that Hodges would have to show that a veto lawful under the Free Speech Clause was nevertheless unlawful under the Free Exercise Clause because of his underlying religious belief; however, Hodges “offer[ed] no case law supporting such a proposition,” and did not explain how his religious motive “changes the court’s

evaluation of his claim.” Pet. App. at 4a. The panel never asked whether the veto was neutral and generally applicable, never applied strict scrutiny, and never treated the religious expression as “doubly protected.”

Judge Barker, constrained by *Lathus*, concurred. Pet. App. at 4a. He agreed that *Lathus* controlled the classification of the Board, and wrote separately because “*Lathus*’s articulation of the exception’s breadth may be in tension with other First Amendment jurisprudence.” Pet. App. at 5a. Ordinarily, he explained, the citizen’s and the government’s burdens “vary depending on which specific right is asserted,” even on the same facts. Pet. App. at 5a (citing *Kennedy*, 597 U.S. at 523–25, 527–28). The Ninth Circuit instead “analyzes the First Amendment rights to freedom of association, freedom of speech, and free exercise of religion under a single test.” Pet. App. at 5a. Association claims are governed by the binary *Elrod-Branti* exception. Speech claims ordinarily require *Pickering* and *Garcetti* balancing, and the government’s interest is “usually weaker for public offices lower down the totem pole”—“such as the Advisory Board at issue here.” Pet. App. at 6a. Free-exercise claims, if the burden is not neutral or generally applicable, require strict scrutiny. Religious expression can be “doubly protected.” Pet. App. at 6a (quoting *Kennedy*, 597 U.S. at 543). Under *Lathus*, by contrast, passage of the commonality test ends protection “regardless of the weight or strength” of the constitutional interests or of the government’s need. Pet. App. at 7a. The concurrence closed by identifying the circuit conflict and inviting clarification of “how the policymaker exception fits with free-speech and

free-exercise claims in the public-employment domain.” Pet. App. at 8a. Rehearing en banc was denied.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted for three reasons. First, the decision conflicts with this Court’s precedents requiring a functional, claim-specific analysis of public-employee speech, political affiliation, and religious exercise. Second, it entrenches a circuit conflict that other courts of appeals have acknowledged, and that Judge Barker has now flagged. Third, the question is recurring, the stakes for religious speech are concrete, and this case presents it cleanly.

I. The decision conflicts with this Court’s precedents requiring claim-specific analysis.

Free speech is the mechanism by which representative government functions. Citizens must be able to criticize officials, debate controversial social questions, and advocate religious views without fear that government will withdraw a public trust in retaliation. Debate on public issues must be “uninhibited, robust, and wide-open.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Speech on government operations and public policy “lies at the heart of the First Amendment.” *Schenck v. Pro-Choice Network*, —U.S. —, —, 117 S.Ct. 855, 858, 137 L.Ed.2d 1 (1997); *Pickering*, 391 U.S. at 571–73; *Connick*, 461 U.S. at 145–46. Religious speech receives the same protection, and more. *Kennedy*, 597 U.S. at 523–28, 543.

This Court has repeatedly rejected the idea that public employment is a privilege conditioned on surrender of constitutional rights. “[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable,” has been “uniformly rejected.” *Pickering*, 391 U.S. at 568 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 605–06 (1967)). Public employees do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” or at the door of an advisory board. *Kennedy*, 597 U.S. at 527 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). The decision below threatens that principle by allowing exclusion for religious speech without the ordinary speech framework and without an independent free-exercise analysis.

A. *Pickering*, *Connick*, and *Rankin* require a balance before speech may be punished.

In *Pickering*, a teacher was dismissed for a letter criticizing the school board’s handling of finances and a tax proposal. This Court held that the First Amendment required “a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” 391 U.S. at 568. The letter addressed the allocation of funds and the administration’s communications with voters—subjects on which “[f]ree and open debate is vital to informed decision-making by the electorate.” *Id.* at 571–72. There was no showing that the letter interfered with classroom duties, discipline,

or daily working relationships. The administration's interest in limiting the teacher's contribution to public debate was "not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.* at 573. Dismissal is itself "a potent means of inhibiting speech." *Id.* at 574. The government may prevail where speech materially interferes with performance, discipline, close working relationships, confidentiality, or effective operations, and knowingly or recklessly false statements receive less protection. It may not prevail on criticism, embarrassment, or a desire to avoid controversy.

Connick refined the threshold, not the balance. Before balancing, a court asks whether the employee spoke as a citizen on a matter of public concern or as an employee on a personal grievance, determined by "content, form, and context ... as revealed by the whole record." 461 U.S. at 147–48. The limitation reflects "the common sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 143. Speech on political, social, or community issues generally qualifies; an office questionnaire about transfers and morale generally does not. But even one question about pressure to work on political campaigns was a matter of public concern, and the Court proceeded to the *Pickering* balance. *Id.* at 149–54. *Connick* thus protects employees who speak about governmental affairs while leaving ordinary workplace disputes to the employer. It does not authorize skipping the balance once public concern is established.

Rankin confirms that controversial speech, unrelated to the job, is protected absent concrete

harm. A clerical employee in a constable’s office was fired for saying, after an attempt on President Reagan’s life, “If they go for him again, I hope they get him.” 483 U.S. at 381. This Court held the statement, in context, addressed a matter of public concern and was not a true threat. Applying the balance, it found no disruption, no impaired discipline, and no interference with performance. *Id.* at 390–92. The employer’s interests did not outweigh the speech.

Those decisions resolve the speech claim here or at least require a court to try. Human sexuality and the public treatment of transgender identity are matters of public concern by any measure of content, form, and context. *Connick*, 461 U.S. at 146–48. The statements were not a workplace grievance. They were made in November 2021, on a different body, nearly two years before the veto, and outside any duty of the City Board. The complaint alleges no disruption of the Board, no impaired working relationship with the Mayor, and no failure of performance. Pet. App. at 13a-14a (citing to FAC ¶¶ 63–65). At the pleading stage those allegations control. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Ninth Circuit nevertheless upheld the disqualification without asking a single *Pickering* question. That is not an application of this Court’s framework. It is a refusal to apply it.

B. *Garcetti* does not apply, because the speech was not made pursuant to City Board duties.

Garcetti limits the *Pickering* framework; it does not erase it. When a public employee speaks “pursuant to [his] official duties,” he is not speaking “as a citizen for First Amendment purposes, and the Constitution does not insulate [his] communications

from employer discipline.” 547 U.S. at 421. Ceballos’s disposition memorandum was unprotected because writing it was his job. The Court restated the two inquiries: first, whether the employee spoke “as a citizen on a matter of public concern”; second, if so, whether the government had an adequate justification for treating him differently from a member of the public. *Id.* at 418. Outside the official-duty category, “employees ... must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively,” and “the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences.” *Id.* at 418–19.

Garcetti’s categorical rule is confined to speech the job requires. It does not support “carte blanche censorship” of every statement by a person who holds a public post. The Ninth Circuit’s decision conflicts with that limit. Hodges’s comments were not a product of his Advisory Board duties. They did not “owe their existence” to those duties. *Id.* at 421. They were made in a different capacity, on a different body, almost two years before the veto. Treating them as a basis for disqualification without the citizen-speech inquiry inverts *Garcetti*: it uses non-duty speech to justify the very censorship *Garcetti* reserved for duty speech, and then skips the balance *Garcetti* preserved.

C. *Kennedy* requires an independent analysis of religious speech.

When the speech is also religious, the framework does not shrink; it expands it. In *Kennedy*, a coach’s brief, personal prayer was a sincere religious exercise. The district’s restriction was not neutral or generally applicable, because it singled out religious

conduct while permitting comparable secular personal activity. Strict scrutiny followed, and an asserted interest in avoiding an Establishment Clause violation did not satisfy it. 597 U.S. at 525–26, 532–36.

The Court separately applied the speech framework. The “first step” is “a threshold inquiry into the nature of the speech.” *Id.* at 527. Official-duty speech falls under *Garcetti*. Citizen speech on a matter of public concern triggers a second step: “a delicate balancing of the competing interests surrounding the speech and its consequences.” *Id.* at 528 (quoting *Garcetti*, 547 U.S. at 423). Kennedy’s prayers were private speech. They did not owe their existence to coaching duties, and the fact that they occurred at the stadium while he remained on duty was not dispositive. An excessively broad conception of job duties, the Court warned, would allow schools to prohibit ordinary private religious or secular expression. *Id.* at 529–31. Whether viewed through free exercise or free speech, “the burden shifts to the District.” *Id.* at 532. “The Constitution neither mandates nor permits the government to suppress such religious expression.” *Id.* at 543. Religious expression is “doubly protected.” *Id.*

The decision below cannot be reconciled with that analysis. Hodges’s statements were private in the only sense that matters under *Garcetti* and *Kennedy*: they were not part of his City Board role. The panel nonetheless held that religious motivation does not change the policymaker inquiry and that no authority supports independent free-exercise protection once speech is deemed regulable under *Lathus*. Pet. App. at 4a. That holding collapses two

clauses into one label. It never asks whether the veto was neutral and generally applicable, never shifts the burden, and never weighs religious speech as doubly protected.

