

**Court of Appeal No. 24-7093**

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

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*DENNIS HODGES, an individual  
Appellant*

v.

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

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*Appeal from the Order of the United States District Court  
for the Southern District of California  
Case No. 3:23-cv-02065-JW-MSB  
The Honorable Judge Thomas J. Whelan, District Judge*

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***APPELLANT'S OPENING BRIEF***

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to the disclosure requirements of Federal Rule of Appellate Procedure 26.1, Dennis Hodges declares that he is an individual and, as such, is not a subsidiary or affiliate of a publicly owned corporation and there is no publicly held corporation that owns ten percent or more of any stock issued by him.

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## I. INTRODUCTION

“Respect for religious expressions is indispensable to life in a free and diverse Republic – where those expressions . . . manifest through the spoken word or a bowed head.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 (2022). The Free Exercise Clause provides that “Congress shall make no law . . . prohibiting the free exercise” of religion. U.S. Const. amend. I. The First Amendment “protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life . . .” *Kennedy*, 597 U.S. at 524.

Appellant Dennis Hodges is a devoted pastor and public servant who has committed his life to serving others. With years of experience in ministry, Pastor Hodges has faithfully pastored a church and cared for his congregation for the past 14 years. Beyond his ministry work, he has made significant contributions to his community, serving as a corrections officer, a captain with the California Department of Corrections, a chaplain with the San Diego Police Department, a volunteer member of the San Diego Citizens Advisory Board on Police/Community Relations, and as a Commissioner on the San Diego County Human Relations Commission.

Despite his years of dedicated service and active community involvement, San Diego Mayor Todd Gloria retaliated against Pastor Hodges for holding religious beliefs that he disfavored. Mayor Gloria removed Pastor Hodges from his unpaid, voluntary advisory board position, solely for expressing his religious convictions regarding gender identity. The First Amendment, United States Supreme Court precedent, and this Court’s precedent protect Pastor Hodges’ right to express his religious beliefs. No public servant should fear retaliation simply for holding religious beliefs, even if those beliefs are unpopular. Mayor Gloria established an

unconstitutional religious test for holding a public position – an action that the United States Supreme Court has explicitly prohibited. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (“We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person ‘to profess a belief or disbelief in any religion.’”). This Court should uphold Pastor Hodges’ First Amendment rights and overturn the District Court’s decision.

## II. JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 because Appellant’s claims arise under the United States Constitution, and pursuant to 28 U.S.C. § 1343 because relief is sought under 42 U.S.C. § 1983. On November 21, 2024, Appellant filed a timely Notice of Appeal of the District Court’s June 24, 2024, Order granting Appellee’s Motion to Dismiss the First Amended Complaint following the District Court’s denial of Appellant’s Motion for Reconsideration. *See* Fed. R. App. P. 4(a)(4). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## III. ISSUES PRESENTED

- Does the policymaker exception to government terminations apply to Pastor Hodges when he held an unpaid, voluntary advisory board position, did not represent the elected official, was not appointed by the elected official, and did not participate in policy implementation.
- Does the categorical application of the policymaker exception, which is contrary to every other sister circuit court’s approach, infringe upon a public servant’s First Amendment rights when the speech at issue is religious in nature and is unrelated to the public servant’s job responsibilities.

- Did Respondent Mayor Gloria create an unconstitutional religious test for participation in public service.

#### IV. STATEMENT OF THE CASE

##### A. Background

###### 1. *Pastor Hodges' Ministry and Public Service*

Pastor Hodges' has dedicated his life to ministry and public service. 1 ER 105, 107, ¶¶ 17, 34. In 1993, he joined New Creation Church where he served as the president of the usher board. 1 ER 107, ¶ 35. In 2001, he was appointed as the chaplain of the San Diego Police Department. 1 ER 107, ¶ 35. From 2005 to 2011, he served as an associate pastor before planting his own church, the Church of Yeshua Ha Mashiach (Jesus the Messiah.). 1 ER 107, ¶¶ 36, 37. Since 2011, Pastor Hodges has been the lead pastor of the church. 1 ER 107, ¶ 37.

Pastor Hodges sincerely believes that God has created two sexes: male and female. 1 ER 107, ¶ 38. Pastor Hodges “believes that God defines human sexuality, and that men and women are created in the image of God. 1 ER 107, ¶ 38. Many of Pastor Hodges religious beliefs run contrary to some contemporary thought, including his belief that transgenderism is a sin in the same way fornication or adultery is a sin. 1 ER 107, ¶ 40.

Pastor Hodges has also committed his professional life to public service. Pastor Hodges started working in the justice system in 1976, beginning as a corrections officer in Chicago. 1 ER 105, ¶ 17. In 1979, he moved to California and worked his way through the ranks eventually reaching the position of special agent/captain, a position he retired from in 2008. 1 ER 106, ¶ 19.

On July 25, 2017, the San Diego City Council appointed Pastor Hodges to the Citizens Advisory Board on Police/Community Relations (the “Police Advisory Board”). 1 ER 105, 107, ¶¶ 12, 22. The Police Advisory Board’s purpose is to “study,

consult and advise the Mayor, City Council and City Manager on Police/Community relations crime prevention efforts.” 1 ER 106, ¶ 23; San Diego Municipal Code (“SDMC”) § 26.0801(a). The Police Advisory Board can also “recommend and review policies and programs to make law enforcement sensitive, effective and responsive to the needs of the City. 1 ER 106, ¶ 24 (citing SDMC § 26.0108(b)).

