No. 24-7093

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Dennis Hodges,

Plaintiff-Appellant,

v.

Todd Gloria, both in his personal capacity and his official capacity as the Mayor of the City of San Diego,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of California
No. 3:23-CV-02065-W-MSB
Hon. Thomas J. Whelan

APPELLEE'S ANSWERING BRIEF

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I. INTRODUCTION

This case is not about religious persecution. Rather, it concerns a public official's authority to ensure that appointees to sensitive, community-facing positions uphold the mission of fostering trust, cooperation, and inclusion for all residents. The First Amendment protects religious beliefs and expression, but it does not insulate political appointees in policymaking roles from accountability when their public statements undermine the goals of their appointment.

Appellant Dennis Hodges was not removed from the Advisory Board because of his religious faith. He was not removed for any reason. Rather, the Mayor exercised his lawfully held veto power under the City Charter § 280 to veto Appellant's reappointment to the Citizens Advisory Board on Police/Community Relations after Appellant publicly characterized transgender identity as a sin—a message fundamentally at odds with the Board's charge to promote mutual respect and inclusive communication between the police and the community. In this policy-oriented role, the Mayor is entitled to insist on alignment with his administration's values.

Thus, the Mayor's decision to veto Appellant's reappointment was lawful, appropriate, and entirely consistent with established First Amendment jurisprudence. Because each of Appellant's claims are either barred or meritless, and because Mayor Gloria is entitled to qualified immunity, the Mayor respectfully requests this Court affirm the District Court's granting of the Mayor's motion to dismiss without leave to amend and/or affirm the District Court's denying of Appellant's motion for reconsideration—it is unclear which order Appellant appeals here.

Important Note: It is unclear which District Court order provides the basis of this appeal. Although Appellant states in his Notice of Appeal that he is

appealing the Court's denial of his motion for reconsideration (Reconsideration Order), (1-ER-134), he seemingly argues throughout the Opening Brief that he is appealing the Court's granting of the Mayor's motion to dismiss (Dismissal Order).

First, under the Jurisdictional Statement, Appellant writes that he "filed a timely Notice of Appeal of the District Court's June 24, 2024, Order," which is the order on the motion to dismiss. (OB at 9; 1-ER-48 ("Dated: June 24, 2024").) The Court's Reconsideration Order is dated October 22, 2024. (1-ER-12.) Further, in Appellant's summary of the argument, he argues the District Court's ruling dismissing the FAC and finding the Mayor "was justified in using his veto power against Pastor Hodges" is contrary to precedent. (OB at 13.) However, the order dismissing the FAC was the June 24 Dismissal Order, not the Reconsideration Order. Moreover, the District Court did not discuss these issues substantively in its reconsideration order, as it only analyzed whether Appellant raised new facts, new law, or showed clear error. (1-ER-4–12.)

Next, in Appellant's standard of review section, Appellant cites law regarding the standard of review for dismissals under Rule 12(b)(6), the rule governing motions to dismiss. (OB at 14.) Appellant does not discuss the standard of review for reconsideration orders, which are reviewed for abuse of discretion. *Zamani v. Carnes*, 491 F.3d 900, 994 (9th Cir. 2007). Moreover, Appellant does not use the phrase "abuse of discretion" whatsoever in his Brief, suggesting he is not appealing the Reconsideration Motion.

Finally, in Appellant's Opening Brief, he only cites to the District Court's Dismissal Order once (outside of the introduction and procedural history), where he discusses the Court's legal analysis. (OB at 16 (citing 1-ER-44, motion to dismiss).) He never cites to the Reconsideration Order (outside of the introduction

and procedural history). Throughout the Brief, though, Appellant raises arguments that were the subject of both the Dismissal Order and the Reconsideration Order—in addition to arguments that were not raised in either briefing set. (*See* OB at 15–16 (raising arguments from the dismissal briefing); OB at 30–33 (discussing arguments raised on reconsideration); OB at 16–17 (discussing the *Fazio* factors, which were never raised in either briefing set below); OB at 20–30 (arguing *Pickering* applies despite not raising it in either briefing set below).)

Based on this confusion, the Mayor is unsure how to adequately oppose Appellant's Opening Brief, what issues are barred, or what standard of review applies. Out of an abundance of caution, the Mayor addresses Appellant's scattered arguments rebutting both Orders by responding directly to the arguments raised in his Brief and noting the idiosyncrasies this confusion creates as they arise.

II. ISSUES PRESENTED

1. Whether Appellant is barred from raising new arguments and theories not presented below in asserting a *Fazio* factor test should apply to determine whether he is a policymaker. And, even considering the *Fazio* factor test, whether Appellant's role on the Advisory Board was properly classified as a policymaking position, thereby barring his First Amendment claims under the well-established policymaker exception.

2. Whether Appellant is barred from raising new arguments and theories not presented below in asserting a different line of jurisprudence under *Pickering* should apply to this case, thereby compelling the Ninth Circuit to depart from its long-standing framework for analyzing the policymaker exception under the First Amendment. And, even considering this argument, whether Appellant was still classified as a policymaker under other circuits' versions of the modified *Pickering* analysis, thereby barring his First Amendment claims.

3. If appealing from the Dismissal Order, whether Appellant is barred from raising new arguments and theories not presented below in asserting the Court did not analyze his speech as religious in nature. If appealing from the Reconsideration Order, whether the District Court abused its discretion in denying Appellant's attempt on reconsideration to recharacterize his speech as religious in nature when he did not raise it in the dismissal briefing and thus was foreclosed from raising it on reconsideration. And even if considered on the merits, whether recharacterizing his speech as religious rather than political, changes the First Amendment analysis when the Mayor did not burden Appellant's religious practice or set up any religious-based barriers to serving on the Advisory Board.

4. Whether the District Court properly dismissed Appellant's First Amendment claims where the Mayor exercised his lawful veto authority under the City Charter to veto Appellant's reappointment to a volunteer advisory board, after Appellant made anti-transgender public statements that undermined the board's mission and his alignment with the Mayor's policy priorities.

5. Whether the Mayor is entitled to qualified immunity where Appellant failed to show that clearly established law prohibits a mayor from vetoing reappointment based on speech that undermines the goals of a policy-driven public body.

6. Whether the District Court properly dismissed Appellant's lawsuit without leave to amend when under well-established Supreme Court and Ninth Circuit precedent, Appellant was in a policymaking position where commonality of political purpose is an appropriate requirement and Appellant failed to identify any facts allowing him to state a claim under the First Amendment.

III. STATEMENT OF THE CASE

Appellant alleges the Mayor violated his First Amendment rights when he vetoed Appellant's reappointment to the City's Citizens Advisory Board on Police/Community Relations (Advisory Board or the Board). In 2017, the Mayor appointed Appellant to serve on the Advisory Board as "the representative of social service, corrections, probation or other related field category." (1-ER-104 ¶3; the Mayor's Request for Judicial Notice at Exhibit 1.) Appellant also concurrently served on the San Diego Human Relations Commission as a commissioner. (1-ER-104 ¶3.)