Torcaso v. Watkins, 367 U.S. 488 (1961), settles whether a state government may condition public office on a profession of religious belief. Maryland refused Torcaso a notary commission because he would not declare a belief in God. The Court held that the state constitutional provision “sets up a religious test which was designed to and, if valid, does bar every person who refuses to declare a belief in God from holding a public ‘office of profit or trust’ in Maryland.” *Id.* at 489–90. That test, the Court concluded, “unconstitutionally invades the appellant’s freedom of belief and religion and therefore cannot be enforced against him.” *Id.* at 496. The decision rests on the First Amendment applied to the States via the Fourteenth. The Court invoked Article VI’s Religious Test Clause only as history; the Clause was adopted to place the people “securely beyond the reach” of test oaths, *id.* at 491 and expressly reserved whether the Clause itself reaches state offices. *Id.* at 489 n.1. The principle that forbids a religious qualification for a municipal trust therefore travels through the First and Fourteenth Amendments, not through Article VI.

The decision below inverts that holding. Treating itself as bound by *Lathus*, the panel concluded that an appointed volunteer “may be dismissed for statements that might otherwise be protected by the First Amendment” when “commonality of political purpose” is an appropriate requirement, and that the Mayor “may decline to reappoint a member based on his public comments.”

Pet. App. at 3a. Once the *Elrod-Branti* exception is found to apply, the panel held, the volunteer “can be fired ‘for purely political reasons’ without any Pickering balancing.” Pet. App. at 4a (quoting *Lathus*, 56 F.4th at 1243 n.2). The panel demanded that Hodges show a veto lawful under the Free Speech Clause was nonetheless unlawful under the Free Exercise Clause “because of his underlying religious beliefs.” Pet. App. at 4a. Finding no case so holding, and no explanation of how a religious motive altered the analysis, the panel stopped short. It ignored that Hodges’s statements squarely constituted his religious beliefs on sin. Pet. App. at 11a. It never asked whether the veto was neutral and generally applicable, never shifted the burden after determining the sincerity of Hodges’s religious beliefs and the burden the veto imposed upon them, and never recognized that such religious expression is “doubly protected.” *Kennedy*, 597 U.S. at 525, 543. As Judge Barker observed, once the role “passes the ‘commonality of political purpose’ test, the First Amendment gives the officeholder no protection from dismissal based on his associations, his speech, or his religious practice—regardless of the weight or strength of those interests and the weight or strength of the government’s need for commonality of political purpose.” Pet. App. at 7a (Barker, J., concurring).

D. *Elrod* and *Branti* create a narrow affiliation exception, not a speech exemption.

Elrod held that the First Amendment generally prohibits dismissal of public employees solely for political affiliation. 427 U.S. at 355–60 (plurality opinion); see also *id.* at 375 (Stewart, J., concurring in

the judgment). Patronage burdens belief and association, coerces affirmation of beliefs the employee may not hold, and threatens a political process in which government jobs depend on partisan loyalty rather than competence. The plurality recognized a narrow exception: affiliation may be considered when it is an appropriate requirement for the effective performance of the office, so that “policies which the electorate has sanctioned are effectively implemented.” *Id.* at 367, 372. The exception is limited to positions for which political loyalty is genuinely necessary. *Elrod* did not hold that every appointed or advisory position may be purged of any speech the appointing official dislikes.

Branti rejected the shortcut the decision below adopts. “The ultimate inquiry is not whether the label ‘policymaker’ or ‘confidential’ fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.” 445 U.S. at 518. Assistant public defenders exercised professional judgment, but their duty was to represent clients independently, not to implement the appointing defender’s partisan objectives. Affiliation was not an appropriate requirement. *Id.* at 519–20. The government cannot prevail by a description. It must connect political agreement to the effective performance of the particular duties.

The Ninth Circuit inverted that inquiry. It asked whether the Board, as described in the municipal code, is the sort of body for which commonality of political purpose is “appropriate,” found that it was, and stopped. Pet. App. at 2a-4a.

Branti requires more, especially where the challenged conduct is public speech rather than a refusal to carry out official duties. An official may need advisors who will help implement or communicate policy. It does not follow that the official may punish an appointee for every public statement that conflicts with the official's views. The government must still establish the connection between the speech and the effective performance of the particular office.

That connection is not established by the allegations here—and at the pleading stage it is contradicted. The Board recommends; it does not implement. Pet. App. at 11a. Hodges did not speak for the Mayor. The speech concerned a different body, a different subject, and a different year. Pet. App. at 11a-12a. The Mayor's interest, as stated, was disagreement with the comments, not a failure to perform Board duties. Pet. App. at 13a. *Elrod* and *Branti* allow that interest to be considered. They do not allow it to be conclusive. Treating them as a categorical rule disregards this Court's later insistence on a distinct analysis of speech claims.

E. *Rutan*, *O'Hare*, and *Umbehr* foreclose formal evasions of the speech framework.

The patronage line has been extended, not diluted, and the extensions cut against the decision below.

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), held that *Elrod* and *Branti* are not limited to discharge. They also reach hiring, promotion, transfer, and recall. *Id.* at 72–75. This Court refused

to let the government escape review by changing the form of the personnel action. What matters is the practical effect: the loss of a public position because of protected association or expression. *Id.* at 72–74.

Rutan’s facts did not revolve around a veto of reappointment to an unpaid advisory board. Its reasoning, however, covers that action. The Mayor here did not have to cut short an existing term. Declining to reappoint Hodges because of his speech had the same effect as removing him. The label “nonappointment” does not take the veto outside *Elrod* and *Branti*.

O’Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712 (1996), extended the principle to an independent contractor removed from a towing rotation after its owner declined to support the incumbent mayor. The First Amendment protects against retaliation that uses an economic or governmental relationship to coerce association or punish expression. *Id.* at 714–15, 720–26. The label on the relationship is not controlling. “Volunteer,” “advisory,” “appointed,” or “non-tenured status” does not resolve the question. And *O’Hare* describes the exception as a test for party alignment, not as a doctrine governing every First Amendment claim. 518 U.S. at 718–19. The phrase “simple, binary test” is Judge Barker’s, citing *O’Hare*. Pet. App. at 6a.

Board of County Commissioners v. Umbehr, 518 U.S. 668 (1996), is the closest analogue and the sharpest conflict. An independent contractor alleged that the county terminated his contract because he criticized the commissioners. This Court held that the claim is evaluated under a *Pickering*-type balance. *Id.* at 673, 677–78. The government’s interests in

effective relationships and performance “do not automatically defeat the speaker’s rights.” They are assessed through the balance. *Id.* at 675–80. If balancing is required before the government may end a contract for speech, it is difficult to see why balancing is unnecessary before the government may refuse to reappoint an unpaid advisor for speech. The interest in political compatibility may enter the balance. It cannot replace it.

Taken together, the patronage cases establish four propositions the decision below does not apply. The general rule is that government may not condition employment or a governmental relationship on affiliation or expression. The exception is narrow and functional: political agreement must be necessary to effective performance of the particular office, not merely convenient to the appointing official. The cases do not treat all political or religious speech as unprotected; a speech claim still requires *Garcetti*, *Connick*, and *Pickering* analysis. And formal distinctions—discharge versus nonrenewal, employee versus contractor, tenured versus volunteer—do not permit the government to skip review. *Rutan*, 497 U.S. at 72–75; *O’Hare*, 518 U.S. at 721–22; *Umbehr*, 518 U.S. at 674–78. The Ninth Circuit treated the exception as dispositive of speech and free exercise alike. That one-step analysis is the conflict with this Court.

Blair does not provide the rule on which the decision below should depend. The Ninth Circuit invoked it for the proposition that “more is fair in electoral politics” and that the First Amendment does not “succor casualties of the regular functioning of the political process.” Pet. App. at 18a. That case was a

vote by elected members of a school board to replace their own vice president. The plaintiff kept his seat and “the full range of rights and prerogatives” of a board member. 608 F.3d at 544. The injury was a loss of internal office among peers, not exclusion from public service.

Hodges was not an elected colleague. He was an appointed volunteer. A single executive vetoed his reappointment to a different body because of religious speech uttered almost two years earlier. Whatever *Blair* holds about the ordinary give-and-take of an elected body, it is not a holding that advisory service may be conditioned on religious conformity. The court of appeals itself treated *Lathus*, not *Blair*, as controlling. Pet. App. at 3a.

II. The decision entrenches an acknowledged conflict among the circuits.

The circuits agree on a thin reed: a narrow core element of *Elrod* and *Branti*. Political affiliation may be considered when it is an appropriate requirement for effective performance. The inquiry is functional: actual duties, authority, relationship to the appointing official, and the need for loyalty to implement or communicate policy. A title is not enough. *Branti*, 445 U.S. at 518.

The circuits, however, are far more out of step with each other than aligned. And this divide is clear and expressly recognized. They disagree about what follows when the adverse action rests not on party affiliation but on speech or religious expression. The Ninth Circuit treats the exception as dispositive. Other circuits treat policymaker status as a factor in a broader analysis, distinguish affiliation claims from

speech claims, and ask whether the speech relates to policies the employee was responsible for implementing. That disagreement is outcome-determinative, and a judge of the court below has said so.

The Ninth Circuit. In *Lathus*, the court held that a volunteer on a citizen advisory board may be removed for otherwise protected activity when commonality of political purpose is appropriate, and that *Pickering* balancing is unnecessary “where the *Branti* exception applies.” 56 F.4th at 1241, 1243 n.2 (quoting *Hobler*, 325 F.3d at 1150). *Hodges* applied that footnote to religious speech and expressly rejected a request for balancing. Pet. App. at 3a. The court did not conclude that the Mayor would prevail after a balance. It held that no balance was required.

The Second Circuit. Policymaker status informs the balance; it does not replace it. In *McEvoy v. Spencer*, 124 F.3d 92 (2d Cir. 1997), the court distinguished an action based on affiliation from one based on speech. Where the action rests solely on speech, “an employee’s policymaking role does not provide an employer with complete insulation for adverse employment action, but does weigh, normally heavily, on the employer’s side in the *Pickering* balance.” *Id.* at 103. *Lewis v. Cowen*, 165 F.3d 154 (2d Cir. 1999), likewise examined whether the speech implicated operational interests and whether those interests outweighed the employee’s, even for a senior official. The Ninth Circuit’s rule eliminates the inquiry *McEvoy* preserves.