In March 2021, San Diego County Supervisor Joel Anderson asked Pastor Hodges to join the San Diego County Human Relations Commission (“County Commission”). 1 ER 107, ¶ 32. Pastor Hodges was asked to serve, in part, because, as an African American, he would bring diversity to the group. 1 ER 107, ¶ 32.

## 2. *Pastor Hodges Removed from the Police Advisory Board*

In November 2021, during transgender awareness month, some members of the County Commission sought to amplify the voices of the San Diego transgender community and held a vote on a motion to further that purpose. 1 ER 108, ¶¶ 42, 43. Because of Pastor Hodges’ sincerely held beliefs on the topic, he abstained from the vote altogether. 1 ER 108, ¶¶ 42, 43.

When asked why he was abstaining from the vote, Pastor Hodges explained that it was part of his sincerely held religious beliefs that “humans are to embrace their biological and creational differences as men and women.” 1 ER 108, ¶ 43. Pastor Hodges did not advocate that any citizen be treated worse or harassed; he simply could not in good conscience take part in celebrating behavior that conflicts with his religious principles.

On June 9, 2022, the County Commission held a special meeting for the purpose removing Pastor Hodges from the commission. 1 ER 109, ¶ 56. However, a majority of the county commissioners refused to remove Pastor Hodges, and the attempt failed. 1 ER 109, ¶ 58.

Nonetheless, on August 8, 2023, nearly a year and a half after Pastor Hodges expressed his religious beliefs, Mayor Todd Gloria vetoed Pastor Hodges’

reappointment to the *Police Advisory Board* because of Pastor Hodges' beliefs that he voiced when serving on the *County Commission*, removing him from his volunteer Police Advisory Board position. 1 ER 109-10, ¶ 61. Mayor Gloria stated that he vetoed Pastor Hodges' reappointment to the Police Advisory Board because Pastor Hodges had made "concerning public comments about LGBTQ people—specifically, the transgender community." 1 ER 110, ¶ 62.

Pastor Hodges' religious views on transgenderism and his public explanation for abstaining from voting as a County Commissioner are unrelated to his role on the Police Advisory Board. 1 ER 110, ¶ 64. His beliefs did not impact his effectiveness as a member of the Police Advisory Board, and there is no evidence to suggest they would hinder or undermine Mayor Gloria's objectives concerning police and civilian relations.

## **B. Procedural History**

Pastor Hodges filed the present lawsuit on November 8, 2023. 1 ER 121. On December 12, 2023, Mayor Gloria filed a motion to dismiss. 1 ER 119-20. On December 28, 2023, Pastor Hodges filed his First Amended Complaint 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. 1 ER 103. On January 11, 2024, Mayor Gloria filed a new motion to dismiss the FAC. 1 ER 78-79.

Without oral argument, the District Court granted Mayor Gloria's Motion to Dismiss the First Amended Complaint for failure to state a claim upon which relief can be granted on June 24, 2024. 1 ER 48. The District Court relied on "the policymaker exception" to the First Amendment as first laid forth by the Supreme Court in *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion). See 1 ER 41. The policymaker exception allows for patronage dismissals (dismissals based solely on

the employee's political associations) of high-ranking officials who occupy positions in which "party affiliation is an appropriate requirement for the effective performance of the public office." 1 ER 41-42 (citing *Branti v. Finkel*, 445 U.S. 507, 518 (1980)).

Pastor Hodges moved for reconsideration on July 22, 2024, arguing that the District Court committed clear error by misconstruing Pastor Hodges' *religious* beliefs as *political* rhetoric and for granting Mayor Gloria's Motion to Dismiss without leave to amend despite neither Mayor Gloria nor the District Court addressing whether Pastor Hodges sufficiently pled his First Cause of Action (free exercise of religion). 1 ER 18-19. Without oral argument, the District Court denied the motion on October 22, 2024. 1 ER 12. Pastor Hodges properly brings this Appeal.

## V. SUMMARY OF THE ARGUMENT

Pastor Hodges has a First Amendment right to express his religious beliefs and convictions regarding gender identity. Mayor Gloria infringed upon this right by retaliating against Pastor Hodges, vetoing his reappointment to the Police Advisory Board solely because the Mayor disfavored his religious beliefs.

The District Court dismissed Pastor Hodges' FAC and ruled that Mayor Gloria was justified in using his veto power against Pastor Hodges, asserting that Mayor Garcia had the right to retain individuals who aligned with his ideals and policy positions. The District Court's holding is contrary to United States Supreme Court precedent and the precedent of every other circuit court. This Court should reverse the District Court's decision for three reasons:

*First*, under Ninth Circuit precedent, Pastor Hodges did not occupy a policymaker position. Pastor Hodges was not appointed by the Mayor to the Police Advisory Board, did not speak on behalf of the Mayor, and did not have authority to

implement policy. Nor was his religious expression related to any of his responsibilities on the Police Advisory Board.

*Second*, by categorically applying the policymaker exception to issues of speech, the court infringes on core Free Speech rights and is contrary to every other appellate circuit's approach.

*Third*, legal precedent prohibits government officials from creating religious tests to hold public office. By removing Pastor Hodges from his Police Advisory Board position because of his religious beliefs, Mayor Garcia created an unconstitutional religious test to serve on the Police Advisory Board.

For these reasons, the Court should reverse the District Court's decision and allow the lawsuit to proceed.