The Advisory Board's purpose is to, in part, "study, consult and advise the Mayor, City Council and City Manager on Police/Community Relations crime prevention efforts. (1-ER-106 ¶23; The Mayor's Request for Judicial Notice at Exhibit 2, S.D.M.C. § 26.0801(a).) The Board is also tasked with "function[ing] 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 City's needs. (RJN Ex. 2 at (b).) Further, the Board's mission includes "promot[ing] and encourage[ing] open communication and cooperation between the Police Department" and the City's residents. (*Id.* at (c).) The Municipal Code specifically states the Board "shall also develop and make recommendations directed toward informing the community of its rights and responsibilities" when interfacing with officers. (*Id.*)

The Municipal Code also delineates some of the Board's duties and functions, which include: establishing rules of conduct for its meetings and activities; studying and reviewing law enforcement functions related to the Board's purpose and mission; making "specific recommendations" on how to improve police-community relations; reviewing police training and making recommendations accordingly; developing and recommending strategies to

improve the City's crime prevention efforts; developing and recommending educational programs to inform the public of its rights and responsibilities when interfacing with officers; and making recommendations regarding community oriented policing. (*Id.* at § 26.0803(a)–(i).) The Code notes this list is not exhaustive and allows the Board to go beyond this list. (*Id.* at (e).)

About four years into his appointment on the City's Advisory Board, Appellant vocalized his anti-transgender beliefs at a County Commissioner meeting. (1-ER-107 ¶40; 1-ER-43 ¶42.) During Transgender Awareness Month, the County Commission put forth an agenda item intended to amplify voices within the San Diego transgender community. (1-ER-108 ¶42.) Appellant abstained from voting on this item and publicly stated the reason was because he believed transgenderism is a sin. (1-ER-108 ¶43.) Appellant faced backlash from his anti-transgender comments from both his fellow County Commissioners and the public.

In response to Appellant's comments, the County Commission changed its bylaws to require Commissions refrain from making "discriminatory and harassing remarks." (1-ER-108 ¶44.) The County Commission then circulated a notice of Appellant's removal to all commissioners asserting Appellation violated the Commission's Code of Conduct and Bylaws by making "discriminatory and harassing remarks" towards the LBGTQ community. (1-ER-108 ¶¶46, 47.) The County Commission held a special meeting to consider the motion to remove Appellant, but the motion failed. (1-ER-109 ¶¶56, 57.) Eventually, in June 2023, at a County Commissioner board meeting, one commissioner opined that Appellant should not be on the Commissioner Board because of his derogatory comments about the LBGTQ community. (1-ER-109 ¶58.) Soon thereafter, the San Diego

Union Tribune wrote an editorial encouraging Appellant's removal from the County Commission. (1-ER-109 ¶59.)

While the fallout from Appellant's remarks on the County Commission was unfolding, Appellant remained on the City's Advisory Board until his term expired per the San Diego Municipal Code's term limits. (1-ER-109–10 ¶61; RJN Ex. 2 at § 26.0802(a).) There are no facts that the Mayor, or any elected official, rebuked, discussed, commented, or in any way reacted to Appellant's anti-trans comments while he was serving on the Board. However, when Appellant was up for reappointment, the Mayor used his veto authority, authorized under the Charter of the City of San Diego Section 280, to veto Appellant's reappointment to the Advisory Board. (1-ER-109–10 ¶61; RJN Ex. 3.) In the Mayor's veto memorandum, he explained he was vetoing Appellant's reappointment based on Appellant's comments regarding the transgender community and could not "support [Appellant's] reappointment to a Board tasked with promoting a positive relationship between the Police Department and the community it serves." (1-ER-110 ¶62.)

Appellant filed suit, alleging the Mayor's exercising of his veto authority prohibiting him from reappointment violated his First Amendment Rights. The Mayor filed a motion to dismiss Appellant's lawsuit, primarily arguing the Mayor was allowed to veto Appellant's reappointment under the well-established policymaker exception to the First Amendment, which forecloses First Amendment protection when a policymaker engages in political speech. (1-ER-84–102.) In opposition, Appellant raised several arguments. (1-ER-67–77.) Appellant argued the Mayor's reliance on *Blair* and *Lathus* was misplaced based on factual distinctions from those cases. (1-ER-68–71.) He also argued the Court must ignore the contradictory allegations between the complaint and the first amended

complaint in response to the Mayor's argument that a plaintiff cannot amend around legal claims by using verified, contradictory allegations. (1-ER-71–74; 1-ER-95–99.) Finally, Appellant argued qualified immunity should not apply. (1-ER-74–76.)

The District Court held the policymaker exception to the First Amendment applied and found Appellant could not prevail on any First Amendment claims and dismissed the lawsuit without leave to amend. (1-ER-41–47.) Appellant then filed a motion for reconsideration, arguing the Court failed to consider his sincerely held beliefs and failed to rule on his other causes of action. (1-ER-27–34.) The Mayor opposed the motion, asserting that because there was no clear error, intervening change in the law, or newly discovered facts, the motion was procedurally deficient. (1-ER-17.) The District Court denied the reconsideration motion, finding Appellant's arguments were barred because he did not raise them in his opposition and the Court ruled on all claims. (1-ER-4–12.)

Appellant timely filed this appeal—but again, it is important to note that it is unclear which Order he is appealing: the Dismissal Order or the Reconsideration Order. This distinction is critical because if Appellant is appealing the Reconsideration Order, he is limited to only the arguments raised in that motion and the Order is reviewed for abuse of discretion. If he is appealing the Dismissal Order, then he is limited only to the arguments raised in that briefing on a de novo review, foreclosing the arguments raised on reconsideration.

IV. SUMMARY OF ARGUMENT

1. Appellant is barred from arguing the *Fazio* factors because he did not raise them in any briefing below. Nevertheless, under *Fazio v. City and County of San Francisco*, 125 F.3d 1328 (9th Cir. 1997), Appellant is considered a policymaker because his role and responsibilities on the Board are inherently

policy-driven, including improving police-community relations, encouraging public participation in crime prevention, and making recommendations on policing strategies. Appellant's statements about transgender individuals directly conflicted with the Board's mission and as a policymaker, the Mayor was entitled to insist on an appointment that was politically aligned.

2. Appellant is also barred from invoking the *Pickering* balancing test as he did not raise this argument in any briefing below. However, substantively, the Ninth Circuit has consistently held that the *Pickering* framework does not override the policymaker exception when the employee occupies a role involving policy discretion or community-facing trust. Further, even under *Pickering*, Appellant's comments are not protected by the First Amendment.

3. If appealing from the Dismissal Order, Appellant's third argument attempting to reframe the Mayor's lawful veto as retaliation for his religious beliefs is also barred because he did not raise it in the dismissal briefing. If appealing the Reconsideration Order, the District Court did not abuse its discretion in rejecting this argument as it was not raised in the dismissal briefing and the District Court properly foreclosed it on reconsideration. And even if considered on the merits, the argument fails to show any First Amendment violations.

4. The Mayor's decision to veto Appellant's reappointment to the Citizens Advisory Board on Police/Community Relations was lawful because Appellant's position falls squarely within the well-established "policymaker exception" under *Branti* and Ninth Circuit precedent. The Board is tasked with building trust between the community and the Police Department and advising on matters of crime prevention and public safety policy. Appellant's public statements characterizing transgender identity as sinful were plainly inconsistent with the Board's mission and undermined its credibility with members of the community it

is charged to serve. As such, Appellant held a position where political alignment and trust were essential, placing him within the policymaker exception and removing his speech from First Amendment protection in this context.

5. Even if Appellant could overcome the procedural and substantive defects he faces, his suit fails because the Mayor is entitled to qualified immunity. Appellant failed to carry his burden to identify clearly established law holding the Mayor violates the First Amendment when he exercises his lawful veto authority to veto reappointment of a member on a volunteer advisory board whose public statements conflict with the mission of the Board and the policies of the Mayor.

6. The District Court correctly denied Appellant leave to amend. The District Court appropriately found Appellant was a policymaker under long-standing Supreme Court and Ninth Circuit jurisprudence. The District Court properly noted Appellant failed to identify any facts during briefing that would allow him to state a First Amendment claim.