The Third Circuit. *Curinga v. City of Clairton*, 357 F.3d 305 (3d Cir. 2004), is the case Judge Barker cited. The employee held a high-level

municipal post for which political affiliation could be relevant. The court nevertheless analyzed the speech claim under *Pickering*, treating policymaker status as a factor in the government's efficiency and loyalty interests rather than as an automatic bar. *Id.* at 309–13. A footnote records the circuits' divergent approaches. *Id.* at 310 n.8. The claim here is not that the Mayor declined to appoint a rival partisan. It is that he vetoed reappointment because of public religious speech. *Curinga* would require a separate speech analysis. *Hodges* refused one.

The Fourth Circuit. *Borzilleri v. Mosby*, 874 F.3d 187 (4th Cir. 2017), the other case Judge Barker cited, recognized that an assistant state's attorney occupied a position for which political compatibility could be relevant, and then separately evaluated the speech claim. *Id.* at 190–91, 193–94. The threshold inquiries were resolved in the employee's favor: she spoke as a citizen, not pursuant to official duties, on a matter of public concern. The court then balanced, and concluded that the government's interest in harmony between an elected prosecutor and policymaking subordinates justified the action. *Id.* at 193–94. The government won the balance. It was not excused from it. The questions whether affiliation is an appropriate requirement, and whether particular speech may be punished, may overlap, but they are not identical. The Ninth Circuit treated them as one question.

The Eighth Circuit. The Eighth Circuit has declined to expand *Elrod-Branti* where political affiliation was not the stated basis for the action. See *Hinshaw v. Smith*, 436 F.3d 997, 1006–08 (8th Cir. 2006). The court said it would hesitate to expand the

Elrod-Branti exception where party affiliation was not alleged as the basis for the termination, and it declined to follow decisions that had done so. *Id.* at 1007. The exception addresses the need for political loyalty. It does not apply automatically whenever the employee occupies a policymaking role and speaks. The stated reason remains central. If the government acts because of party affiliation, *Elrod* and *Branti* may control. If it acts because of public speech or religious expression, the court applies the framework governing that right. The Mayor's stated reason was Hodges's "public comments." Pet. App. at 13a. The Ninth Circuit substituted the affiliation exception for that reason.

The Tenth Circuit. The Tenth Circuit preserves *Pickering* review where the speech does not implicate the employee's politics or substantive policy viewpoints, even if the employee is a policymaker for affiliation purposes. *Barker v. City of Del City*, 215 F.3d 1134, 1139 (10th Cir. 2000). Policymaker status "bears considerable attention" in the balance; it does not displace the balance for speech unrelated to those viewpoints. *Id.* *Jantzen v. Hawkins*, 188 F.3d 1247, 1251–52 (10th Cir. 1999), applies *Pickering* to the speech claim and *Elrod-Branti* to the affiliation claim. It does not treat a policymaker label as the end of a speech case. The facts alleged here—an unpaid advisory role, no implementation authority, comments made on another body and motivated by religious belief, no disruption—would be central in that analysis. The Ninth Circuit's rule prevented their consideration.

The D.C. Circuit. *Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988), upheld dismissal of a high-level

employee only after determining that he was a key deputy whose speech concerned the core policies he was responsible for implementing. *O'Donnell v. Barry*, 148 F.3d 1126 (D.C. Cir. 1998), marked the limit, distinguishing a key deputy from a senior but primarily supportive employee and requiring factual development on the value and disruptive effect of the speech. The D.C. Circuit does not treat policymaker status as automatically eliminating protection. It asks whether the employee is a close representative, whether the speech concerns policies he implements, and whether the government's interests justify the restriction. The Ninth Circuit required none of that. A general advisory relationship with the Mayor was enough to end balancing.

The Eleventh Circuit. *Leslie v. Hancock County Board of Education*, 720 F.3d 1338, 1346–49 (11th Cir. 2013), described three approaches to whether a policymaker may prevail under *Pickering*. The First, Sixth, and Seventh Circuits hold that, where a policymaking or confidential employee is terminated for speech related to political or policy views, the balance favors the government as a matter of law. The Ninth Circuit, the court wrote—citing *Fazio*, 125 F.3d at 1332, and *Biggs*, 189 F.3d at 994–95, not *Lathus*, which had not been decided—“treats that inquiry as dispositive of any First Amendment retaliation claim” and does not apply the balance. The Second and Eighth Circuits, *Leslie* continued, preserve a *Pickering* analysis and do not treat policymaker status as automatic insulation. *Id.* at 1346–49 (discussing *Hinshaw*, 436 F.3d at 1006–08). *Leslie* arose in a qualified-immunity posture and does not cite *Lathus*. It is still the map. *Hodges* and *Lathus*

confirm that the Ninth Circuit's side of it is categorical: the panel held that the request for *Pickering* balancing was foreclosed. Pet. App. at 3a. The question *Leslie* identified, and that Judge Barker has now renewed, is whether policymaker status makes *Pickering* unnecessary, or is instead one factor in the balance.

The conflict can be stated without caricature. The circuits share a functional instinct: the government's interest is stronger for a close advisor, key deputy, policy implementer, or public representative, and weaker for a low-level, unpaid, nonconfidential appointee who does not formulate or implement policy. Speech claims and affiliation claims are not identical. The connection between the expression and the actual duties matters. The Ninth Circuit's rule is categorical. Once commonality is appropriate, speech, religious expression, and association receive no further protection against removal or nonappointment. The other approaches treat policymaker status as a reason to give substantial weight to the government's interests, and still ask whether the speech related to the duties and whether the interests justified the action. A government may prevail with little extended balancing where the speaker is a true key policymaker and the speech directly conflicts with policies he must implement. That conclusion should result from examining the position and the speech, not from a rule that all public speech by a labeled policymaker is unprotected.

III. This case is a clean vehicle for a recurring and important question.

The conflict is not academic. The result changes with each Circuit's approach.

Under the Ninth Circuit's rule, the claim fails once the Board is classified as a position involving commonality of political purpose. The court need not ask whether Hodges spoke as a citizen, whether the speech addressed a matter of public concern, whether it was made pursuant to official duties, whether it concerned policies he was responsible for implementing, whether he spoke for the Mayor, whether political compatibility was necessary to his specific duties, whether the speech threatened disruption, whether the Board implements policy or only advises, whether he held a confidential relationship with the Mayor, or whether the government's interests outweighed the speech and free-exercise interests.

Under the approaches followed by all other circuits, each of those questions is open. Here, Hodges served without pay. The Board makes recommendations rather than binding policy. He alleges that he did not speak for the Mayor, exercise final authority, or communicate official City positions. FAC ¶¶ 23–27. The statements were made in connection with a separate commission and were motivated by religious belief. FAC ¶¶ 38–43, 65. The complaint alleges no disruption. FAC ¶ 64. The Mayor's memorandum identifies the comments and their religious nature, not party affiliation or a failure of duty, as the reason. FAC ¶ 62. The Ninth Circuit's categorical approach prevented consideration of those facts. Other circuits would treat them as central.

The case presents the conflict between the circuits cleanly. The court of appeals held that the exception foreclosed balancing. Pet. App. at 3a. It did not conclude, after balancing, that the Mayor's interests prevailed. The district court likewise stopped at commonality. Pet. App. at 20a. Because the case was decided on a motion to dismiss, there is no dispute of fact for this Court to resolve and no alternative ground that depends on a developed record. The stated reason is the speech. The distinction between party-affiliation patronage and speech-based retaliation is therefore square.

Two objections are likely, and neither is a reason to deny review. The first is that the Mayor had discretion to decline reappointment without cause, and that *Blair* and *Lathus* involved removal rather than nonrenewal. Discretion to appoint is not discretion to punish protected speech. *Rutan* rejected the distinction between discharge and other personnel actions; *Umbehr* rejected the distinction between employees and contractors. 497 U.S. at 72–75; 518 U.S. at 674–78. A city charter may authorize a veto. It may not authorize a veto for an unconstitutional reason. The second objection is that volunteer advisors are the public face of the appointing official, so commonality is always appropriate. That is an argument on the merits of the functional inquiry, and it is contestable on these allegations: a fifteen-member board appointed by the Mayor and confirmed by the Council, charged to study and recommend, is not the Mayor's alter ego in the sense of a chief of staff or a press secretary. Compare *Hall*, 856 F.2d at 262, with *Rankin*, 483 U.S. at 390–92. The objection confirms that the question is legal and recurring. It

does not show that the Ninth Circuit’s categorical answer is correct.

The question presented by this Petition will recur. Municipal governments appoint volunteers to commissions, boards, and advisory bodies as a matter of course. If the Ninth Circuit’s rule stands, an elected official may characterize those positions as requiring “commonality of political purpose” and then exclude appointees for disfavored religious, political, or policy expression without *Pickering* and without the Free Exercise Clause. The risk is sharpest where the speech concerns religion or public controversy. A political-compatibility requirement cannot be transformed into a religious-conformity requirement. Nor should a policymaker label spare the government the obligation to determine whether the individual spoke as a citizen, whether the speech involved a matter of public concern, and whether the asserted interests justified suppression.