## **VI. STANDARD OF REVIEW**

A dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is reviewed *de novo*. *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013). In considering a motion to dismiss under Rule 12(b)(6), "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." *Wylar Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). If a complaint alleges enough facts to state a claim for relief that is plausible on its face, a complaint may not be dismissed for failing to allege additional facts that the plaintiff would need to prevail at trial. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

## VII. ARGUMENT

### A. The Policymaker Exception To Government Terminations Does Not Apply Because Pastor Hodges Is Not A Policymaker

“The First Amendment ordinarily prohibits an elected official from firing or retaliating against an employee for his political opinions, memberships, or activities.” *Hunt v. Cnty. of Orange*, 672 F.3d 606, 611 (9th Cir. 2012). However, the Supreme Court has established an exception known as the policymaker exception. *Elrod*, 427 U.S. 347. The policymaker exception was established to address situations where employees are terminated solely due to their political affiliation. The policymaker exception originated in *Elrod v. Burns*, when a newly elected sheriff made four patronage firings of civil service employees to make room for employees that he deemed politically loyal. 427 U.S. at 350. The United States Supreme Court held these types of “patronage dismissals severely restrict political belief and association.” *Id.* at 372.

In coming to this conclusion, the United States Supreme Court noted the ill-fated origins of the patronage system in America, including its use by President Jackson to create a corrupt and inefficient system of public employment. *Id.* at 354. President Jackson’s system ultimately led Congress to pass the Pendleton Act to ensure employees are free from improper influences as well as to restore efficiency and fair elections. *Id.* The Supreme Court noted that European countries had not been so prescient, and countries like Germany had allowed the patronage system to continue—a mistake that played a significant role in Adolf Hitler’s rise to power. *Id.* at 353. The Supreme Court observed that the patronage system greatly limits freedoms of belief and association, disrupts the functioning of the electoral process, and fosters inefficiency and corruption. *Id.* at 353–60.

In light of its sordid origins, combined with the superiority of a merit-based system, the Supreme Court ruled that the patronage system only withstands

constitutional scrutiny in very limited circumstances. Specifically, the Supreme Court held that patronage dismissals were appropriate only for high-ranking positions in which political loyalty is essential – also called policymaker positions. *Id.* at 367. The Supreme Court arrived at this conclusion after balancing the harms of the patronage system with the need that our “representative government not be undercut by tactics obstructing the implementation of policies of the new administration.” *Id.* In *Branti*, 445 U.S. 507, the Supreme Court extended the exception to include any position where “the hiring authority can demonstrate that *party affiliation* is an appropriate requirement for the effective performance of the public office involved.” *Id.* at 518 (emphasis added).

The policymaker exception only applies to “high-level, personally and politically loyal officials who will help [] implement the policies that the public voted for.” *Bardzik v. Cnty. of Orange*, 635 F.3d 1138, 1144 (9th Cir. 2011). Ultimately, the key question in determining whether a position qualifies as a policymaker is whether the purposes behind the policymaker exception are served. *See Hunt*, 672 F.3d at 611, 613 (“[C]onsiderations in determining whether Hunt is a policymaker, [] should not be considered in a vacuum, but rather in light of the underlying purpose of the ‘policymaker’ exception.”). As the District Court correctly noted, the purpose of the exception is to help ensure that the “policies which the electorate has sanctioned are effectively implemented.” 1 ER 44 (citing *Elrod*, 427 U.S. at 372). Here, the policymaker exception does not apply.

1. *Pastor Hodges served as a volunteer Police Advisory Board member, providing recommendations on policy related to community relations*

In *Fazio v. City & Cnty. of San Francisco*, this Court laid out nine factors a court should consider in determining if an employee occupies a policymaker position:

1. vague or broad responsibilities;
2. relative pay;
3. technical competence;
4. power to control others;
5. authority to speak in the name of policymakers;
6. public perception;
7. influence on programs;
8. contact with elected officials;
9. and responsiveness to partisan politics and political leaders.

125 F.3d 1328, 1134 n.5 (9th Cir. 1997) [*Fazio* factors]. This Court noted that even if one can “marshal colorable arguments to conclude that a majority of *Fazio* factors apply” that does not mean there is sufficient reason “to widen what the Supreme Court has deemed a narrow exception to the First Amendment.” *Hunt*, 672 F.3d at 613. These factors are intended to guide the “policymaker” analysis but not supplant “the essential inquiry” of whether “party affiliation is an appropriate requirement for the effective performance of the public office involved.” *Id.*

Weighing the *Fazio* factors makes it clear that as an unpaid, volunteer Police Advisory Board member with no actual power to implement any policies, Pastor Hodges is *not* the type of “high ranking” employee to which the narrow exception was meant to apply.

First, the evidence in the record at this time is clear that Pastor Hodges, as a member of the Police Advisory Board, did not hold “vague or broad responsibilities.” San Diego Municipal Code section 26.0803 outlines the limited advisory role of board members. Police Advisory Board members have no responsibility regarding implementing, adopting, or enforcing policies. Police Advisory Board members do not have responsibilities related to implementing, adopting, or enforcing policies. Instead, their role is entirely advisory, focusing on generating ideas for crime prevention and public education. Additionally, their

duties are restricted to making recommendations on specific issues such as police training, crime prevention, and police/community relations.