V. STANDARD OF REVIEW

As noted above, it is unclear which District Court Order serves as the basis of this appeal: the Dismissal Order or the Reconsideration Order. Based on this confusion, the Mayor is unsure of which standard of review applies. To the extent Appellant is challenging the Dismissal Order, the Mayor agrees the Court reviews such orders de novo. (OB at 14.) However, to the extent Appellant challenges the Reconsideration Order, that is reviewed for abuse of discretion. *Zamani v. Carnes*, 491 F.3d 900, 994 (9th Cir. 2007).

VI. ARGUMENT

Appellant attempts to frame this appeal as standing up for religious freedom. However, public officials have the authority and responsibility to ensure that individuals appointed to sensitive, community-facing boards align with the mission

of fostering trust, inclusion, and open dialogue with the community. Here, Appellant's public statements that transgenderism is a sin, conflicted with the goals of the Police Advisory Board and undermined his ability to serve in that role. As such, the Mayor's lawful decision to veto Appellant's reappointment was justified and did not violate the First Amendment.

Based on the confusion noted above regarding which Order he is appealing, the Mayor alternatively argues that either (1) the Appellant's arguments stemming from the Dismissal motion fail, (2) the District Court did not abuse his discretion in the denying reconsideration because the arguments raised therein were not raised in the dismissal briefing, or (3) that many of the arguments raised are procedurally barred because they were either raised in one motion or the other, or not raised below at all. The Mayor attempts to make these distinctions below, where relevant. Accordingly, the Mayor respectfully requests the Court either affirm the Dismissal Order or affirm the Reconsideration Order.

1. Appellant is Barred From Arguing the *Fazio* Factors as He Did Not Raise this Argument Below, But Even Considering it, His Position Falls Squarely Within the Policymaker Exception.

Appellant did not raise the *Fazio* factor test in any briefing below to support his position that he is not a policymaker. As such, he is procedurally barred from raising it now. However, even if the Court considers this argument substantively, it establishes Appellant's role was a policymaking one, foreclosing First Amendment protection regarding his speech.

a. Appellant is Barred From Raising New Issues on Appeal.

Generally, appellate courts cannot consider an issue raised for the first time on appeal. *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978). However, Appellate Courts may consider new issues on appeal only under narrow

circumstances: (1) "to prevent a miscarriage of justice;" (2) when there is an intervening change in the law; and (3) when the issue is purely legal. *MacDonald v. Grace Church Seattle*, 457 F.3d 1079, 1086 (9th Cir. 2006). Courts also have discretion to consider unpreserved issues when doing so would not prejudice the other party. *Id.* Here, Appellant has not identified that any of these narrow exceptions apply: He does not cite a change in law, explain how declining review would result in a miscarriage of justice, or raise a purely legal question.

The Ninth Circuit has held that the determination of whether an individual is a policymaker is a mixed question of fact and law. *Walker v. City of Lakewood*, 272 F.3d 1114, 1132 (9th Cir. 2001). Thus, Appellant cannot raise this argument now because it is not a purely legal issue. Thus, the Mayor requests this Court exercise its discretionary power and decline to review this argument only raised for the first time on appeal. However, even if the Court were to consider Appellant's argument, application of the *Fazio* factors weighs in favor of finding Appellant was a policymaker.

b. Under the* Fazio *Factors, Appellant is a Policymaker.

The Advisory Board volunteers are political appointments because they advise the Mayor, the City Manager, and City Council on community issues and are the public face of the Mayor. As such, Appellant's status on the Advisory Board falls within the policymaker exception to the First Amendment and he cannot avail himself of the constitutional protections therein. *Hunt v. County of Orange*, 672 F.3d 606, 611 (2012). Although Appellant argues he is not a policymaker under *Fazio*, his robotic application of these factors—without a single citation to supporting case law—is misplaced. (OB at 16–18.)

The nine factors listed in *Fazio v. City & County of San Francisco* were not meant to provide a rote test to determine whether an individual falls within the

policymaker exception. 125 F.3d 1328, 1332 (9th Cir. 1997). There, this Court considered whether the termination of an Assistant District Attorney—after running against the District Attorney in an upcoming election—implicated First Amendment rights. *Id.* at 1330, 1334. This Court held the ADA was considered a policymaker and thus his First Amendment rights were not violated when he was terminated. *Id.* at 1334. In a footnote, the Court suggested nine non-exclusive factors to consider when determining whether a job is a policymaker position. *Id.* at 1334 n.5. However, 15 years later, this Court in *Hunt* emphasized the correct test is not a mechanical application of the *Fazio* factors, but "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Hunt*, 125 F.3d at 611–12 (quoting *Branti v. Finkel*, 445 U.S. 507, 518 (1980)).

Here, both the *Fazio* factors and the more important *Hunt* inquiry demonstrate Appellant is a policymaker. First, Appellant argues he is not a policymaker because his position has "no actual power to implement any policies" and is "entirely advisory." (OB at 17.) However, that point is inapposite as the Supreme Court made clear that "a public employee need not literally make policy in order to fit within the . . . policymaker exception." *Branti*, 445 U.S. at 518. But even under the *Fazio* factors, it is beyond dispute that Appellant is a policymaker.

i. Appellant Had Broad Responsibilities as an Advisory Board Member.

The first *Fazio* factor, vague or broad responsibilities, weighs in favor of a policymaker position. Appellant's tasks were the same as those in *Lathus*, where the Ninth Circuit held a Citizen Participation Advisory Board (CPAB) member was a policymaker. *Lathus v. City of Huntington Beach*, 56 F.4th 1238, 1239 (9th Cir. 2023). There, Lathus' responsibilities included encouraging "citizen

participation and coordination in the City's planning process," addressing issues regarding the community's needs, evaluating and prioritizing projects, obtaining the public's input, and providing specific recommendations to City Council. *Id.*

Here, Although Appellant argues he did not hold vague or broad responsibilities because his role was entirely advisory, they were nearly identical to *Lathus*. (OB at 17–18.) Advisory Board members are tasked with broad responsibilities including creating and adopting its own bylaws to govern the Board, study and review "functions of the law enforcement system consistent with the purpose and intent" of the Board, make recommendations on how to improve relations between police and the community, review and make recommendation on officer training, develop and recommend strategies for improving crime prevention efforts and citizen participation in such, develop and recommend educational programs to inform the public on how to interact with officers, develop and make recommendations regarding "community oriented policing," and more. (RJN Ex. 2 at § 26.0803(a)–(i).)

These tasks demonstrate broad responsibility because they extend beyond passive or clerical functions and instead encompass a range of high-level functions involving policy development, strategic evaluation, and oversight. And as Ninth Circuit held, because an Advisory Board member is "'an advisor [who] formulates plans for the implementation of broad goals' [] a councilperson is entitled to an appointee who represents her political outlook and priorities." *Lathus*, 56 F.4th at 1242 (quoting *Elrod v. Burns*, 427 U.S. 347, 368 (1976)).

ii. Appellant's Role in the Advisory Board Primarily Included Influencing Programs.

The most critical factor, influence on programs, also weighs in favor of a policymaker position. *See Bardzik v. Cnty. of Orange*, 635 F.3d 1138, 1146 (9th

Cir. 2011) ("[T]he most critical factor [is] influence over programs."). Here again, *Lathus* is instructive. The *Lathus* Court noted the CPAB "is designed to influence policy decision by the Council on such programs" by acting as "a conduit between the community and City Council." *Lathus*, 56 F.4th at 1242. Further, the *Bardzik* Court clarified that influence exists even if the policymaker could not unilaterally create or implement programs on their own. *Bardzik*, 635 F.3d at 1147 (finding "the ability to "unilaterally" create and implement programs without any input from the Sheriff is not required by our case law or by logic.").