Judge Barker’s concurrence is an invitation, not an obstacle. He agreed that circuit precedent controlled and wrote to explain why that precedent “may be in tension with broader principles of First Amendment jurisprudence, which seek to account for the sometimes-complex interplay between the government’s interests and a given First Amendment right.” Pet. App. at 7a. (citing *Kennedy*, 597 U.S. at 527). He identified the departure from *Borzilleri* and *Curinga*. And he stated the question this Court is asked to answer: how the policymaker exception “fits with free-speech and free-exercise claims in the public-employment domain.” *Id.* En banc review having been denied, only this Court can answer it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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**APPENDIX A - UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT ORDER-
MEMORANDUM FILED FEBRUARY 26, 2026
NOT FOR PUBLICATION**

FILED FEB 26 2026
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

**UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

DENNIS HODGES, an
individual,

Plaintiff -Appellant,

v.

TODD GLORIA, both in
his personal capacity
and in his official
capacity as the Mayor of
the City of San Diego,

Defendant - Appellee.

No. 24-7093

D.C. No. 3:23-cv-02065-
W-MSB

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California Michael S.
Berg, Magistrate Judge, Presiding

Argued and Submitted December 3, 2025

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

Pasadena, California

Before: CALLAHAN and KOH, Circuit Judges,
and BARKER, District Judge.** Concurrence by
Judge BARKER.

Dennis Hodges, a correctional officer and religious pastor, challenges San Diego Mayor Gloria’s veto of his reappointment as a voluntary member to the City’s Police Advisory Board (“Advisory Board”) as violating his First Amendment rights to free speech and free exercise of religion. The Mayor stated that he vetoed Hodges’s reappointment because Hodges had made repeated public comments that he considered “transgenderism” to be a sin just like adultery and fornication. The district court dismissed Hodges’s First Amended Complaint, citing *Lathus v. City of Huntington Beach*, 56 F.4th 1238 (9th Cir. 2023). It subsequently denied Hodges motion for reconsideration. Hodges filed a timely appeal. We affirm.

We review de novo a dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013). We review the denial of a motion for reconsideration for abuse of discretion. *Zamani v. Carnes*, 491 F.3d 990, 994 (9th Cir. 2007).

Hodges asserts that he was not a policymaker and that government officials may not create religious tests for holding public office. However, a consistent line of cases running from *Elrod v. Burns*, 427 U.S. 347, 368 (1976), through *Branti v. Finkel*, 445 U.S.

**The Honorable J. Campbell Barker, United States District Judge for the Eastern District of Texas, sitting by designation.

507 (1980), to *Blair v. Bethel School District*, 608 F.3d 540 (9th Cir. 2010), and most recently to *Lathus v. City of Huntington Beach*, 56 F.4th 1238 (9th Cir. 2023), hold that an appointed volunteer may be dismissed for statements that might otherwise be protected by the First Amendment when “commonality of political purpose” is an appropriate requirement for the volunteer’s services. *Lathus*, 56 F.4th at 1241.

Here, the district court correctly concluded that under the San Diego Municipal Code, the Advisory Board is an extension of the Mayor, who appoints its members, and that commonality of political purpose with the Mayor is required for members of the Advisory Board, such that the Mayor may decline to reappoint a member based on his public comments.

Even if commonality of political purpose presented a closer question, our decisions in *Blair* and *Lathus* concerned the removal of board members from their existing positions. Hodges offers no authority extending the asserted First Amendment right to serve on an advisory committee to cover reappointment to a committee. He does not deny that under the Municipal Code, the Mayor has discretion to appoint or reappoint individuals without cause.

Hodges assertion that we should apply a weighted *Pickering v. Board of Education*, 391 U.S. 563 (1968), balancing test was rejected in *Lathus*, 56 F.4th at 1243 n.2 (citing *Hobler v. Brueher*, 325 F.3d 1145, 1150 (9th Cir. 2003) (“where the *Branti* exception applies the employee can be fired ‘for purely political reasons’ without any *Pickering* balancing.”)). We are bound by that decision.

It appears that Hodges first raised his free exercise of religion claim—that he was discriminated against based on his sincerely held religious beliefs—in the district court in his motion for reconsideration. The district court held that the motion was based on a new legal theory and that Hodges had failed to demonstrate legal error.

Hodges has not shown that the district court erred in rejecting his free exercise claim. To prevail on this claim, Hodges would have to show that even though the veto of his reappointment did not violate his free speech rights, it violated his free exercise rights because of his underlying religious beliefs. He offers no case law supporting such a proposition. Moreover, he does not explain how his religious motive for making public statements changes the court’s evaluation of his claim; nor does he deny that the Mayor chose not to reappoint him because of his public statements. Accordingly, he has not shown that the district court abused its discretion in rejecting his free exercise claim.

The district court’s grant of defendant’s motion to dismiss and denial of Hodges motion for reconsideration are **affirmed**.¹

BARKER, District Judge, concurring:

I agree with my colleagues that *Lathus v. City of Huntington Beach*, 56 F.4th 1238 (9th Cir. 2023), dictates that Dennis Hodges’s position on the Advisory Board fits within the policymaker exception. I write separately to note that *Lathus*’s articulation of the exception’s breadth may be in tension with other

¹ Defendant’s request for judicial notice is granted.

First Amendment jurisprudence.

In analyzing First Amendment claims, a citizen's and a government's respective burdens usually vary depending on which specific right is asserted, even if the same facts underlie different claims. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 523–25, 527–28 (2022) (discussing free-exercise-of-religion and free-speech analytical frameworks). This circuit's approach in *Lathus*, however, analyzes the First Amendment rights to freedom of association, freedom of speech, and free exercise of religion under a single test in the context of public employment.

The policymaker exception originally applied only to the first of those three rights. The First Amendment right to freedom of association generally prohibits the government from conditioning public employment on political-party affiliation. *See Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021) (citing *Elrod v. Burns*, 427 U.S. 347, 355 (1976) (plurality opinion)). But an exception exists when the nature of a public office makes it necessary “for the effective performance” of that office to discriminate based on political party. *Branti v. Finkel*, 445 U.S. 507, 518 (1980); *Elrod*, 427 U.S. at 367–68 (plurality opinion). When that is true, the government's need is not then balanced against the employee's interest in freedom of association. The exception simply applies, and the legal analysis ends.

When a public employee's First Amendment right to freedom of speech is at issue, however, courts ordinarily employ an analysis featuring a balancing test under *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563

(1968), and *Garcetti v. Ceballos*, 547 U.S. 410 (2006). When a public employee speaks as a citizen on a matter of public concern, courts balance the employee’s speech interests against the public employer’s interest in efficiently performing public services. *Kennedy*, 597 U.S. at 527–28. The government’s interest in controlling such speech is usually weaker for public offices lower down the totem pole of government authority—such as the Advisory Board at issue here.

Yet another analysis applies to a public employee’s free-exercise-of-religion claim. If a plaintiff shows that a challenged policy burdens his sincere religious practice and is not neutral or generally applicable, the burden shifts to the government to “satisfy ‘strict scrutiny’ by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest.” *Id.* at 525. That test again looks to the strength of the government’s interest. Religious expression can thus be “doubly protected” under both the Free Exercise and Free Speech Clauses. *Id.* at 543.

The policymaker exception began as a simple, binary test to decide whether a public employee could be fired for political-party alignment. See *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 718–19 (1996). But it has evolved in this circuit to govern any First Amendment claim brought by a dismissed public official or employee. Under *Lathus*, “an appointed public official can be removed for engaging in otherwise protected First Amendment activity” if “commonality of political purpose . . . is an appropriate requirement” for the public office in

question. 56 F.4th at 1241 (internal quotation marks omitted). Put another way, if the role in question passes the “commonality of political purpose” test, the First Amendment gives the officeholder no protection from dismissal based on his associations, his speech, or his religious practice—regardless of the weight or strength of those interests and the weight or strength of the government’s need for commonality of political purpose.

By avoiding a balancing test and applying a one-step exception across the board for First Amendment claims in the public-employment context, *Lathus*’ approach may be in tension with broader principles of First Amendment jurisprudence, which seek to account for the sometimes-complex interplay between the government’s interests and a given First Amendment right. *See, e.g., Kennedy*, 597 U.S. at 527 (noting this complexity in the free-speech and public-employment context). It also differs from the approach used in other circuits. *See, e.g., Borzilleri v. Mosby*, 874 F.3d 187, 190–91, 193–94 (4th Cir. 2017) (applying different analyses to freedom-of-association and free-speech claims); *Curinga v. City of Clairton*, 357 F.3d 305, 309–13 & n.8 (3d Cir. 2004) (same and noting circuits’ different approaches). Federal courts would benefit from clarification of that circuit split and how the policymaker exception fits with free-speech and free-exercise claims in the public-employment domain.

**APPENDIX B - ORDER GRANTING
DEFENDANT'S MOTION TO DISMISS FIRST
AMENDED COMPLAINT FILED JUNE 24, 2024**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DENNIS HODGES, Plaintiffs, v. TODD GLORIA, both in his personal capacity and in his official capacity as the Mayor of the City of San Diego, Defendant.	Case No.: 23-cv- 2065 W (MSB) ORDER GRANTING DEFENDANT'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT WITHOUT LEAVE TO AMEND [DOC. 8]
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Pending before the Court is Defendant Mayor Todd Gloria's motion to dismiss the First Amended Complaint ("FAC") under Federal Rule of Civil Procedure 12(b)(6).

Plaintiff Dennis Hodges opposes. The primary issue is whether Mayor Gloria violated Hodges's First Amendment rights by vetoing Hodges's reappointment to a volunteer municipal board because of statements Hodges made regarding the transgender community.

The Court decides the matter on the papers submitted and without oral argument.