The second (relative pay), third (technical experience), fourth (power to control others), seventh (influence on programs), and ninth (responsiveness to partisan politics) *Fazio* factors strongly weigh in favor of finding that Police Advisory Board members are not policymakers. Membership on the Police Advisory Board is an unpaid, volunteer position. There is no requirement that members have *any* technical competence. While Pastor Hodges does have law enforcement experience, whether a position is a policymaker position only considers what is *required* of the *position*. There is nothing in the record that indicates technical competence of any type was required to become a Police Advisory Board member. As outlined in SDMC section 26.803, Police Advisory Board members do not have the authority to control others; their role is limited to reviewing and providing *recommendations* to their superiors on well-defined issues. The San Diego Municipal Code grants Police Advisory Board members no real influence over public programs beyond offering suggestions. Furthermore, there is no evidence in the record to suggest that the Police Advisory Board is partisan. In fact, crime prevention—the primary focus of the Police Advisory Board—is a nonpartisan issue, and there is no indication of the political affiliation of any party involved.

As to the fifth (authority to speak for the policymaker), sixth (public perception factors), and eighth (contact with the elected official) *Fazio* factors, these factors are neutral as the record does not provide strong evidence either way. It is not clear how often and the extent of contact Pastor Hodges had with Mayor Gloria. Given the unpaid nature of the job and rarity in which the Police Advisory Board met, it is unlikely there was significant contact.

Accordingly, the *Fazio* factors indicate that Pastor Hodges is not a policymaker.

2. *Pastor Hodges' case is unlike Lathus v. City of Huntington Beach*

As a preliminary matter, when factors are available for a court to apply to determine whether a position requires commonality of political purpose, the application of those factors should take precedence over comparisons to somewhat analogous cases. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 420 (2024) (Gorsuch, J., concurring) (“[F]uture judges had to proceed with an open mind to the possibility that different facts and different legal arguments may dictate a different outcome”). Again, the determination of whether a position is a policymaker cannot be based on job title alone; it requires consideration of the actual duties involved. *DiRuzza v. Cnty. Of Tehama*, 206 F.3d 1304, 1312 (9th Cir. 2000).

The position in *Lathus v. City of Huntington Beach*, 56 F.4th 1238 (9th Cir. 2023) was materially different than Pastor Hodges' position. While Lathus also served on a volunteer advisory board, the *Lathus* Court held that the advisory board position spoke to “the public and other policymakers *on behalf* of the official who appointed them.” *Id.* at 1242 (emphasis added) (citation removed). And Lathus had been appointed by the official who removed her. *Id.* at 1239. As such, the Court held that Lathus was the “public face” of the official who removed her. *Id.* at 1242.

In the present matter, Pastor Hodges was not appointed by Mayor Gloria and there is no evidence that anyone considered Pastor Hodges to be the “public face” for Mayor Gloria. 1 ER 106-107, ¶¶ 25, 27-29. In other words, in *Lathus*, the *Fazio* factor's including public perception and authority to speak in the name of policymakers weighed in favor of finding the position was a policymaker position. But in the present case, these factors weigh against finding Pastor Hodges is a policymaker. Furthermore, in *Lathus* the Court held that the position at issue “formulat[ed] plans for the implementation of broad goals.” *Lathus*, 56 F.4th at 1242. In the present matter, there is no indication that advisory board members ever

formulated plans; rather, they merely developed ideas and *recommended* those ideas for consideration.

Accordingly, in light of the appropriate application of the *Fazio* factors, it is clear that Pastor Hodges did not hold a policymaker position; as such, the policymaker exception does not apply.

**B. Even If Pastor Hodges Is A Policymaker, Because Speech, Not Just Affiliation Is At Issue, The Use Of The Policymaker Exception Fails To Adequately Protect First Amendment Rights**

A citizen does not cease to be a citizen when he chooses to work for the government. *See Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Illinois*, 391 U.S. 563, 568 (1968). Nor does he forfeit his ability to discuss relevant social and political issues in the public square. *Connick v. Meyers*, 461 U.S. 138, 146 (1983). Speech concerning public affairs “is more than self-expression; it is the essence of self-government.” *Id.* at 145. Restricting speech on political and social matters “hinders the interchange of ideas for the bringing about of political and social changes desired by the people.” *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (superseded on other grounds). “The First Amendment prevents the government, *except in the most compelling circumstances*, from wielding its power to interfere with its employees’ freedom to believe and associate.” *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 76 (1990) (emphasis added). Accordingly, if the government wishes to restrict an employee’s exercise of his First Amendment rights, it is required to do so in the least restrictive means necessary. *Elrod*, 427 U.S. at 367.

Historically, when a government employee suffers an adverse employment action because of his speech, the *Pickering* analysis applies to determine whether the speech is protected. *See generally Pickering*, 391 U.S. at 566-67. The analysis weighs the government’s interest in efficiency against the employee’s free speech rights and the public’s interest in knowledgeable and open discussion on matters of

public concern. *Id.* When applying the *Pickering* balancing analysis, courts address the likely disruption caused by the speech; examining its content, form, and context to determine how it will likely impact governmental efficiency. *Connick*, 461 U.S. at 147.

The Supreme Court left open the question of what role the policymaker exception would play when a policymaker was fired based upon their *speech* rather than political *affiliation*. However, in *O'Hare Truck Service, Inc. v. City of Northlake*, the Supreme Court stated in dicta that when both Free Speech and Free Association claims are at issue, the *Pickering* balancing test should be used, stating:

A reasonableness analysis will also accommodate those many cases, perhaps including the one before us, where specific instances of the employee's speech or expression, which require balancing in the *Pickering* context, are intermixed with a political affiliation requirement. In those cases, the balancing *Pickering* mandates will be inevitable.