Here, contrary to this well-settled principle, Appellant argues he has "no real influence over public programs" because his role was limited to "reviewing and providing recommendations" and "offering suggestions." (OB at 18 (emphasis removed).) Nevertheless, Appellant's role is again identical to *Lathus* because the Advisory Board was designed to influence the Mayor, City Council, and the City Manager's policy decisions on police-related programs. (RJN at Ex. 2 § 26.0801(a)–(c).) Further, Appellant acted as a conduit between the public and the Mayor, even if the Board could not implement or create its own programs outside of its own bylaws. (*Id.* at (b), (c); § 26.0803(b), (c), (f), (g), (h).) Thus, the most critical factor weighs in favor of finding Appellant was a policymaker.

iii. The Mayor Nominated Appellant Due to His Technical Competence.

Next, as to the third factor, technical competence, Appellant is incorrect in asserting that "[t]here is no requirement that members have *any* technical competence." (OB at 18.) The Code details the requirements for being a Board member. (RJN Ex. 2 at § 26.0802(b).) There, the Code requires the Mayor to appoint individuals with specific backgrounds, including: one from a police employee group, one must be a human relations expert, one a youth expert, and

two from social service, corrections, probation, or related fields. (*Id.*) Here, Appellant was nominated to serve as an expert in the "social service, corrections, probation or other related field category." (RJN at Ex. 1.) Although not in the record, the Mayor separately requests judicial notice of this public document. Even without this document, though, Appellant agrees he was asked to join "given his significant experience in law enforcement" and his unique ability to "provide[] valuable insight to the development of these strategy recommendations." (1-ER-106 ¶¶21, 26.) Thus, this factor weighs in favor of policymaker.

iv. Appellant Spoke on Behalf of the Mayor and Was Perceived as such by the Public.

The fifth and sixth factors also weigh in favor of a policymaker position (authority to speak and public perception). Although Appellant describes these factors as "neutral," there is ample evidence otherwise. (OB at 18.) Here, Appellant had authority to speak on behalf of the Mayor as the public face of the Mayor's politics on these matters—in fact, that was in large part the role's purpose. The Code defines Appellant's responsibilities as functioning "as a method of community participation," actively encouraging and fostering "citizen participation," and promoting and encouraging "open communication between the Police Department" and City residents. (RJN Ex. 2 at § 26.0801(b).)

The *Lathus* Court found that because CPAB members advise on policy matters, solicit public feedback, and are appointed directly by City Council, the board members "speak to the public and to other policymakers on behalf of the official who appointment them." *Lathus*, 56 F.4th at 1242. Further, the Court found her role on CPAB "required her to speak to the public. . . ." *Id.* The Court held these facts indicated Lathus was the councilperson's "public face" on the board

and "the public was entitled to assume that she spoke on [the councilmember's] behalf." *Id.*

Here, the public could infer that Appellant's "actions and statements while serving in the role reflect the current views and goals of the" the Mayor. *See id.* Thus, it is reasonable to find Appellant was the public face of the Advisory Board, and the "public was entitled to assume" he spoke on the Mayor's behalf. *See id.* Further, Appellant's role required him to speak to the public, City officials, and potentially any City employee or other representative across from any agency "comprising the criminal justice system" to facilitate these conversations. (RJN Ex. 2 at § 26.0803(b).) Appellant initially pleaded he acted "as a conduit between the community and City Council" and "served as a bridge between law enforcement and the community and sought to build trust between the public and law enforcement." (1-ER-95 (quoting District Court ECF No. 1 ¶22).) He also pleaded he "advised the community on shooting incidents and fostered police and community relations." (1-ER-95–96 (quoting District Court ECF No. 1 ¶23).)

However, after the City filed its dismissal motion, Appellant deleted these allegations, attempting to distinguish policymaker cases from his own. (1-ER-95–98.) As the Mayor argued in its motion to dismiss, the Court need not accept as true allegations that contradict what was alleged in a prior, verified complaint. (1-ER-96); *see Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296–97 (9th Cir. 1990); *see also Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1144–45 (N.D. Cal. 2010) ("Where allegations in an amended complaint contradict those in a prior complaint, a district court need not accept the new alleged facts as true"). In addition, this Court may consider the omitted allegations as Appellant provided no explanation for why the allegations were omitted. (1-ER-96); *see Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988); *see also Adams v. United of*

Omaha Life Ins. Co., No. SACV12969 JST JPRX, 2013 WL 12113225, at *3 (C.D. Cal. Jan. 10, 2013). Thus, both factors weigh in favor of a policymaker.

v. Appellant Contacted Elected Officials and the Board Members Must be Responsive to Politics.

The eighth and ninth factors are easily met because Appellant had contact with elected officials and his position was responsive to partisan politics and political leaders. First, the Code requires Board members have contact with elected members because their main responsibility is to make recommendations to the Mayor, City Council, and the City Manager on a number of issues. (RJN Ex. 2 at §§ 26.0801(a)–(c); 26.0803(c)–(i).) Further, members communicate with the City Manager and the City Attorney, both elected positions, for staff support and legal services. (*Id.* at § 26.0802(b).)

Second, Appellant asserts this factor is "neutral," as he curiously does not know "how often and the extent of contact" he had with the Mayor. (OB at 18.) Appellant, however, is uniquely in possession of this information and should know the extent of his contact with the Mayor rather than feigning ignorance. Nevertheless, his allegations shed some light on the matter as he stated he "developed and recommended to the Mayor, City Council, and City Manager various strategies and programs for improving police relations and city safety." (1-ER-106 ¶25.) Although Appellant refused to illustrate the frequency of his communication with elected officials, he served on the Board from 2017 to 2023, a total of six years. (1-ER-106 ¶22; 1-ER-109 ¶61.) It is reasonable to infer Appellant, over the course of six years, had meaningful contact with elected officials in carrying out the Board's policy directives.

As to the Ninth factor, Appellant quite literally was a political appointee, appointed by the Mayor and confirmed by City Council. (RJN Ex. 2 at

§ 26.0802(a).) Accordingly, he must be responsive to the Mayor and City Council's policy objectives. This factor considers "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance" of the position. *Branti*, 445 U.S. at 518. Further, the Ninth Circuit extended this reasoning and explained the policymaker exception is not limited to "party affiliation," but should include also "political affiliation," which "includes commonality of political purpose and support." *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 996 (9th Cir. 1999).

Again, *Lathus* is instructive here. Lathus, like Appellant, was an appointed volunteer to an advisory board tasked with communicating with the public on behalf of elected individuals and making recommendations to those elected individuals. *Lathus*, 56 F.4th at 1239, 1242. After being photographed at a rally standing near suspected "antifa," Lathus was removed from the advisory board by the councilperson who appointed her; in part for failing to adequately denounce antifa and not sharing the councilperson's views on the matter. *Id.* at 1239–40. Lathus sued, making the same arguments Appellant raises now, that her dismissal violated her First Amendment rights to free speech, association, and constituted retaliation. *Id.* at 1240. The Ninth Circuit held that Lathus' dismissal did not violate the First Amendment because she was a policymaker. *Id.* at 1244. The Court emphasized that because the advisory board's purpose is to advise about public policy, a councilperson is "entitled to an appointee who represents her political outlook and priorities" and "is allowed to 'distance' herself from an appointee who might be a political liability." *Id.* at 1242, 1244 (quoting *Blair*, 608 F.3d at 545).