See Civ. L.R. 7.1(d.1). Because the relevant San Diego Municipal Code establishes that

Hodges's position on the municipal board is one for which "commonality of political purpose" with the Mayor is an appropriate requirement, the Court finds Defendant did not violate Hodges's First Amendment rights. Accordingly, the Court will GRANT the motion to dismiss [Doc. 8] **WITHOUT LEAVE TO AMEND**.

I. BACKGROUND

The following allegations are taken from the FAC.

Plaintiff Dennis Hodges has been involved in law enforcement since 1976, when he began working as a corrections officer in Chicago. (FAC [Doc. 7] ¶ 17.) In 1979, he moved to California "and worked his way up through the California Department of Corrections, retiring as a special agent/captain in 2008." (*Id.* ¶ 19.)

"In addition to his public service, Mr. Hodges has dedicated his life to ministry." (FAC ¶ 34.) In 2001, he was "appointed Chaplain of the San Diego Police Department... and joined New Creation Church in 1993, where he served as president of the usher board." (*Id.* ¶ 35.) "He then served as an associate pastor from 2005 to 2011," and in "May of 2011, Mr. Hodges was directed by God to plant the Church of Yeshua Ha Mashiach (Jesus the Messiah)." (*Id.* ¶¶ 36, 37.) Hodges "believes that God defines human sexuality, and that men and women are created in the image of God. His religion also holds that God created two sexes: male and female." (*Id.* ¶

38.) “He is unashamed of his Christian beliefs and has vocalized that transgenderism is a sin like adultery and fornication.” (*Id.* ¶ 40.)

On July 25, 2017, Hodges was appointed to the Citizens Advisory Board on Police/Community Relations (the “Advisory Board”). (FAC [Doc. 7] ¶¶ 12, 22.) Members of the Advisory Board “serve until his or her successor is duly appointed and qualified.” (*Id.* ¶ 30, citing San Diego Municipal Code (S.D.M.C.) § 26.0802(a).) The Advisory Board’s purpose is to “study, consult and advise the Mayor, City Council and City Manager on Police/Community Relations crime prevention efforts.” (*Id.* ¶ 23.)

S.D.M.C. § 26.0801(a).) The Advisory Board then “recommend[s] and review[s] policies and programs designed to make law enforcement sensitive, effective and responsive to the needs of the City.” (*Id.* ¶ 24, *citing* S.D.M.C. § 26.0801(b).)

In addition to serving on the Advisory Board, “[o]n or about March 2021, Joel Anderson, San Diego County Supervisor, asked Mr. Hodges to join the [San Diego County Human Relations Commission (the ‘Commission’)] because he would bring diversity to the group as an African American.” (FAC ¶ 32.) Hodges agreed to serve, and the Commission subsequently appointed him. (*Id.* ¶ 33.)

“On November 9, 2021, during Transgender Awareness Month, the Commission discussed an agenda item to amplify the voices of the San Diego transgender community.” (FAC ¶ 42.) “Pursuant to the Commission’s Rules of Order, Mr. Hodges abstained from voting on the motion because of his sincerely held religious belief that humans are to

embrace their biological and creational differences as men and women.” (*Id.* ¶ 43.)

“On or around April 2022, the Commission revised their Bylaws and added a code of conduct which was approved by the Board of Supervisors.” (FAC ¶ 44.) Under the Code of Conduct, “Commissioners must refrain from discriminatory and harassing remarks.” (*Id.*)

“On May 31, 2022, the Commission, spearheaded by Commission Chair Ellen Nash, circulated a notice of removal of Mr. Hodges to all Commissioners.” (FAC ¶ 46.) “Ms. Nash claimed, in her letter, that Mr. Hodges violated the Commission’s Code of Conduct and Bylaws by saying ‘discriminatory and harassing remarks’ towards members of the LGBTQ community.” (*Id.* ¶ 47.) Hodges alleges the effort to remove him was “premised on a disingenuous narrative that his actions and statements were ‘discriminatory’ and ‘hateful’ towards the transgender community.” (*Id.* ¶ 48.)

“On June 9, 2022, the Commission held a special meeting to remove Mr. Hodges from the Commission.” (FAC ¶ 56.) “At the June 2022 special meeting, a majority of the Commissioners refused to remove Mr. Hodges.” (*Id.* ¶ 57.) “At a board meeting in June 2023, Commissioner Nicole Murray expressed to the Commissioners that Mr. Hodges should not be on the Commission because of his remarks on the LGBTQ community.”

(*Id.* ¶ 58.) “In July 2023, the San Diego Union Tribune (‘Tribune’) wrote an editorial encouraging the removal of Mr. Hodges from the Commission,” which

Hodges alleges was influenced by Commissioners Nash and Murray.” (*Id.* ¶¶ 59, 60.)

On August 8, 2023, “Mayor Tod Gloria used his veto authority, pursuant to Charter of the City of San Diego Section 280, to veto the reappointment of Mr. Hodges to the Advisory Board because of his comments regarding the transgender community.” (FAC ¶ 61.) “In his memorandum vetoing Mr. Hodges’ reappointment, Mayor Gloria explained that because Mr. Hodges ‘has made repeated concerning public comments about LGBTQ people – specifically, the transgender community,’ he could not ‘support [Mr. Hodges] reappointment to a Board tasked with promoting a positive relationship between the Police Department and the community it serves.’” (*Id.* ¶ 62.)

Hodges contends the “Mayor’s veto of Mr. Hodges’ reappointment to the Advisory Board was not based on Mr. Hodges’ credentials (or lack thereof). Indeed, Hodges has a lengthy background in not only public service, but law enforcement. He is well-suited to serve on the Advisory Board.” (FAC ¶ 63.) He also contends his “decision to abstain from voting on a Commission agenda item and his public comments related to his abstention did not interfere with the efficient operation of the Advisory Board.” (*Id.* ¶ 64.) Further, Hodges alleges the “Commission and Advisory Board are two separate entities, and his actions and statements were solely related to his position on the Commission.” (*Id.* ¶ 65.)

On November 8, 2023, Hodges filed this lawsuit. (See Compl. [Doc. 1].) On December 7, 2023, Defendant Mayor Todd Gloria filed a motion to dismiss. (See MTD [Doc. 5].) On December 28, 2023,

Hodges filed the FAC, which asserts three causes of action under 42 U.S.C. § 1983 for: (1) Violation of the Free Exercise Clause of the First Amendment to the United States Constitution; (2) Violation of the Free Speech Clause of the First Amendment to the United States Constitution; and (3) First Amendment Retaliation. (See FAC.) On January 11, 2024, Mayor Gloria filed the pending motion to dismiss the FAC.¹

II. STANDARD

The Court must dismiss a cause of action for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). A complaint may be dismissed as a matter of law either for lack of a cognizable legal theory or for insufficient facts under a cognizable theory.

Balisteri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1990). In ruling on the motion, a court must “accept all material allegations of fact as true and construe the complaint in a light most favorable to the non-moving party.” *Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1249 (9th Cir. 2007).

A complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Supreme Court has interpreted this rule to mean that “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v.*

¹ Because Hodges filed the FAC, the motion to dismiss the complaint [Doc. 5] is moot.

Twombly, 550 U.S. 554, 555 (2007). The allegations in the 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 *Twombly*, 550 U.S. at 570).

Well-pled allegations in the complaint are assumed true, but a court is not required to accept legal conclusions couched as facts, unwarranted deductions, or unreasonable inferences. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Sprowell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

III. DISCUSSION

Although the FAC asserts three separate causes of action, each is premised on the theory that Mayor Gloria retaliated against Hodges based on the exercise of his First Amendment rights. To prevail on his First Amendment retaliation claims, Hodges must state facts establishing the following: “(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 protected activity; and (3) there was a substantial causal relationship between the constitutionally protected activity and the adverse action.” *Blair v. Bethel School District*, 608 F.3d 540, 543 (2010 9th Cir.). However, “[i]t is settled ... that an appointed public official can be removed for engaging in otherwise protected First Amendment activity if ‘political affiliation is an appropriate requirement for the effective performance of the public office involved.’” *Lathus v. City of Huntington Beach*, 56 F.4th 1238, 1241 (9th Cir. 2023) (quoting *Hobler v. Brueher*, 325 F.3d 1145, 1154 (9th Cir.

2003)).

In *Branti v. Finkel*, 445 U.S. 507 (1980), the Supreme Court recognized for a second time that an appointed public official could be removed from their position for otherwise protected First Amendment activity. In *Branti*, the newly appointed Public Defender fired the assistant public defenders because they belonged to a different political party. The assistant public defenders sued claiming a First Amendment violation. The district court recognized that under the Supreme Court's decision in *Elrod v. Burns*, 427 U.S. 347 (1976), certain "policymaking, confidential employees" could be "discharged solely on the basis of their political affiliation." *Branti* at 1291. However, the district court ultimately concluded that the assistant public defenders did not fit within that category and thus enjoined the Public Defender from discharging plaintiffs.