518 U.S. 712, 719–20 (1966) [O'Hare]. In accordance with *O'Hare*, every circuit has implemented some type of *Pickering* balancing test when mixed issues of speech and association are present.

This Court should follow its sister circuits and hold that the *Pickering* test should be applied to cases involving both *association* and *speech*, with a slight preference given to the government when the employee is a policymaker and the speech relates to the policymaker's official duties, for the reasons outlined below.

1. *Every circuit has adopted some type of modified Pickering analysis when a policymaker is fired based in part on his speech*

Other circuits have recognized the major flaw with blindly applying the policymaker exception to circumstances involving speech: The policymaker exception weighs different interests than the *Pickering* analysis and does not give any weight to Free Speech interests in an employee's free speech rights and the

public's interest in knowledgeable and open discussion on matters of public concern. *Pickering*, 391 U.S. at 571-72.

The D.C. Circuit conducts a modified *Elrod/Branti* test. In *Hall v. Ford*, the court noted the overlap in government interests protected by both the *Pickering* balancing test and the *Elrod/Branti* policymaker exception. 856 F.2d 255, 263 (D.C. Cir. 1988). The policymaker exception reflects the importance of allowing officials at the top of the organizational hierarchy to implement their policies through politically compatible deputies. The *Pickering* balancing test protects the “same concern for the success of a government program” as reflected by weighing the government’s interest. *Id.* at 309. Considering these interests, the court laid forth a three-step test. First, the court considers if the employee’s position relates to an area which there is room for principled disagreement on goals—essentially is it a “policy position”? Second, does the position have broad responsibility with respect to policy formulation and implementation – essentially is it a position in which political loyalty is required? Finally, does the employee’s speech “relate to policy for which he is responsible.” *Id.* at 310. Only when the official can demonstrate that each element is present may he categorically fire the employee under the policymaker exception.

The First Circuit applies a weighted *Pickering* analysis when there are mixed issues of speech and affiliation. *Flynn v. City of Bos.*, 140 F.3d 42, 47 (1st Cir. 1998). In *Flynn*, the court upheld the termination of a policymaker who spoke against the elected official’s policies. However, the court noted that the circumstances would be different if the speech had not been related to his position. *Id.* at 48. This approach appears to mirror the approach taken by the D.C. circuit.

Likewise, the Second Circuit only applies the *Elrod/Branti* policymaker exception where the speech at issue is closely related to issues of political affiliation. *Adler v. Pataki*, 185 F.3d 35, 46 (2d Cir. 1999). In *Adler*, the court noted a

policymaker does not lose their First Amendment speech rights. *Id.* at 48. Even if someone may categorically be terminated for a permissible reason, they may not be terminated for an *impermissible reason*. *Id.* The court noted the disconnect between the purpose of the exception and the reason for the termination when an employee is fired under the policymaker exception for reasons other than political affiliation. *Id.* at 47. If the reasons for permitting the policymaker exception are not present, then the exception should not apply. *Id.* (“Firing someone because of his relationship with his spouse, for instance, is entirely distinct from firing someone because of his party affiliation”.)

The Third Circuit in *Curinga v. City of Clairton* analyzed whether a policymaker’s First Amendment Rights were violated when he was fired based on his speech. 357 F.3d 305, 306 (3d Cir. 2004). While the court analyzed the claims under both the *Pickering* balancing test and the *Elrod/Branti* policymaker exception, the court stated, “we believe that in most cases, where a confidential or policy making employee engages in speech or conduct against his public employer, the better analytical approach is found under the [*Pickering*] doctrine.” *Id.* at 309. Practically, the court noted that the *Pickering* analysis was able to accommodate the interests protected by the *Elrod/Branti* policymaker exception. As such, *Pickering* is the superior test in mixed speech and affiliation cases. *Id.* at 312. Specifically, an elected official’s interest in effectively implementing his policies can be considered in the *Pickering* balancing. Whereas free speech interests are not weighed by the *Elrod/Branti* exception.

The Fourth Circuit ultimately applies a “weighted” *Pickering* analysis. In *Borzilleri v. Mosby*, the court first determined that the employee was a policymaker as described in *Branti*. 874 F.3d 187, 194 (4th Cir. 2017). The court utilized a modified *Pickering* analysis that weighed in favor of the government when the employee was a policymaker. *Id.* (“policymakers enjoy substantially less free speech

protection.”) Accordingly, when speech demonstrated disloyalty, the government was free to fire the policymaker, because if the policymaker can be fired for lack of political loyalty, that policymaker can be fired for speech demonstrating political disloyalty. *Id.* at 195.

The Fifth Circuit has explicitly relied on the United State Supreme Court’s dicta in *O’Hare* to hold that in mixed cases of affiliation and speech, *Pickering* balancing should still be used. *See, e.g., Brady v. Fort Bend Cnty.*, 145 F.3d 691, 705, 707–08 (5th Cir. 1998) (“[w]e have also concluded that, in cases involving public employees who occupy policymaker or confidential positions . . . , the government’s interests more easily outweigh the employee’s (as a private citizen).” (internal quotations removed).) Accordingly, it does not categorically apply the policymaker exception to mixed cases of speech and affiliation.