Similarly, here, Appellant was a volunteer on an advisory board, appointed and confirmed by elected individuals. (1-ER-106 ¶¶21, 22.) Appellant again argues

that *Lathus* is distinguishable, however those arguments are inapposite. (OB at 19–20.) First, Appellant asserts that because he was not appointed by the Mayor, he was not the public face for the Mayor, and thus the *Lathus* reasoning does not apply here. (*Id.* at 19.) However, this assertion fails to comport with the Municipal Code § 26.0802(a), which states only the Mayor can appoint members to the board. Courts have held the local law provides the best foundation for classifying positions for First Amendment purposes. *Lathus*, 56 F.4th at 1241 (listing cases); *Hagan v. Quinn*, 867 F.3d 816, 827 (7th Cir. 2017) ("[W]here a statute establishes a position, the statute is likely to provide the best foundation for classifying it for . . . First Amendment purposes."). Council President Myrtle Cole's memorandum nominating Appellant also supports this distinction, as the memorandum shows Council President Cole *nominated* Appellant for appointment but did not actually *appoint* him (because only the Mayor can). (RJN Ex 1 at 1.)

Nevertheless, even if this Court accepts as true that Appellant was appointed by a councilmember and not the Mayor, that fact is a distinction without a difference. The Board's members were tasked with speaking to the public on behalf of the Mayor and City Council regardless of the appointing authority, allowing the public to infer the members are the public face of the elected officials. *See Lathus*, 56 F.4th at 1242. Therefore, he could be "dismissed for lack of political compatibility." *Id.* In sum, even if a councilperson appointed Appellant,

that does not change the political-compatibility requirement for the position, tipping the ninth factor in favor of being a policymaker.[1]

Moreover, Courts typically find individuals are not policymakers under this element when they are employees who perform basic, primary functions of their position; and Appellant is very clearly not an employee with basic, primary functions. For example, in *DiRuzza v. County of Tehama*, the Ninth Circuit found a deputy sheriff was not a policymaker under the *Fazio* factors. 206 F.3d 1304, 1311 (9th Cir. 2000). Regarding this factor, the Court relied on a Third Circuit case which also found that a deputy sheriff's position was not politically affiliated because the deputy sheriff's primary tasks were "service of process, transport of prisoners, and courtroom security." *Id.* (citing *Burns v. County of Cambria*, 971 F.2d 1015, 1022 (3rd Cir. 1992)). The *DiRuzza* Court emphasized that *Burns* found it significant that, while loyalty is certainly valued in a sheriff's deputy, "[i]t has never been suggested that the need for loyalty and confidentiality alone" justified politically motivated dismissals, absent a connection to the employee's actual job duties. *Id.* (quoting *Burns*, 971 F.2d at 1023).

However, here, Appellant was not a typical City employee performing basic, primary functions of a job. Appellant's position on the Board is much closer to that

[1] It is important to clarify Appellant repeatedly argues he was "removed" from his position on the Board in his appeal briefing. (*See* OB at 11 ("Pastor Hodges Removed from the Police Advisory Board"); 29 (Pastor Hodges alleges that he was removed from his position. . . .".) However, Appellant was not removed by the Mayor or other councilmembers and Appellant never alleged as such in his First Amended Complaint. (1-ER-103–118.) Rather, the Mayor exercised his right under the City Charter to veto Appellant's reappointment without cause, which Appellant concedes he had the authority to do. (1-ER-109–110 ¶61; RJN Ex. 3 at § 280.)

of *Lathus* as a policymaker than an employee. These factors weigh in favor of finding Appellant was a policymaker.

vi. Although Two Factors Weigh in Favor of Appellant, the Majority Find He Was a Policymaker.

Finally, only the second and fourth factors (pay and power to control others) weigh in favor of Appellant. The Board position is explicitly voluntary. (RJN Ex. 2 at § 26.0802(a) ("who shall serve without Compensation.").) And it is unclear if Board members have the power to control or direct anyone. While the Code states members are to be provided support staff, it is unclear who controls them. (*Id.* at (b).) Further, the Code states members can request the Police Chief or other representative's presence at meetings, but again, it is unclear as to what level of control that amounts to. (*Id.* at § 26.0803(b).) However, overall, seven of the nine *Fazio* factors weigh in favor of finding Appellant was a policymaker.

2. Appellant's Reliance on *Pickering* is Procedurally Barred, Substantively Misplaced, and Fails on the Merits as the Mayor's Actions Did Not Violate Appellant's First Amendment Rights.

Appellant—for the first time on appeal—relies on *Pickering v. Board of Education*, apparently arguing he is a government employee whose speech should be analyzed under the *Pickering* balancing test. (OB at 20–25.) However, Appellant did not raise this argument in the District Court in either his opposition to the Mayor's dismissal motion or in his own motion for reconsideration. (1-ER-62–77; 1-ER-24–34.) Accordingly, it is barred. Even should the Court consider this argument, it nevertheless fails as it is inapplicable here.

a. Appellant is Barred From Raising New Issues on Appeal.

Again, appellate courts cannot consider an issue raised for the first time on appeal. *Patrin*, 575 F.2d at 712. Here, Appellant has not identified that any of the

narrow exceptions apply: He does not cite a change in law, explain how declining review would result in a miscarriage of justice, or raise a purely legal question.

The Ninth Circuit has suggested that the *Pickering* test presents mixed questions of fact and law. *Posey v. Lake Pend Oreille School Dist. No. 84*, 546 F.3d 1121, 1130 (9th Cir. 2008) ("we hold that after *Garcetti* the inquiry into the protected status of speech presents a mixed question of fact and law."); *Rivero v. City & County of San Francisco*, 316 F.3d 857, 865–66 (9th Cir. 2002) (determining "the outcome of the *Pickering* balancing test" requires resolving underlying "question[s] of fact"); *Hyland v. Wonder*, 972 F.2d 1129, 1139 (9th Cir. 1992) ("Application of [the *Pickering*] balancing test entails" resolution of underlying "factual inquir[ies]"); *but see Moser v. Las Vegas Metropolitan Police Dept.*, 984 F.3d 900, 905 (9th Cir. 2021) ("While the *Pickering* balancing test presents a question of law for the court to decide, it may still implicate factual disputes that preclude the court from resolving the test at the summary judgment stage.").

Thus, because the *Pickering* test requires at least some factual analysis to resolve the legal question, it cannot fall under the exception because it is not a purely legal issue. The Mayor requests this Court exercise its discretionary power and decline to review this argument only raised for the first time on appeal.

b. **Pickering *is Inapplicable on These Facts Under Clear Ninth Circuit Jurisprudence.***

The Ninth Circuit has repeatedly confirmed that a court need not analyze the *Pickering* balancing test "where the *Branti* exception applies" because "the employee can be fired for purely political reasons." *Hobler*, 325 F.3d at 1150 (cleaned up); *Lathus*, 56 F.4th at 1243 n.2. Nevertheless, Appellant urges the Ninth

Circuit to dispose of its long-standing and well-reasoned jurisprudence and follow other circuits. (OB at 20–28.)