The Supreme Court began its analysis by reaffirming that "party affiliation may be an acceptable requirement for some types of government employment." *Id.* at 1294 (*citing Elrod*, 427 U.S. at 351.) But the Court cautioned that "it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered" and that under some circumstances, "a position may be appropriately considered political even though it is neither confidential nor policymaking in character." *Id.* With respect to the assistant public defenders, the Court agreed that political affiliation was not an acceptable requirement because their "primary, if not the only responsibility... is to represent individual citizens in controversy with the State." *Id.* at 1295. In so doing,

an “indispensable element” of plaintiffs’ job was “the ability to act independently of the government and to oppose it in adversary litigation.” *Id.* (quoting *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).) Accordingly, “whatever policymaking occurs in the public defender’s office must relate to the needs of the individual client and not to any partisan political interests.” *Id.* “Under these circumstances,” the Court concluded that “it would undermine, rather than promote, the effective performance of an assistant public defender’s office to make his tenure dependent on his allegiance to the dominant political party.” *Id.*

In *Blair v. Bethel School District*, 608 F.3d 540, 546 (9th Cir. 2010), the Ninth Circuit faced a similar claim. There, the plaintiff sued the school board for First Amendment retaliation after it voted to oust him as its vice president because of his criticism of the school’s superintendent. It was undisputed that plaintiff’s statements about the superintendent were protected by the First Amendment and that the board’s decision to remove him as vice president was based on those statements. The court explained, however, that the case was “not a typical First Amendment case” because “the ‘adverse action’ [plaintiff] is challenging was taken by his peers in the political arena.” *Id.* Plaintiff’s “fellow Board members wanted a vice president who shared their views.

Because [plaintiff] didn’t, they removed him by a procedurally legitimate vote.” *Id.* at 543–544.

In affirming the district court’s dismissal of the plaintiff’s claim, the Ninth Circuit recognized that “more is fair in electoral politics than in other contexts” and explained that “we expect political

officials to cast votes in internal elections in a manner that is, technically speaking, retaliatory, i.e., to vote against candidates whose views differ from their own.” *Id.* at 544. “[T]o accept [plaintiff’s] argument is to hold that the First Amendment prohibits elected officials from voting against candidates whose speech or views they don’t embrace.” *Id.* at 544–545. The court also reasoned that there was “little difference between what the Board’s internal vote against [plaintiff] accomplished and what voters in a general public election might do if they too were disaffected by [plaintiff’s] advocacy.” *Id.* at 545. The court, therefore, concluded that “the First Amendment does not succor casualties of the regular functioning of the political process” *Id.* at 545.

In 2023, the Ninth Circuit decided a case analogous to the one brought by Hodges.

In *Lathus v. City of Huntington Beach*, 56 F.4th 1238 (9th Cir. 2023), the court considered whether the First Amendment protects a volunteer member on a municipal board from dismissal by the city councilperson who appointed her and is authorized under the city ordinance to remove her. Plaintiff Shayna Lathus was appointed by City Councilperson, Kim Carr, to the City’s Citizen Participation Advisory Board (“CPAB”). Under the governing municipal code, each councilperson appointed one member to the CPAB, whose mandate was to “provide citizen participation and coordination in the City’s planning processes” related to a Department of Housing and Urban Development block grant program. *Id.* The program addressed issues faced by low- and moderate-income households. *Id.* In carrying out its mandate, the CPAB held regular meetings to “assess

the needs of the community,” “evaluate and prioritize projects,” “obtain citizen input,” and “provide specific recommendations” to the City Council. *Id.*

After Lathus was appointed, she was photographed at an immigrants’ rights rally standing near individuals believed to be “Antifa.” *Id.* at 1239–40. Councilperson Carr instructed Lathus to write a public statement denouncing Antifa, which Lathus did believing she would remain on CPAB. However, Carr then removed Lathus from the board and Lathus sued claiming First Amendment retaliation. The district court dismissed, finding that “Carr was not politically powerless to disassociate herself from Plaintiff’s public actions through a process that authorized appointment and removal in Carr’s sole discretion.” *Id.* at 1240.

Although Blair did not “control the day” because it was factually distinguishable, the Ninth Circuit stated Blair was important because “it makes clear that the First Amendment rights of government officials are not absolute.” *Latus*, 56 F.4th at 1241. The court cited as an example the Supreme Court’s holding in *Elrod* that “employees in ‘policymaking positions’ may be dismissed for engaging in activities protected by the First Amendment so that ‘policies which the electorate has sanctioned are effectively implemented.’” *Id.* (citing *Elrod*, 427 U.S. at 372). The question presented was “whether ‘commonality of political purpose’ with Carr is an appropriate requirement for Lathus’s service on the CPAB.” *Id.* The court also instructed that in evaluating the issue, “where a statute establishes a position, the statute is likely to provide the best foundation for classifying it for . . . First Amendment purposes.” *Id.*

Based on its review of the relevant city ordinance governing CPAB, the court held that “[b]ecause a CPAB member is thus ‘an adviser who formulates plans for the implementation of broad goals,’ [citation omitted], a councilperson is entitled to an appointee who represents her political outlook and priorities.” *Lathus*, at 1242 (citing *Elrod*, 427 U.S. at 368). This holding was based on two findings. First that CPAB’s members spoke to “‘the public and to other policymakers on behalf of the official’ who appointed them,” which indicated “responsiveness to partisan politics and political leaders.” *Id.* at 1242. This finding was based on (1) the councilperson’s ability to remove without cause the CPAB member who the councilperson appointed; (2) CPAB provided advice on matters of policy; and (3) CPAB solicited public feedback. *Id.* Second, the court found that under the municipal code, CPAB was a “conduit between the community and City Council.” *Id.* This was based on (1) CPAB providing advice on a “vital political issue,” namely the “provision of housing to low and middle income city residents;” (2) CPAB’s directive to “‘assess the needs of the community,’ ‘evaluate and prioritize projects,’ ‘obtain citizen input,’ and ‘provide specific recommendations’ to the City Council”; and (3) CPAB conducted “‘regular monthly meetings’ open to the public.” *Id.*

Accordingly, the Ninth Circuit affirmed the dismissal of plaintiff’s First Amendment claims.

Here, the Advisory Board was established by and is governed by San Diego Municipal Code (S.D.M.C.) §§ 26.0801, et seq. Thus, these sections guide the evaluation of whether commonality of political purpose is an appropriate requirement for

service on the Advisory Board.

S.D.M.C. § 26.0802(a) provides that the Advisory Board consists of fifteen members, all of whom “shall be appointed by the Mayor and confirmed by the Council.”

S.D.M.C. § 26.0802(a). Members then serve for “a two-year term and each member shall serve until his or her successor is duly appointed and qualified.” *Id.* However, members who miss three or more consecutive meetings are deemed to have forfeited their membership on the Board “unless good and valid reasons... are... approved by the Council.” *Id.* Additionally, under section 280 of Article XV of the San Diego City Charter—passed by voters in 2004 to implement the “Strong Mayor” form of governance, see City Charter § 250—the “Mayor shall have veto power over all resolutions and ordinances passed by Council,” with certain exceptions. Significantly, Hodges does not argue, and this Court is not aware of any municipal code or City Charter provision limiting this veto power in the context of municipal board reappointments. Accordingly, these provisions establish that the Mayor appoints and may veto without cause the reappointment of Advisory Board members.

Next, S.D.M.C. § 26.0801(a) states that the purpose and intent of the Advisory Board is to “study, consult and advise the Mayor, City Council and City Manager on Police/Community Relations crime prevention efforts.” Subsections (b) and (c) state that the “Board shall function as a method of community participation in recommending and reviewing policies, practices and programs designed to make law

enforcement sensitive, effective and responsive to the needs of the City” and the “Board shall promote and encourage open communication and cooperation between the Police Department and residents....”

Finally, section 26.0803 lists some of the Advisory Board’s “Duties and Functions.” These include:

- (c) Make specific recommendations to the Mayor, City Council and City Manager on actions that can be taken to improve relations between police and community.
- (d) Review Police Academy and in-service training in human relations and make recommendations to the Mayor, City Council and City Manager.
- (e) Develop and recommend strategies to the Mayor, City Council and City Manager for improving City-wide crime prevention efforts.
- (f) Develop and recommend to the Mayor, City Council and City Manager strategies for increasing citizen participation in crime prevention efforts.
- (g) Develop and recommend to the Mayor, City Council and City Manager education programs

designed to inform the public of its rights and responsibilities when coming into contact with police officers.

- (h) Develop and make recommendations to the Mayor, City Council and City Manager with respect to community oriented policing.

Based on the above provisions, the Court finds that “commonality of political purpose” with the Mayor is an appropriate requirement for service on the Advisory Board. Just as in *Lathus*, the San Diego Municipal Code and City Charter establish that Advisory Board members speak to the public and other policymakers on behalf of the Mayor. This finding is supported by the same facts that existed in *Lathus*: (1) the Mayor appoints all Advisory Board members, including Hodges, and is authorized to veto without cause their reappointment; (2) Advisory Board members provide advice on matters of policy on a number of issues involving police and community relations; and (3) by functioning “as a method of community participation in recommending and reviewing policies,” the Advisory Board is clearly charged with seeking public feedback. Additionally, under the San Diego Municipal Code, the Court finds the Advisory Board is a conduit between the community and Mayor’s office. This finding is also supported by the same factors that existed in *Lathus*: (1) the Advisory Board provides advice on a vital political issue, specifically Police/Community Relations crime prevention efforts (*S.D.M.C.* §

26.0801(a)); (2) the Advisory Board's directive is to "study, consult and advise," "function as a method of community participation in recommending and reviewing policies, practices and programs," "actively encourage and foster citizen participation in crime prevention efforts," and provide specific recommendations on a number of issues to the Mayor, City Council and City manager (*Id.* § 26.0803 (c)–(h)); and (3) the Advisory Board's meetings are open to the public.²

In short, each of the facts relied upon by the Ninth Circuit in *Lathus* in holding that commonality of political purpose is an appropriate requirement for CPAB also exists with respect to the Advisory Board. For these reasons, the Court finds that as a matter of law, Hodges cannot maintain his First Amendment retaliation claims against Mayor Gloria.

IV. LEAVE TO AMEND

Hodges requests leave to amend. Leave to amend should be given unless it would be futile. *Lathus*, 56 F.4th at 1243 (citing *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004)).

