

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

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6 **I. BACKGROUND**

7 The following allegations are taken from the FAC.

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

12 “In addition to his public service, Mr. Hodges has dedicated his life to ministry.”
13 (*FAC* ¶ 34.) In 2001, he was “appointed Chaplain of the San Diego Police Department...
14 and joined New Creation Church in 1993, where he served as president of the usher
15 board.” (*Id.* ¶ 35.) “He then served as an associate pastor from 2005 to 2011,” and in
16 “May of 2011, Mr. Hodges was directed by God to plant the Church of Yeshua Ha
17 Mashiach (Jesus the Messiah).” (*Id.* ¶¶ 36, 37.) Hodges “believes that God defines
18 human sexuality, and that men and women are created in the image of God. His religion
19 also holds that God created two sexes: male and female.” (*Id.* ¶ 38.) “He is unashamed of
20 his Christian beliefs and has vocalized that transgenderism is a sin like adultery and
21 fornication.” (*Id.* ¶ 40.)

22 On July 25, 2017, Hodges was appointed to the Citizens Advisory Board on
23 Police/Community Relations (the “Advisory Board”). (*FAC* [Doc. 7] ¶¶ 12, 22.)
24 Members of the Advisory Board “serve until his or her successor is duly appointed and
25 qualified.” (*Id.* ¶ 30, citing San Diego Municipal Code (S.D.M.C.) § 26.0802(a).) The
26 Advisory Board’s purpose is to “study, consult and advise the Mayor, City Council and
27 City Manager on Police/Community Relations crime prevention efforts.” (*Id.* ¶ 23,
28 S.D.M.C. § 26.0801(a).) The Advisory Board then “recommend[s] and review[s] policies

1 and programs designed to make law enforcement sensitive, effective and responsive to
2 the needs of the City.” (*Id.* ¶ 24, citing S.D.M.C. § 26.0801(b).)

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

8 “On November 9, 2021, during Transgender Awareness Month, the Commission
9 discussed an agenda item to amplify the voices of the San Diego transgender
10 community.” (*FAC* ¶ 42.) “Pursuant to the Commission’s Rules of Order, Mr. Hodges
11 abstained from voting on the motion because of his sincerely held religious belief that
12 humans are to embrace their biological and creational differences as men and women.”
13 (*Id.* ¶ 43.)

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

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

25 “On June 9, 2022, the Commission held a special meeting to remove Mr. Hodges
26 from the Commission.” (*FAC* ¶ 56.) “At the June 2022 special meeting, a majority of the
27 Commissioners refused to remove Mr. Hodges.” (*Id.* ¶ 57.) “At a board meeting in June
28 2023, Commissioner Nicole Murray expressed to the Commissioners that Mr. Hodges

1 should not be on the Commission because of his remarks on the LGBTQ community.”
2 (*Id.* ¶ 58.) “In July 2023, the San Diego Union Tribune (‘Tribune’) wrote an editorial
3 encouraging the removal of Mr. Hodges from the Commission,” which Hodges alleges
4 was influenced by Commissioners Nash and Murray.” (*Id.* ¶¶ 59, 60.)

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

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

22 On November 8, 2023, Hodges filed this lawsuit. (*See Compl.* [Doc. 1].) On
23 December 7, 2023, Defendant Mayor Todd Gloria filed a motion to dismiss. (*See MTD*
24 [Doc. 5].) On December 28, 2023, Hodges filed the *FAC*, which asserts three causes of
25 action under 42 U.S.C. § 1983 for: (1) Violation of the Free Exercise Clause of the First
26 Amendment to the United States Constitution; (2) Violation of the Free Speech Clause of
27 the First Amendment to the United States Constitution; and (3) First Amendment
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1 Retaliation. (*See FAC.*) On January 11, 2024, Mayor Gloria filed the pending motion to
2 dismiss the FAC.¹

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4 **II. STANDARD**

5 The Court must dismiss a cause of action for failure to state a claim upon which
6 relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)
7 tests the legal sufficiency of the complaint. *See Parks Sch. of Bus., Inc. v. Symington*, 51
8 F.3d 1480, 1484 (9th Cir. 1995). A complaint may be dismissed as a matter of law either
9 for lack of a cognizable legal theory or for insufficient facts under a cognizable theory.
10 *Balisteri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1990). In ruling on the
11 motion, a court must “accept all material allegations of fact as true and construe the
12 complaint in a light most favorable to the non-moving party.” *Vasquez v. L.A. Cnty.*, 487
13 F.3d 1246, 1249 (9th Cir. 2007).