Appellant asserts the Ninth Circuit should follow the other circuits and a 59-year-old Supreme Court case, (OB at 26), even though this Circuit has affirmed its commitment to *Branti* in over two dozen cases spanning more than thirty years.[2] *See Thomas v. Carpenter*, 881 F.3d 828, 830 (9th Cir. 1989) (stating that the *Branti* test is the "ultimate inquiry"); *see also Lathus*, 56 F.4th at 1242 (same). Appellant criticizes the Ninth Circuit for "blindly applying the policymaker exception to circumstances involving speech" and for "weigh[ing] different interests" than those considered under *Pickering*. (OB at 21.) But this argument misunderstands the framework: *Branti* represents an exception to *Pickering*, not an extension of it. By definition, an exception entails a different analysis. Thus, "apply[ing] a weighted *Pickering* balance test," as Appellant suggests, renders the exception meaningless. (OB at 26.)

This Circuit reaffirmed this commitment to *Branti* two years ago in *Lathus*, when it held it "need not separately balance Lathus's interests 'in commenting upon matters of public concern' against the City's interest 'in promoting the efficiency of the public services it performs through its employees" under *Pickering*. *Lathus*, 56 F.4th at 1243 n.2. Although Appellant urges the Ninth Circuit to extend the *Pickering* test beyond logical explanation, purporting that

[2] Appellant also urges this Court to give *O'Hare* "due weight as it is a 'prophecy' of what the Court might hold." (OB at 26 (quoting *U.S. v. Montero-Camargo*, 208 F.3d 1122, 1133 n.17 (9th Cir. 2000)).) But *O'Hare* was decided nearly 60 years ago, and in half a century since, the Supreme Court has not adopted the view that the policymaker exception must be analyzed under *Pickering*. If *O'Hare* ever foreshadowed a change in doctrine, that prediction has long since passed without fruition. No special weight is owed to dicta that both time and precedent have left behind.

every other circuit has apparently done the same, (OB at 21–28), the Ninth Circuit has repeatedly reaffirmed that *Pickering* only applies in cases where the employee is not in a policymaking position. *Walker v. City of Lakewood*, 272 F.3d 1114, 1132 (9th Cir. 2001). And here, Appellant was in a policymaking position, rendering *Pickering* inapplicable.

c. Even Under a Weighted* Pickering *Test, the Mayor's Vetoing of Appellant's Reappointment Does Not Violate His Rights.

Even if this Court were to analyze Appellant's case under *Pickering* or a weighted *Pickering* analysis, the Mayor did not violate Appellant's First Amendment rights. Appellant argues under a modified *Pickering* analysis, the Mayor vetoing his reappointment violated his First Amendment rights because Appellant's "speech was of public concern on an issue entirely unrelated to his responsibilities as member [sic] of the Police Advisory Board." (OB at 29.) It remains worth noting that although Appellant continually argues the Mayor "removed" him from the Advisory Board, that is misleading, factually inaccurate, and not based on the pleadings. (*See supra*, footnote 1.) The Mayor did not remove him, but rather exercised his lawful veto authority given under the City Charter to veto Appellant's reappointment. (1-ER-109–10 ¶61; RJN Ex. 3.)

First, although Appellant cites cases from other circuits to support his argument that a weighted balancing test should apply, he does not identify any specific test for this Court to adopt. (OB at 20–28.) He references a range of circuit approaches without committing to one, leaving his argument vague and unsupported by a clearly defined standard. The Mayor, out of an abundance of caution, takes each test Appellant relies on—Second, Third, and Sixth (OB at 26–28)—and applies them here.

i. The First, Second, Sixth, Seventh, Tenth, and D.C. Circuits' Precedent Support the Mayor's Position.

The First Circuit held (on nearly identical facts) that a town council's refusal to reappoint a volunteer on an advisory commission after he publicly criticized council policies did not violate the First Amendment. *Foote v. Town of Bedford*, 642 F.3d 80, 81 (1st Cir. 2011). There, the Town of Bedford vested administrative authority in a seven-member town council to appoint members to boards like the Recreation Commission. *Id.* The Recreation Commission makes recommendations to Council and the Town Manager about acquiring, holding, and disposing of recreational facilities, staffing the facilities, and rules regulating their operation. *Id.* Foote was appointed to the Commission in 2005. *Id.* In early 2009, after publicly criticizing the Council's changes to a community park project and urging alternative funding, Foote was not reappointed despite expressing interest in continuing his service. *Id.* at 81–82. He sued alleging his non-reappointment was retaliation for his protected speech. *Id.* at 82.

The First Circuit held the Commission was a policymaking body whose primary function was to advise Council. *Id.* at 86. The Court also found that "[a]n office-holder who is principally involved with policy, 'even if only as an adviser,' qualifies as a policymaker." *Id.* at 86 (quoting *Flynn v. City of Boston*, 140 F.3d 42, 46 (1st Cir. 1998)). The Court noted that the Commission involved policymaking, the Commission members were "instruments for carrying out that mission," they worked directly with elected officials, and had the capacity to influence municipal decisions affecting parks and recreation. *Id.* Thus, the Court held, they were policymakers. *Id.* The Court determined that Foote's speech bared directly "on matters that the Council reasonably could expect to fall within the purview of the Commission," and thus "the necessary link between the speech and the position"

was forged. *Id.* The Court ultimately held the Council did not violate Foote's First Amendment rights because "[a] position-specific assessment makes manifest that compatibility of views of a reasonable requirement for appointment to the Commission." *Id.* at 87.

Foote is nearly indistinguishable from the facts at hand. The Mayor, like Bedford's Council, has the authority to appoint members to the Advisory Board. The Advisory Board is equivalent to the Recreation Commission, in that both were created to provide recommendations to the local government's leadership about underlying relevant issues. Appellant, like Foote, both served until the end of their terms and then were denied reappointment. And Appellant, like Foote, was denied reappointment based on speech that did not align with the appointing authority. Like *Foote*, this Court should find that even under the First Circuit's precedent, Appellant is a policymaker because the Advisory Board involved policymaking, the members were instruments for carrying out the Board's purpose and mission, they worked with elected officials, and had the capacity to influence the City's decisions affecting police and community relations.

Further, Appellant's speech is linked to his role on the Advisory Board. The Board is not a passive body; rather, it "shall actively encourage and foster citizen participation in crime prevention activities," and was tasked with "promot[ing] and encourage[ing] open communication between the Police Department and residents of the City." (RJN Ex. 2 at § 26.0801. Appellant's public statements labeling transgender identity as sinful—delivered while serving in public office at the County (a government that encompasses the City)—directly implicates the Board's core purpose: to build trust and strengthen relationships between the police and all members of the community, including those who are transgender. This especially includes transgender individuals who, as a minority and vulnerable group, may fear

police interaction given today's charged environment regarding transgenderism. These remarks undermine the very foundation of inclusive community engagement and damage the legitimacy of the Board as a representative liaison.

When a Board member makes statements that disparage a vulnerable population with the community the Board is charged with serving, it reasonably calls into question the member's ability to fulfill that mission. It is not akin to a policymaker in a parks and rec committee making comments on prison reform. (OB at 27.) Rather, when an official's speech "openly undermines the appointing authority's interest in ensuring that its policies will be implemented," the policymaker exception applies. *Foote*, 642 F.3d at 84. The Mayor was entitled to select a representative who could credibly and effectively foster open dialogue between the Police Department and the community it serves—all of it. Appellant's comments calling transgenderism a sin directly relates to his tasks on the Board and thus the Mayor was entitled to have an appointment that "sing[s] from the same sheet music." *Foote*, 642 F.3d at 85.