As set forth above, the S.D.M.C. and City Charter establish that commonality of political purpose is an appropriate requirement for Advisory Board members. Based on this finding, the Court is unaware and Hodges has not identified any facts Hodges could allege that would state a claim for First

² See <https://www.sandiego.gov/cab/meetinginfo>; see also <https://www.youtube.com/channel/UC-4gY2k1D1ikzb25QM-O3eg/streams>. The Court takes judicial notice of these pages under Fed.R.Evid.201(b).

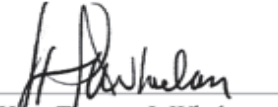
Amendment retaliation. Accordingly, leave to amend is not warranted.

V. SUMMARY AND CONCLUSION

For the reasons discussed above, the Court **GRANTS** Defendant's motion to dismiss the FAC [Doc. 8] without leave to amend.

IT IS SO ORDERED.

Dated: June 24, 2024


Hon. Thomas J. Whelan
United States District Judge

**APPENDIX C - ORDER DENYING
MOTION FOR RECONSIDERATION
FILED OCTOBER 22, 2024**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DENNIS HODGES,

Plaintiffs,

v.

TODD GLORIA, both in
his personal capacity and
in his official capacity as
the Mayor of the City of
San Diego,

Defendant.

Case No.: 23-cv-
2065 W (MSB)

**ORDER
DENYING
PLAINTIFF'S
MOTION FOR
RECONSIDER
ATION [DOC.
15]**

Pending before the Court is Plaintiff Dennis Hodges' motion for reconsideration of this Court's Order Granting Defendant's Motion to Dismiss the First Amended Complaint under Federal Rule of Civil Procedure 12(b)(6) (the "Order"). Defendant Todd Gloria, the Mayor of the City of San Diego, opposes. The Court decides the matter on the papers submitted and without oral argument. See Civ. L.R. 7.1(d.1). For the reasons stated below, the Court **DENIES** the motion [Doc. 15].

I. BACKGROUND

As set forth in the Order, this lawsuit arises

from Mayor Gloria’s exercise of his authority to veto Dennis Hodges’ reappointment to the Citizens Advisory Board on Police/Community Relations (the “Advisory Board”). Hodges served on the board since 2017. (*FAC* [Doc. 7] ¶ 3.) In addition, Hodges served on the San Diego County Human Relations Commission (the “Commission”) since 2021. (*Id.*)

Mayor Gloria’s decision to veto Hodges’ reappointment stems from Hodges’ public statements related to his abstention from voting on a matter before the Commission. According to the *FAC*, “[o]n November 9, 2021, during Transgender Awareness Month, the Commission discussed an agenda item to amplify the voices of the San Diego transgender community.” (*FAC* ¶ 42.) During the meeting, Hodges exercised his right to abstain from voting on a “motion.” (*Id.**) Hodges then made “public comments related to his abstention,” which certain Commission members believed were “‘discriminatory’ and ‘hateful’ toward the transgender community.” (*Id.* ¶¶ 6, 47, 58.†) Hodges, a former Chaplain of the San Diego Police Department and associate pastor, contends his abstention was based on his religious beliefs. (*Id.* ¶¶ 5, 40, 43, 53.)

The *FAC* further alleges that on June 9, 2022, the Commission held a special meeting to remove Hodges “because of his remarks on the LGBTQ community.” (*FAC* ¶ 58.) The attempt to remove

* The *FAC* provides no information regarding the substance of “the motion.”

† The *FAC* provides no information regarding the substance of Hodges’ public statements, except that they “related to his abstention” from “voting on [the] agenda item relating to the transgender community.” (*FAC* ¶¶ 6, 5.)

Hodges failed. (*Id.* ¶ 7.) Then in July 2023, the San Diego Union Tribune wrote an editorial encouraging the removal of Mr. Hodges from the Commission. (*Id.* ¶ 59.)

On August 8, 2023, Defendant San Diego Mayor Todd Gloria vetoed Hodges’ reappointment to the Advisory Board. (FAC ¶¶ 3, 61.) “In his memorandum vetoing Mr. Hodges’ reappointment, Mayor Gloria explained that because Hodges ‘has made repeated concerning public comments about LGBTQ people—specifically, the transgender community,’ he could not ‘support [Mr. Hodge’s] reappointment to a Board tasked with promoting a positive relationship between the Police Department and the community it serves.’” (*Id.* ¶ 62, bracket in original.)

On November 8, 2023, Hodges filed this lawsuit. (Compl. [Doc. 1].) The FAC asserts three causes of action for (1) Deprivation of the Free Exercise of Religion; (2) Deprivation of the Freedom of Speech; and (3) First Amendment retaliation. Though the FAC asserts three separate causes of action, they are all premised on the theory that Mayor Gloria’s veto of Hodges’ reappointment to the Advisory Board violated Hodges’ First Amendment rights. (See FAC ¶¶ 75–79 (1st Cause of Action), 92, 93, 95, 100, 104, 105 (2nd Cause of Action), 112, 116, 117 (3rd Cause of Action).)

On January 11, 2024, Mayor Gloria filed a motion to dismiss each of the three causes of action in the FAC. Hodges opposed the motion. On June 24, 2024, this Court issued the Order dismissing Hodges’ FAC without leave to amend. The Order primarily

relied on the Ninth Circuit’s decision in *Lathus v. City of Huntington Beach*, 56 F.4th 1238 (9th Cir. 2023). As explained in the Order, under *Lathus*, whether Mayor Gloria violated Hodges’ First Amendment rights depends on whether the Advisory Board position is one for which “commonality of political purpose” with the mayor is an appropriate requirement. *Id.* at 1241 (“It is settled ... that an appointed public official can be removed for engaging in otherwise protected First Amendment activity if ‘political affiliation is an appropriate requirement for the effective performance of the public office involved.’”) (*quoting Hobler v. Brueher*, 325 F.3d 1145, 1154 (9th Cir. 2003)). In evaluating this issue, “where a statute establishes a position, the statute is likely to provide the best foundation for classifying it for . . . First Amendment purposes.” *Id.*

Applying this standard, the Order looked primarily to the statute that established the Advisory Board, San Diego Municipal Code §§ 26.0801, et seq., as well as City Charter § 250 governing the mayor’s veto authority. (See Order 10:4–7.) Under these provisions, the Order first found the mayor appoints and may veto without cause the reappointment of all Advisory Board members. (*Id.* 10:20–21.) The Order also found that under the municipal code, Advisory Board members speak to the public and other policymakers on behalf of the mayor and the Advisory Board serves as a conduit between the community and mayor’s office. (*Id.* 11:21–23, 12:1–2.). Because similar findings led to the Ninth Circuit’s determination that there was no First Amendment violation in *Lathus*, the Order concluded that commonality of political purpose with the mayor is an

appropriate requirement for service on the Advisory Board. (*Id.* 12:11–14.) The Order, therefore, dismissed without leave to amend all causes of action.

II. DISCUSSION

The motion for reconsideration argues the Order committed clear error in two respects. First, Hodges argues the “Court improperly construed Pastor Hodges’ sincerely held religious beliefs as political rhetoric not protected by the First Amendment.” (Recon. Mot. [Doc. 15-1] 5:3–4.) Second, Hodges argues the “Court committed clear error when it failed to opine on Pastor Hodges” two causes of action for violation of the First Amendment’s Free Exercise Clause and Free Speech Clause. (*Id.* 8:9–11.) The Court is not persuaded by either argument.

A. The Order Did Not Misconstrue the FAC’s Allegations.

Hodges argues the Order improperly misconstrued his religious beliefs as political rhetoric. (Recon. Mot. 5:3–4.) As a result, Hodges argues the Order erred in relying on cases involving “whether a public officer could be removed from public office for his” political speech—i.e., *Lathus*, 325 F.3d 1145 and *Blair v. Bethel School District*, 608 F.3d 540, 546 (9th Cir. 2010)—as opposed to cases involving religious beliefs. (*Id.* 5:25–6:6.) The Court disagrees for two reasons.

First, Hodges’ contention that the Order misconstrued his religious beliefs as political rhetoric lacks merit. His argument assumes that his public comments that led to Mayor Gloria’s veto of his reappointment involved only his religious beliefs. The FAC establishes otherwise. The FAC alleges that

Mayor Gloria's veto arose from Hodges' public comments regarding his refusal to vote on "the motion" involving the transgender community. (See FAC ¶¶ 5, 6, 42, 43, 53, 58, 61, 62.) While Hodges' abstention and related public statements were motivated by his religious beliefs, they were also political conduct and speech because they involved his work on the Commission. Indeed, the FAC recognizes that his statements were also political to the extent it alleges Mayor Gloria "exercised his veto authority in a discriminatory manner" because he had not previously "exercised his veto authority against other commissioners who express differing political and social views in support of transgenderism." (*Id.* ¶ 78, emphasis added.) Thus, Hodges' attempt to characterize his statement as involving only his religious beliefs lacks merit.