14 A complaint must contain “a short and plain statement of the claim showing that
15 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Supreme Court has
16 interpreted this rule to mean that “[f]actual allegations must be enough to raise a right to
17 relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007).
18 The allegations in the complaint must “contain sufficient factual matter, accepted as true,
19 to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662,
20 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

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

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

1 **III. DISCUSSION**

2 Although the FAC asserts three separate causes of action, each is premised on the
3 theory that Mayor Gloria retaliated against Hodges based on the exercise of his First
4 Amendment rights. To prevail on his First Amendment retaliation claims, Hodges must
5 state facts establishing the following: “(1) he engaged in constitutionally protected
6 activity; (2) as a result, he was subjected to adverse action by the defendant that would
7 chill a person of ordinary firmness from continuing to engage in protected activity; and
8 (3) there was a substantial causal relationship between the constitutionally protected
9 activity and the adverse action.” *Blair v. Bethel School District*, 608 F.3d 540, 543 (2010
10 9th Cir.). However, “[i]t is settled ... that an appointed public official can be removed for
11 engaging in otherwise protected First Amendment activity if ‘political affiliation is an
12 appropriate requirement for the effective performance of the public office involved.’”
13 *Lathus v. City of Huntington Beach*, 56 F.4th 1238, 1241 (9th Cir. 2023) (quoting *Hobler*
14 *v. Brueher*, 325 F.3d 1145, 1154 (9th Cir. 2003)).

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

25 The Supreme Court began its analysis by reaffirming that “party affiliation may be
26 an acceptable requirement for some types of government employment.” *Id.* at 1294
27 (citing *Elrod*, 427 U.S. at 351.) But the Court cautioned that “it is not always easy to
28 determine whether a position is one in which political affiliation is a legitimate factor to

1 be considered” and that under some circumstances, “a position may be appropriately
2 considered political even though it is neither confidential nor policymaking in character.”
3 *Id.* With respect to the assistant public defenders, the Court agreed that political
4 affiliation was not an acceptable requirement because their “primary, if not the only
5 responsibility... is to represent individual citizens in controversy with the State.” *Id.* at
6 1295. In so doing, an “indispensable element” of plaintiffs’ job was “the ability to act
7 independently of the government and to oppose it in adversary litigation.” *Id.* (quoting
8 *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).) Accordingly, “whatever policymaking
9 occurs in the public defender’s office must relate to the needs of the individual client and
10 not to any partisan political interests.” *Id.* “Under these circumstances,” the Court
11 concluded that “it would undermine, rather than promote, the effective performance of an
12 assistant public defender’s office to make his tenure dependent on his allegiance to the
13 dominant political party.” *Id.*

14 In *Blair v. Bethel School District*, 608 F.3d 540, 546 (9th Cir. 2010), the Ninth
15 Circuit faced a similar claim. There, the plaintiff sued the school board for First
16 Amendment retaliation after it voted to oust him as its vice president because of his
17 criticism of the school’s superintendent. It was undisputed that plaintiff’s statements
18 about the superintendent were protected by the First Amendment and that the board’s
19 decision to remove him as vice president was based on those statements. The court
20 explained, however, that the case was “not a typical First Amendment case” because “the
21 ‘adverse action’ [plaintiff] is challenging was taken by his peers in the political arena.”
22 *Id.* Plaintiff’s “fellow Board members wanted a vice president who shared their views.
23 Because [plaintiff] didn’t, they removed him by a procedurally legitimate vote.” *Id.* at
24 543–544.

25 In affirming the district court’s dismissal of the plaintiff’s claim, the Ninth Circuit
26 recognized that “more is fair in electoral politics than in other contexts” and explained
27 that “we *expect* political officials to cast votes in internal elections in a manner that is,
28 technically speaking, retaliatory, *i.e.*, to vote against candidates whose views differ from

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

9 In 2023, the Ninth Circuit decided a case analogous to the one brought by Hodges.
10 In *Lathus v. City of Huntington Beach*, 56 F.4th 1238 (9th Cir. 2023), the court
11 considered whether the First Amendment protects a volunteer member on a municipal
12 board from dismissal by the city councilperson who appointed her and is authorized
13 under the city ordinance to remove her. Plaintiff Shayna Lathus was appointed by City
14 Councilperson, Kim Carr, to the City’s Citizen Participation Advisory Board (“CPAB”).
15 Under the governing municipal code, each councilperson appointed one member to the
16 CPAB, whose mandate was to “provide citizen participation and coordination in the
17 City’s planning processes” related to a Department of Housing and Urban Development
18 block grant program. *Id.* The program addressed issues faced by low- and moderate-
19 income households. *Id.* In carrying out its mandate, the CPAB held regular meetings to
20 “assess the needs of the community,” “evaluate and prioritize projects,” “obtain citizen
21 input,” and “provide specific recommendations” to the City Council. *Id.*

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

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

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

1 Council”; and (3) CPAB conducted ““regular monthly meetings’ open to the public.” *Id.*
2 Accordingly, the Ninth Circuit affirmed the dismissal of plaintiff’s First Amendment
3 claims.