The Sixth Circuit holds that the policymaker exception applies when speech is at issue only if the employee is a policymaker *and* the basis of the speech at issue is *related* to his political or substantive policy views. *Rose v. Stephens*, 291 F.3d 917, 924 (6th Cir. 2002). The court noted that the government’s interest in appointing politically loyal employees converges with its interest in operating an efficient workplace when dealing with policymaking employees because the loyalty of a policymaking employee is an essential requirement for the efficient functioning of the workplace. *Id.* at 923. The rule also protects the policymaker as it allows them to speak freely on issues that do not call into question their ability to help implement the policies of the elected official. *Id.*

The Seventh Circuit does not apply the *Elrod/Branti* policymaker exception when a policymaker is fired for speech that does not involve her political or policy viewpoints. *Bonds v. Milwaukee Cnty.*, 207 F.3d 969, 979 (7th Cir. 2000). The court has been clear that the policymaker exception does *not cover all* employee speech, especially when the speech is *unrelated* to job duties or political viewpoints. *Id.*

The Eighth Circuit also utilizes the weighted *Pickering* balancing test, as it weighs policymaker’s speech more heavily in favor of the government. *Hinshaw v. Smith*, 436 F.3d 997, 1006–07 (8th Cir. 2006). However, no extra weight is given to speech that does not relate to the employee’s political or substantive views “*related to her public office.*” *Id.* (emphasis added).

The Tenth Circuit in *Barker v. City of Del City*, agreed with the approach taken by the Seventh Circuit that “[a]lthough an employee’s status as a policymaker bears considerable attention when weighing the interests of the government, the policymaking exception does not apply and courts must apply *Pickering* balancing when the speech at issue does not implicate the employee’s politics or substantive policy viewpoints.” 215 F.3d 1134, 1139 (10th Cir. 2010). The court likewise found the dicta in *O’Hare* compelling that the *Pickering* analysis could adequately weigh all government interests when a policymaker is terminated for his speech. *Id.* at 1139–40.

The issue has not been decided in the Eleventh Circuit. However, in *Leslie v. Hancock Cnty. Bd. of Educ* – after noting the other circuits’ different iterations of applying *Pickering* (and the Ninth Circuit’s categorical approach in applying the policymaker exception) – the court noted the necessity of *Pickering* in mixed cases but refused to adopt any approach in the case at hand. 720 F.3d 1338, 1346 (11th Cir. 2014).

Of all the circuits, the Ninth Circuit is the only circuit that applies the *Elrod/Branti* policymaker exception to *all* cases in which the employee occupies a policymaker position regardless of whether speech is at issue. *See, e.g., Rose*, 291 F.3d at 922 (“The final approach, taken by the Ninth Circuit, applies the exception in all situations where the employee is at the policymaking level”); *Fazio*, 125 F.3d at 1332.

2. *The Ninth Circuit should adopt the approach of the other circuits and remand Pastor Hodges' case*

The Ninth Circuit should follow its sister circuits and apply a weighted *Pickering* balancing test. To account for the interests protected by the policymaker exception, when the speech at issue relates to the policymaker's responsibilities, the *Pickering* analysis should be held to favor the government as a matter of law. This approach most faithfully protects the public and the individual's interest in free and open debate, while simultaneously safeguarding the government's interest in running efficiently and the elected official's ability to faithfully implement the policies for which he was elected.

As noted by numerous other circuit courts, the Supreme Court's dicta in *O'Hare* recognizes that when both speech and affiliation are at issue "the balancing *Pickering* mandates will be inevitable." *O'Hare*, 518 U.S. at 719. While not binding, Supreme Court dicta should be given due weight as it is a "prophecy" of what the Court might hold. *United States v. Montero-Camargo*, 208 F.3d 1122, 1133 n.17 (9th Cir. 2000). Here, the *Pickering* balancing test is less restrictive and still protects the government's interest. Furthermore, the reasoning laid out by the other circuits demonstrates the superiority of using the *Pickering* balancing test in mixed issues of affiliation and speech.

First, as the Sixth Circuit noted in *Rose*, the *Pickering* analysis incorporates the government's greater need to restrict policymakers than regular employees since a policymaker's higher status means he will be more apt to cause disruption. *Rankin v. McPherson*, 483 U.S. 378, 390 (1987). In *Rankin*, the Supreme Court stated, "[T]he burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails." *Id.* This implicitly suggests that *Pickering* will give sufficient weight to the government's interest in circumstances in which a policymaker's speech disrupts

government efficiency. The *Pickering* balancing test can account for both the government's interest in efficiency and an elected official's interest in having politically loyal employees in high-ranking positions. The official's interest in implementing his policies efficiently is a subset of the government's general interest in running efficiently.

Second, as the Second Circuit noted in *Adler*, while a policymaker may be fired for permissible reasons, he may not be fired for *impermissible* reasons. 185 F.3d at 47. If the policymaker exception is applied categorically (or blindly), an official may terminate a policymaker for *any reason* under the *guise* of political affiliation. It allows an official to fire a policymaker based on their religion, gender, or, as was the case in *Adler*, because of his spouse's associations. Or as alleged in the present matter, solely because of religious beliefs. While an individual gives up his right to uninhibited freedom of association by taking a policymaker position, he does not give up *all* his constitutional rights.