Appellant concedes that the D.C. Circuit and the Second Circuit follow the same test as the First Circuit. (OB at 22–23.) Moreover, in *Rose v. Stephens*, the Sixth Circuit expressly recognized that they have the same approach as the First, Seventh, and Tenth Circuits. 291 F.3d 917, 922 (6th Cir. 2002). Thus, the D.C., First, Second, Sixth, Seventh, and Tenth Circuits all apply the same framework—one that, as articulated in *Foote*, supports the conclusion that Appellant occupied a policymaking position and could not avail himself of First Amendment protections under these facts.

ii. The Third Circuit's Precedent Supports the Mayor's Position.

Under the Third Circuit approach, the Court must balance *Pickering* with *Connick* to determine whether Appellant's interest in his speech outweighs the Mayor's countervailing interest in providing efficient and effective services to the public. *Curinga v. City of Clairton*, 357 F.3d 305, 310 (3d Cir. 2004). Under the first part of the test, Appellant must establish that his speech was protected and about a matter of public concern. *Id.* "A public employee's speech involves a matter of public concern if it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'" *Green v. Phila. Housing Auth.*, 105 F.3d 882, 885–86 (3d Cir. 1997) (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)). Courts determine whether a matter addresses a public concern by considering the content, form, and context of a given statement based upon the entire record. *Connick*, 461 U.S. at 148.

Here, Appellant's statements were on matters of public concern, demonstrated by Appellant's own allegations. Appellant was serving on the San Diego County Human Relations Commission. (1-ER-104 ¶3.) During Transgender Awareness Month, the Commission raised "an agenda item to amplify the voices of the San Diego transgender community." (1-ER-108 ¶42.) Appellant not only abstained from voting on the agenda item because of his purported religious beliefs, but also publicly commented that he was abstaining due to his religious beliefs that being transgender is a sin. (1-ER-108 ¶43; 1-ER-110 ¶64.) Further, Appellant acknowledges his speech is political. (1-ER-111 ¶78 ("differing political and social views").) The issues of whether a government should embrace a subgroup of constituents is a matter of public concern, which is why it was being raised during the County's Human Relations Commission meeting and why Appellant felt the need to speak publicly. Thus, the first part of the test is met.

Second, Appellant must demonstrate his interest in speech outweighs the Mayor's interest in promoting the efficient of public services. *Curinga*, 357 F.3d at 310. While the Third Circuit has not analyzed a case like this one, a district court within its jurisdiction has. *Leslie v. Philadelphia 1976 Bicentennial Corp.*, 343 F. Supp. 768 (E.D. Penn. 1972). There, Plaintiff was the Coordinator of Community Development for the Philadelphia 1976 Bicentennial Corporation. *Id.* at 769. She was discharged after she made public statements accusing the Bicentennial Corp. of racist policies. *Id.* The Court found that unlike *Pickering*, her duties required a high degree of cooperation and loyalty with her coworkers and supervisors. *Id.* at 777. The Court held the disparaging public comments not only impeded the performance of her duties, but they also made it impossible because the Bicentennial Corp. needed public good will to succeed and her comments prevented that due to their divisive nature. *Id.* Thus, the Court concluded that e Bicentennial Corp.'s right "to promote its objectives through her particular role outweighed her right to speak as a citizen in the manner. . . ." *Id.*

Similarly, here, a high degree of loyalty and cooperation is required to foster an environment of trust not only between the Board and San Diego's elected officials, but between the community and the elected officials, of which the Board acts as a conduit. To make policies regarding efficient police/community operations, the Board was tasked with communicating with the public, requiring public good will to succeed. The Mayor was entitled to have a representative who promoted his objectives through this role and Appellant's comments were divisive. Thus, even under the Third Circuit's test, Appellant's speech was not constitutionally protected.

3. Appellant's Recharacterization of His Speech as Religious Rather Than Political is Both Barred and a Red Herring, as it Can be Both.

Appellant argues that the Ninth Circuit's policymaker precedent should not apply here because his speech was religious in nature rather than political. (OB at 30–34.) However, this argument is barred, was properly dismissed on reconsideration, and overall is a red herring as many courts have analyzed "religious" speech under the First Amendment policymaker exception.

a. Appellant is Barred From Raising New Issues on Appeal.

First, to the extent Appellant is appealing the Dismissal Order, Appellant's argument is barred. Like his reliance on *Fazio* and *Pickering*, Appellant did not properly raise this argument in opposition to the City's motion to dismiss. (1-ER-62–77.) Here, again, Appellant has not identified that any of the narrow exceptions apply: He does not cite a change in law, explain how declining review would result in a miscarriage of justice, or raise a purely legal question. The Court should deny considering this argument now.

b. The District Court Did Not Abuse its Discretion in Denying This Argument in the Reconsideration Order.

Further, to the extent Appellant is appealing the Reconsideration Order, his argument still fails because the Court did not abuse its discretion in denying it. Although he raised this argument in his reconsideration motion, he was foreclosed from doing so as it was not raised during the dismissal briefing. *See Cooper v. Toyko Electric Power Company*, 166 F. Supp. 3d 1103 (S.D. Cal. 2015) (holding parties may not raise new arguments or present new evidence on a reconsideration motion if it could have reasonably raised them earlier). This is reviewed for abuse of discretion.

Here, the District Court did not abuse its discretion in denying Appellant's reconsideration motion on these grounds. The District Court noted that the reconsideration motion was "based on a new argument that was not raised in his opposition to the motion to dismiss." (1-ER-8.) The Court found Appellant's argument that the Court only analyzed political affiliation cases rather than religious belief cases was misleading because "Hodges never argued that *Blair* or *Lathus* did not apply because of the *type* of First Amendment speech at issue." (1-ER-8.) The Court then summarized Appellant's arguments raised in his opposition to the motion to dismiss: (1) Appellant argued *Blair* did not apply based on factual distinctions, (1-ER-8–9; 1-ER-68–69); and (2) Appellant argued *Lathus* was distinguishable based on "relevant municipal codes, not because the case did not involve religious beliefs," (1-ER-9; 1-ER-69–71).

The Court also pointed out that Appellant's own argument likened his case to *Hunt v. County of Orange*, which also analyzed political beliefs, not religious ones. (1-ER-10; 1-ER-71.) The District Court ultimately held that Appellant could not avail himself on a new legal theory in a reconsideration motion. (1-ER-10 (citing *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.")).) Appellant did not raise this argument in the dismissal briefing, and thus the District Court did not abuse its discretion by denying it on reconsideration.

c. Even Considering Appellant's Argument, His Focus on Religion over Affiliation is a Red Herring.

Appellant gives no legal basis for treating religious speech any differently than political speech. (OB at 30–34.) Courts have held that they should be treated similarly and that "matters of public concern" is defined broadly to include "almost *any* matter other than speech that relates to internal power struggles within the workplace." *Tucker v. State of Cal. Dept. of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996) (finding that "speech is religious expression" and "obviously of public concern"). Thus, Appellant's distinction is a red herring. However, even considering this argument on the merits, it fails to establish a constitutional violation.

Appellant cites *Kennedy v. Bremerton School District* in arguing his transgender-based speech is protected under the Free Exercise Clause. 597 U.S. 507 (2002); (OB at 31). Appellant argues "[t]he 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." (OB at 31.) To state a Free Exercise claim, Appellant must allege "that a government entity has burdened [his] sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Kennedy*, 597 U.S. at 525. Once that showing has been made, the focus shifts to the Mayor to demonstrate the challenged action survives strict scrutiny. *Id.* at 524–25.