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

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

22 Next, S.D.M.C. § 26.0801(a) states that the purpose and intent of the Advisory
23 Board is to “study, consult and advise the Mayor, City Council and City Manager on
24 Police/Community Relations crime prevention efforts.” Subsections (b) and (c) state that
25 the “Board shall function as a method of community participation in recommending and
26 reviewing policies, practices and programs designed to make law enforcement sensitive,
27 effective and responsive to the needs of the City” and the “Board shall promote and
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1 encourage open communication and cooperation between the Police Department and
2 residents....”

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

- 5 (c) Make specific recommendations to the Mayor, City Council and City
6 Manager on actions that can be taken to improve relations between police
7 and community.
- 8 (d) Review Police Academy and in–service training in human relations and
9 make recommendations to the Mayor, City Council and City Manager.
- 10 (e) Develop and recommend strategies to the Mayor, City Council and City
11 Manager for improving City–wide crime prevention efforts.
- 12 (f) Develop and recommend to the Mayor, City Council and City Manager
13 strategies for increasing citizen participation in crime prevention efforts.
- 14 (g) Develop and recommend to the Mayor, City Council and City Manager
15 education programs designed to inform the public of its rights and
16 responsibilities when coming into contact with police officers.
- 17 (h) Develop and make recommendations to the Mayor, City Council and City
18 Manager with respect to community oriented policing.

19 Based on the above provisions, the Court finds that “commonality of political
20 purpose” with the Mayor is an appropriate requirement for service on the Advisory
21 Board. Just as in *Lathus*, the San Diego Municipal Code and City Charter establish that
22 Advisory Board members speak to the public and other policymakers on behalf of the
23 Mayor. This finding is supported by the same facts that existed in *Lathus*: (1) the Mayor
24 appoints all Advisory Board members, including Hodges, and is authorized to veto
25 without cause their reappointment; (2) Advisory Board members provide advice on
26 matters of policy on a number of issues involving police and community relations; and
27 (3) by functioning “as a method of community participation in recommending and
28 reviewing policies,” the Advisory Board is clearly charged with seeking public feedback.

1 Additionally, under the San Diego Municipal Code, the Court finds the Advisory Board
2 is a conduit between the community and Mayor’s office. This finding is also supported
3 by the same factors that existed in *Lathus*: (1) the Advisory Board provides advice on a
4 vital political issue, specifically Police/Community Relations crime prevention efforts
5 (*S.D.M.C.* § 26.0801(a)); (2) the Advisory Board’s directive is to “study, consult and
6 advise,” “function as a method of community participation in recommending and
7 reviewing policies, practices and programs,” “actively encourage and foster citizen
8 participation in crime prevention efforts,” and provide specific recommendations on a
9 number of issues to the Mayor, City Council and City manager (*Id.* § 26.0803 (c)–(h));
10 and (3) the Advisory Board’s meetings are open to the public².

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

15 16 **IV. LEAVE TO AMEND**

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

20 As set forth above, the S.D.M.C. and City Charter establish that commonality of
21 political purpose is an appropriate requirement for Advisory Board members. Based on
22 this finding, the Court is unaware and Hodges has not identified any facts Hodges could
23 allege that would state a claim for First Amendment retaliation. Accordingly, leave to
24 amend is not warranted.

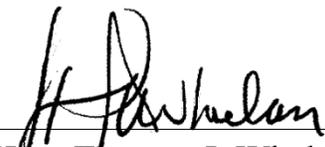
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27 ² See <https://www.sandiego.gov/cab/meetinginfo>; see also <https://www.youtube.com/channel/UC-4gY2k1D1ikzb25QM-O3eg/streams>. The Court takes judicial notice of these pages under
28 Fed.R.Evid.201(b).

1 **V. SUMMARY & CONCLUSION**

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

4 **IT IS SO ORDERED.**

5 Dated: June 24, 2024

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8 Hon. Thomas J. Whelan
9 United States District Judge

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