Second, Hodges' motion for reconsideration is based on a new argument that was not raised in his opposition to the motion to dismiss. Hodges now contends the Order erred in "adopt[ing] the precedent of a string of cases that dealt solely with a plaintiff's political affiliation" and that did not "address dispositive facts related to religious beliefs." (Recon. Mot. 8:1–3.) But in opposing the motion to dismiss, Hodges never argued that *Blair* or *Lathus* did not apply because of the type of First Amendment speech at issue. Instead, Hodges' opposition argued Blair did not control because of factual distinctions with the municipal board positions at issue in each case and how each plaintiff lost the position:

Unlike Blair, Pastor Hodges was not removed from a "titular position" through an electoral process, and he did not retain "the full range of rights and

prerogatives” upon his removal from his Advisory Board position. See 608 F.3d at 544; FAC, ¶¶ 55-25, 29, 61. Blair was elected to his vice president position while Pastor Hodges ‘was not an elected official, but rather an appointed volunteer in public service.” *Lathus*, 56 F.4th at 1241 (differentiating plaintiff *Lathus* from plaintiff Blair). As such, his “volunteer status does not by itself remove First Amendment protection.” *Id.*

The Blair case might be applicable if Pastor Hodges had been removed from his position as a Commissioner and was challenging the conduct of the Commission rather than Defendant’s conduct. Indeed, Pastor Hodges’ fellow commissioners exercised their electoral process to attempt to remove Pastor Hodges from the Commission, but they failed to remove him when the majority of the Commissioners refused to remove Pastor Hodges. FAC, ¶¶ 46-47, 56-57.

In contrast, Pastor Hodges was a volunteer appointed by the city council to serve on the Advisory Board, but he was denied his reappointment, not by an electoral process, but by a single individual—Defendant. See FAC, ¶¶ 22, 30. By wielding his veto authority against Pastor Hodges, Defendant effectively removed Pastor Hodges from his Advisory Board position, thereby chilling his speech as an Advisory Board member, and revoking the full range of his rights and prerogatives as an Advisory Board member.

(Opp’n to MTD [Doc. 9] 7:24–26.) With respect to *Lathus*, Hodges attempted to distinguish the case based on the provisions of the relevant municipal

codes, not because the case did not involve religious beliefs. Hodges began by acknowledging that *Lathus* was analogous to the extent the plaintiff—like Hodges—was a volunteer, but Hodges then argued the “similarities end there” because:

Pastor Hodges’ FAC shows that he was not the “public face” of Defendant. FAC, ¶¶ 25, 27-29. Indeed, unlike in *Lathus*, in which the person who removed *Lathus* was also the person who appointed *Lathus*, the City Council appointed Pastor Hodges and Defendant—not City Council—effectively removed Pastor Hodges from his position. FAC, ¶¶ 22, 61. Further, in *Lathus*, the city councilperson was permitted to remove an appointment without cause. 56 F.4th at 1244. Here, SDMC provides that an Advisory Board member serves until his successor is duly appointed and qualified. *Id.*, ¶ 30. Additionally, in *Lathus*, the CPAB solicited public feedback and spoke to the public on behalf of the official who appointed them. 56 F.4th at 1242. In contrast, the Advisory Board is responsible for studying, consulting, and advising the Mayor, City Council and City Manager—not the public. See FAC, ¶¶ 23-24. Further, Pastor Hodges neither spoke on behalf of the Mayor nor implemented any policies on behalf of the Mayor. FAC, ¶ 27. The cited municipal code sections in Defendant’s Motion do not suggest anything different. Mot. at 18. The purpose of the Advisory Board is to advise the Mayor, City Council, and City Manager, including by making recommendations to those entities on how to assist with informing the community of its rights and responsibilities. FAC, ¶¶ 23-24.

(*Id.* 8:27–28, 99:14–10:2.) Thus, Hodges’ opposition never argued *Blair* or *Lathus* were distinguishable because the cases involved political affiliation and not religious beliefs.

In fact, Hodges’ opposition also argued that this “case is more akin to *Hunt v. Cnty. of Orange*, 672 F.3d 606 (9th Cir. 2012).” (Opp’n to MTD 10:3–4.) What is notable about *Hunt* is that like *Blair* and *Lathus*, it also involved an alleged First Amendment violation related to plaintiff’s political beliefs, and not religious beliefs. Hodges’ reliance on *Hunt* confirms he was not attempting to distinguish *Blair* and *Lathus* based on the type of First Amendment activity at issue. Because Hodges’ motion for reconsideration is based on a new legal theory not raised in opposing the motion to dismiss, he has failed to demonstrate legal error. *See Motorola, Inc. v. J.B. Rodgers Mechanical Contractors*, 215 F.R.D. 581, 582 (D.Ariz. 2003) (citations omitted) (“Motions for reconsideration are disfavored ... and are not the place for parties to make new arguments not raised in their original briefs. Nor is reconsideration to be used to ask the Court to rethink what it has already thought.”)

For these reasons, the Order did not misconstrue the allegations in the FAC or erroneously rely on *Lathus* in findings that “commonality of political purpose” with the mayor is an appropriate requirement to serve on the Advisory Board.

B. The Order Did Not Err in Dismissing all of Hodges’ claims.

Hodges argues the “Court committed clear error when it failed to opine on Pastor Hodges” causes

of action for violation of the First Amendment’s Free Exercise Clause and Free Speech Clause. (Recon. Mot. 8:9–11.) In support of this argument, Hodges contends Mayor Gloria only challenged the third cause of action for First Amendment retaliation. (*Id.* 8:16–19.[‡]) Hodges also argues, for the first time, that the Free Exercise and Free Speech causes of action should not have been dismissed because the elements differ from his retaliation cause of action. Hodges’ arguments are unavailing.

First, Hodges’ contention that Mayor Gloria’s motion to dismiss only challenged the retaliation cause of action is false. Because all three causes of action are based on the same alleged wrongful conduct (see FAC ¶¶ 75–79, 92, 93, 95, 100, 104, 105, 112, 116, 117), Mayor Gloria’s notice of motion stated that each cause of action should be dismissed because “Defendant’s veto of Plaintiff’s reappointment to the [Advisory Board] did not violate Plaintiff’s First Amendment rights.” (MTD Notice [Doc. 8] ¶¶ 2, 3, 4.) Mayor Gloria’s memorandum of points and authorities then repeated the same argument:

the crux of all three of Hodges’ causes of action is that the loss of his position on the Advisory Board was allegedly in response to or in retaliation for Hodges’ “protected speech.” However,... the speech was not protected....

(MTD P&A [Doc. 8-1] 9:17–21.) In the next

[‡] Hodges’ opposition to the motion to dismiss also asserted that “Defendant does not attempt to challenge the sufficiency of Pastor Hodges’ constitutional claims” (even though the FAC only alleges constitutional claims). (Opp’n to MTD 6:8–9.) As explained below, Hodges’ assertion is false.

section titled, “HODGES CANNOT STATE A CLAIM FOR RELIEF BASED ON THE VETO OF HIS RE-APPOINTMENT TO THE POLITICAL ‘ADVISORY BOARD’ BY THE PERSON WHO APPOINTED HIM,” the motion argued that *Lathus* foreclosed a First Amendment claim. (*Id.* 9:22–16:17.) The motion then concluded that because “Mayor Gloria could... veto Hodges’ reappointment ‘for lack of political compatibility,’ ... Mayor Gloria respectfully requests that the FAC be dismissed in its entirety without leave to amend.” (*Id.* 22:17–21.) Thus, Hodges’ contention in the motion for reconsideration that Mayor Gloria only moved to dismiss the third cause of action is false.

Second, Hodges’ contention that the Order did not “opine” on all of his causes of action lacks merit. In opposing Mayor Gloria’s motion to dismiss, Hodges (1) did not dispute that all of his causes of action were based on the same alleged wrongful conduct and (2) did not address how the first or second causes of action could survive if Mayor Gloria’s veto did not violate the First Amendment. Instead, the opposition argued *Lathus* and *Blair* were factually distinguishable, and concluded that “because Pastor Hodges’ FAC presents sufficient facts to demonstrate that he is a public servant volunteer protected by the First Amendment, his claims should be allowed to move forward.” (*Id.* 10:17–19, emphasis added.) In light of the parties’ arguments, the Order’s analysis began by recognizing that “[a]lthough the FAC asserts three separate causes of action, each is premised on the theory that Mayor Gloria retaliated against Hodges based on the exercise of his First Amendment rights.” (Order 6:2–4.) Because (1) the

Court found that under *Lathus* Mayor Gloria's veto did not violate the First Amendment, and (2) Hodges did not dispute that all of "his claims" were premised on the same alleged wrongful conduct, the Order dismissed all three causes of action without leave to amend. (Order 13:2–3.)

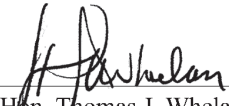
In the motion for reconsideration, Hodges now contends the Court committed clear error by dismissing the first and second causes of action because "[t]he elements of a free exercise, free speech, and First Amendment retaliation claim are different and should be treated separately." (Recon. Mot. 9:16–18.) Hodges then discusses the differences with the three causes of action. (*Id.* 9:18–10:14.) But this argument was never raised in Hodges' opposition to the motion to dismiss. Because a motion for reconsideration is "not the place for parties to make new arguments not raised in the original briefs," Hodges' argument is unavailing. *Motorola, Inc.*, 215 F.R.D. at 582 (citations omitted).

III. SUMMARY & CONCLUSION

For the reasons discussed above, the Court GRANTS Defendant's motion to dismiss the FAC [Doc. 8] without leave to amend.

IT IS SO ORDERED.

Dated: October 22, 2024



Hon. Thomas J. Whelan
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

DENNIS HODGES, an
individual,

Plaintiff - Appellant,

v.

TODD GLORIA, both in
his personal capacity and
in his official capacity as
the Mayor of the City of
San Diego,

Defendant - Appellee.

No. 24-7093

D.C. No.

3:23-cv-02065-W-MSB

Southern District of
California, San Diego

ORDER

Before: CALLAHAN and KOH, Circuit
Judges, and BARKER, District Judge.*

Judge Callahan and Judge Koh vote to deny
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. 40. The petition for
rehearing en banc is denied.

* The Honorable J. Campbell Barker, United States District
Judge for the Eastern District of Texas, sitting by designation.