Third and relatedly, as the Third Circuit noted in *Curinga*, the categorical approach allows the policymaker exception to swallow the rule for which it was created. 357 F.3d at 310. The exception was only created to protect an official's interests in effectuating the policies for which he was elected. When there is no indication that that interest is threatened, then there is no basis for applying the exception. Likewise, as discussed by the D.C. Circuit, First Circuit, Eighth Circuit, and Tenth Circuit; if the speech does not deal with policy for which the policymaker is responsible, it does not reasonably indicate a lack of political disloyalty. When a policymaker in the parks department contributes to the public debate regarding prison reform, such speech does not reasonably indicate any relevant lack of political loyalty. In such circumstances, an official is often trying to punish the official for *impermissible* reasons. Likewise, the Mayor punished Pastor Hodges for *impermissible* reasons – he vetoed Pastor Hodges reappointment to the Police

Advisory Board due to Pastor Hodges sharing his religious beliefs regarding gender identity while sitting on the County Commission. The act of sharing and the content of what he shared are unrelated to his position on the Police Advisory Board. Because the policymaker exception was not meant to shield official's *religious* discrimination, it should not apply.

Fourth, a categorical application of the policymaker exception treats Freedom of Speech as a second-class right. “[S]peech occupies the highest rung of the hierarchy of First Amendment values,” and “is the essence of self-government.” *Connick*, 461 U.S. at 145. *Pickering*’s case-by-case analysis is better suited because speech rights are so fundamental they require “jealous protection” which “abjures a mechanical response.” *Gonzalez v. Benavides*, 712 F.2d 142, 147 (5th Cir. 1983). The public also has an interest in having informed views made possible through open civic discussion of all its citizens. *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). The policymaker’s exception mechanically sets a balance that does not weigh speech rights or the public’s interest in open discussion. Only the *Pickering* analysis can adequately safeguard the rights and interests present to determine which side has the greater interests.

As a final point, *Elrod/Branti* Court was concerned that disloyalty would threaten the implementation of policies sanctioned by the electorate. But *Pickering* protects a more central public right; the right to free and open debate so that the electorate may be well-informed in its decisions making. *Pickering*, 391 U.S. at 571-72. While the public’s interest in having sufficient information to make well-informed decisions and its interests in having their will carried out have both been recognized by this Court, logically well-informed decisions precede the need for implementation of those decisions to exploit democracy’s potential.

3. *Under a weighted Pickering analysis, it is clear that Pastor Hodges' speech was unrelated to his position on the Police Advisory Board*

A weighted *Pickering* analysis must apply in this instance. As to the present matter, even if this Court finds that Pastor Hodges is a policymaker (which he is not), his speech was of public concern on an issue entirely unrelated to his responsibilities as member of the Police Advisory Board. Furthermore, Pastor Hodges' comments regarding transgenderism occurred in his position on the County Commission, *not* the Police Advisory Board.

As a preliminary matter, Pastor Hodges alleges that he was removed from his position on the Police Advisory Board based on his religious views on transgenderism. Because the present matter comes before the Court on an appeal of a Motion to Dismiss, Pastor Hodges' allegations should have been taken as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Accordingly, the District Court's use of the policymaker exception to permit Mayor Gloria to veto Pastor Hodges' reappointment based on his religious views is an example of how the categorical approach permits a policymaker to be terminated for impermissible reasons.

Putting that issue aside, Pastor Hodges' comments on transgenderism do not reasonably indicate that he could not or would not recommend policies related to police community relations to Mayor Gloria. The comments were made by Pastor Hodges in his role on the Commission, an entirely separate government body. There is no evidence in the record that his position on the Police Advisory Board had any responsibilities that would be affected by his religious beliefs that transgenderism was a sin. To the contrary, the record demonstrates Pastor Hodges' lifelong commitment to criminal justice and his many accomplishments in the field. 1 ER 105-106. Pastor Hodges has helped to provide access to justice for all people from all walks of life. 1 ER 106.

Pastor Hodges' Police Advisory Board position responsibilities involve providing input and suggestions regarding police community relations, police training, and educating the public. His personal beliefs on transgenderism cannot reasonably be considered likely to interfere with these responsibilities. As such, this Court should reverse the District's decision and allow the lawsuit to move forward.

**C. As An Unpaid Member On The Police Advisory Board, Pastor Hodges' Retained First Amendment Rights To Disclose His Religious Views On Gender Identity**

Regardless of whether being a member of the Police Advisory Board is a policymaker position; a Free Exercise claim must be analyzed under a different rubric than the one utilized by the District Court. The Ninth Circuit has not held that the policymaker exception applies in cases in which it is alleged the termination occurred due to *religious* affiliation. Counsel was unable to find cases in other circuits in which the issue was raised either. Accordingly, it appears to be an issue of first impression.

However, there is no legal precedent that justifies a government official disregarding or discriminating against an individual's sincerely held religious beliefs when exercising governmental authority. When Mayor Gloria exercised his veto authority against Pastor Hodges, 1 ER 110, Mayor Gloria gave Pastor Hodges an ultimatum: either abandon his religious beliefs on transgenderism to align with the Mayor's ideology and keep his volunteer appointment or retain his beliefs and lose his position. This undermines the fundamental principles of the First Amendment.

In denying Plaintiff's Motion for Reconsideration, the District Court elaborated that, "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." 1 ER 8. However, the Free Exercise Clause protects a materially different interest than the Free Speech or Free

Association Clauses. Pastor Hodges was removed from his position for discussing his religious beliefs and was removed in accordance with those beliefs. Therefore, he should not be foreclosed protection under the Free Exercise Clause. As the Supreme Court noted about the Free Exercise Clause in *Kennedy*:

The Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps *its most important work* by protecting the ability of those who hold religious beliefs of all kinds *to live out their faiths in daily life through the performance of (or abstention from) physical acts.*

597 U.S. at 525 (emphasis added) (citation and quotations removed.) As discussed in Section VII.B, the policymaker exception represents a balancing of First Amendment associational rights and the need to implement the policies sanctioned by the electorate. *See also Elrod*, 427 U.S. at 367. The policymaker test does not weigh the interests of the Free Exercise Clause in allowing a person to live out his faith in his daily life. *Kennedy*, 597 U.S. at 525. When two constitutional rights are at stake, both must be considered in the analysis, rather than dismissing one after analyzing only the other. For example, if a policymaker is dismissed after informing an elected official that they are African American, they cannot simply be terminated based on their policymaker status. Instead, the Court must evaluate whether the dismissal violated the Equal Protection Clause or any other relevant law, statute, or constitutional provision.

Because the Free Exercise claim is based on the same wrongful conduct as the Free Speech claim does not mean that a court can forego consideration of whether Pastor Hodges' religious beliefs were unduly burdened. In *Kennedy*, Mr. Kennedy—a high school football coach—alleged the school district's decision to suspend him for publicly praying after football games “violated the First Amendment's Free Speech and Free Exercise Clauses.” 597 U.S. at 520. The

Supreme Court noted that the Framers intended that religious speech be *doubly* protected by both the Free Exercise clause *and* Free Speech clause. *Id.* at 524–25. Accordingly, the Court reviewed coach Kennedy’s claims first under the Free Exercise Clause *and then* under the Free Speech clause. *Id.* at 525–36. While all Coach Kennedy’s claims relied on the same wrongful conduct by the school, the Supreme Court applied the tests for both Free Speech and Free Exercise claims.

But the District Court’s order did not consider whether Pastor Hodges’ Free Exercise rights were violated, and thus, did not fully consider whether his First Amendment rights were violated. The District Court conflates the two clauses. Even if Pastor Hodges’ Free Speech rights were not violated, that does not mean that his Free Exercise rights were not violated. The clauses exist separately from each other, and each protects different individual rights.

By categorizing Pastor Hodges’ actions/speech as *political* rhetoric rather than *sincerely held religious beliefs*, the District Court encourages and permits Mayor Gloria, and other government officials, to establish a religious test to hold public office—a test that is not legally valid. *See* 1 ER 8; *Torcaso*, 367 U.S. at 495 (“We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person ‘to profess a belief or disbelief in any religion.’”) While “commonality of political purpose” may be an appropriate requirement to serve in particular government positions (*Lathus*, 56 F.4th at 1241), *commonality of religious beliefs* should never be required for service on the Police Advisory Board. To hold otherwise sets dangerous precedent and is in direct conflict with the purpose of the First Amendment. *See Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15-16 (1947) (“No person can be punished for entertaining or professing religious beliefs or disbeliefs . . .”). Mayor Gloria set up a religious test which was designed to and, if valid, does bar every person who refuses to declare a belief in transgenderism from holding a public position.

In *Feminist Women's Health Ctr. v. Codispoti*, the Ninth Circuit addressed the issue of religious tests, holding that a circuit judge who held deeply held religious views regarding abortion did not need to recuse himself from a case involving abortion issues. 69 F.3d 399, 400 (9th Cir. 1995). Judge Noonan correctly observed, “If religious beliefs are the criterion of judicial capacity in abortion-related cases, many persons with religious convictions must be disqualified from hearing them.” *Id.* He noted that if a judge’s religious beliefs were dispositive, “[N]o judge with religious beliefs condemning abortion may function in abortion cases.” *Id.* at 401. Likewise, Mayor Gloria’s actions and the Court’s Order, present the same dichotomy: no public servant with religious beliefs espousing a traditional view on biological sex and gender may function in local government.

Mayor Gloria’s actions and the District Court’s decision set a dangerous precedent by imposing a religious test for public office. This creates a discriminatory environment that runs counter to the protections guaranteed by the Constitution and threatens the integrity of public service for all individuals. The policymaker exception was meant to permit an elected official to appoint politically loyal individuals into policymaker positions. Conversely, it was meant to permit an elected official to fire a policymaker who did not share a commonality of political beliefs. However, it does not allow an elected official to fire a policymaker based on the employee’s religious beliefs. The logic of the District Court’s order would allow Mr. Hodges to be fired for simply stating he was a Christian because the Court determined he was a policymaker. *See McEvoy v. Spencer*, 124 F.3d 92 (2d Cir. 1997).

The reasons provided in Section VII.B for not applying the policymaker exception when speech is present apply with more force here, because religion is more attenuated. While speech is often a conduit for proving disloyalty, religion is

not. Accordingly, this Court should reverse the District Court's decision and allow the lawsuit to move forward.

### VIII. CONCLUSION

For the reasons stated above, Appellant requests:

1. That this Court overturn the District Court's holding that Pastor Hodges was a policymaker based on the *Fazio* factors or alternatively, remand the case and require the District to make a finding on each of the *Fazio* factors;
2. That this Court find that even if Pastor Hodges is a policymaker, his speech was entirely unrelated to his work on the Police Advisory Board and is protected. Alternatively, that this Court remand the case to the District Court to conduct a *Pickering* analysis as discussed above;
3. That this Court overturn the District Court's application of the policymaker exception to dismiss Free Exercise claims and remand the case to the District Court to conduct the appropriate Free Exercise framework to determine if Pastor Hodges' Free Exercise rights were violated; and
4. That this Court reverse the District Court's decision and allow Pastor Hodges' lawsuit to proceed forward.

Respectfully submitted,

/s/ Julianne Fleischer

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/s Julianne Fleischer  
Julianne Fleischer

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