However, here, Appellant never alleged a **policy** by the Mayor that is not neutral or not generally applicable. (1-ER-111–13.) The only conduct Appellant alleges is the Mayor's vetoing of his reappointment, however, Appellant concedes the Mayor rightfully retains this veto power under the City Charter. In *Kennedy*, the government action consisted of issuing a letter to Kennedy, with numerous directives instructing him not to have motivational talks with students that include religious expression or prayer, to avoid from interacting with students praying, and to only engage in "nondemonstrative" religious activity. *Id.* at 516. In other words,

the school district created a policy dictating Kennedy's religious expression at work.

Here, there are no facts suggesting the Mayor has a policy of categorically vetoing individuals from the Board based on their religion. Appellant's own allegation supports this as he alleges the Mayor has not exercised his veto authority against other commissioners who express differing opinions. (1-ER-111–12 ¶78.) Further, the Mayor did not dictate, instruct, demand, or require Appellant to act, speak, or do anything differently during his time on the Board regarding his religious expression. The Mayor did not react to Appellant's transphobic comments, but rather let him serve "more than a year and a half" without any intervention. (1-ER-109 ¶61.) Instead, the Mayor exercised his rightful veto to Appellant's reappointment, which does not constitute a policy burdening his sincere religious practice. Simply put, the Mayor did not hinder Appellant's free exercise of religion in any way or substantially burden his religious practice, distinguishing *Kennedy*.

Additionally, Appellant's new argument that the Mayor "set up a religious test" barring individuals from holding a public position if they don't believe in transgenderism is absurd and unsupported by the record. (OB at 32–33.) First, it is obvious from the record that Appellant only came up with this "religious test" argument in his reconsideration motion. (OB at 15.) Appellant does not allege the Mayor's actions established a "religious test" in his complaint or in his opposition to the motion to dismiss. Thus, this argument is already foreclosed from being raised anywhere because it is not in the pleadings. *See Farr v. U.S.*, 990 F.2d 451, 454 (9th Cir. 1993) (holding on a motion to dismiss, the Court's review is limited to the pleadings).

Second, both Supreme Court and Ninth Circuit precedent clearly find that when an individual represents the government, the First Amendment does not protect that speech when such speech is employment-based. *See Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006); *City of San Diego, Cal. V. Roe*, 543 U.S. 77, 80 (2004) ("a governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public."). When an individual is considered a policymaker, the policymaker jurisprudence applies, even if the speech is religious.

Further, the case Appellant relies on, *Torcaso v. Watkins*, could not be any more factually distinguishable. (OB at 32.) In *Torcaso*, Maryland had a state constitutional requirement that public officers must declare their "belief in the existence of God" to hold a public office. 367 U.S. 488, 489 (1961). Torcaso was appointed to the office of Notary Public but was refused a commission "because he would not declare his belief in God." *Id.* The Supreme Court held that requiring an individual to declare a belief in God "sets up a religious test" designed to bar people who refuse to declare a belief in God from holding a public office. *Id.* at 489–90.

However, here, there are no allegations any City laws exist that suggest, let alone require, that anyone holding office, or appointed to an advisory board, in the City of San Diego is required to declare any religious or nonreligious beliefs or declare any commitment to any particular ideology prior to taking such office. There is nothing express or implied that the Mayor established any ideology requirement prior to an individual serving on the Advisory Board.

Another case Appellant cites to is also largely distinguishable. (OB at 33.) In *Feminist Women's Health Center v. Codispoti*, Plaintiff filed a motion requesting Judge Noonan, a circuit court judge, recuse himself from their appeal regarding

abortion issues arguing that the Judge was biased based on his religious beliefs against abortion. 69 F.3d 399, 400–01 (9th Cir. 1995). The Judge held that recusal based on religious beliefs would violate Article VI's mandate that no religious tests are required to hold public office. *Id.* at 400.

Here, the Mayor did not prevent, recuse, or disqualify Appellant from being appointed as a member of the Advisory Board based on his religion or religious beliefs—in fact he was the one who appointed him! *Feminist Women's Health Center* dealt with a limited issue of judicial disqualification, and thus is not appropriate precedent here. There are 16 cases citing *Feminist Women's Health Center*, and none of them extend the reasoning of the case beyond recusal or disqualification issues; this Court should decline to do so now.

Finally, Appellant's argument that the policymaker exception allows elected officials to fire a policymaker for political beliefs, but not religious ones is a distinction without a difference and presents a false dichotomy. (OB at 33.) As previously stated, speech on matters of public concern include both political speech and religious speech. Further, Appellant made his own religious beliefs political when he joined two public commissions, vetoed a matter regarding transgender individuals, and stated the reasons behind his veto on the record.

Moreover, the current political climate makes clear that transgender issues are highly politicized, having been at the forefront of national political and legal debates over the past decade. *See Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019) (reviewing a district court's preliminary injunction order on Trump's barring transgender individuals from serving the military); *Shilling v. United States*, --- F. Supp. 3d ---, *12 (W.D. Wash. Mar. 27, 2025) (analyzing the equal protection rights of transgender individuals in the military, stating the "desire to harm a

politically unpopular group" cannot justify disparate treatment, and noting the political powerlessness applies to transgender rights).

As the District Court correctly observed, while Appellant's statements may have been "motivated by his religious beliefs, they were also political conduct and speech because they involved his work on the Commission." (1-ER-8.) Appellant fails to identify authority requiring a rigid distinction between political and religious speech, and any such distinction would be both artificial and legally unsupported. Thus, the Mayor did not burden Appellant's religious practice.

4. The Mayor Properly Exercised his Veto Authority to Remove Appellant Because Political Commitment is Necessary to Serve on the Advisory Board.

Under the Ninth Circuit's clear precedent, Appellant's role on the Board was a policymaking position and political loyalty was a requirement of the job. Appellant's three claims are all premised on the same failing argument: that he lost his position on the Advisory Board due to, or in retaliation to, his "protected speech." (1-ER-111 ¶76; 1-ER-113 ¶92; 1-ER-116; ¶112.) However, the Mayor's vetoing of Appellant's reappointment was well within his constitutional rights and did not violate Appellant's First Amendment rights.

When the District Court made this determination in the Dismissal Order, it appropriately considered each claim, as they all stemmed from the same alleged wrongful conduct. (1-ER-10–9; 1-ER-41–47.) Although Appellant argued on reconsideration that analyzing all three claims together was clear error, the District Court properly noted Appellant failed to raise that argument in his opposition to the City's motion to dismiss. (1-ER-11.) Accordingly, if Appellant is appealing the Dismissal Order, his argument the District Court committed error in analyzing his claims together is barred. If the Appellant is appealing the Reconsideration Order,

the District Court did not abuse its discretion in rejecting this argument because it was improperly raised in reconsideration as it was never brought during the dismissal briefing. Nevertheless, even on the merits, the District Court rightfully held the Mayor's use of his veto power did not violate the First Amendment under the policymaker exception.

Here, the crux of Appellant's three claims is that Appellant lost his position on the Advisory Board allegedly in response to, or in retaliation for, his "protected speech." However, this speech was not protected because it fell under the policymaker exception to the First Amendment.

To state a claim for First Amendment retaliation by the government, Appellant must show that "(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 the 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 (9th Cir. 2010).

In *Blair*, the Ninth Circuit held that termination is permissible when an employee's conduct disrupts the effective performance of policymaking duties. 608 F.3d 540 (9th Cir. 2010). There, the plaintiff school board member claimed his First Amendment rights were violated when he was stripped of his position as vice president of the board in retaliation for publicly criticizing the school superintendent. *Id.* at 543. The Court emphasized *Blair*'s case was not a typical First Amendment case because he was challenging an adverse action "taken by his peers in the political arena." *Id.*

The *Blair* Court noted his claim had "little in common" with First Amendment claims because "more is fair in electoral politics than in other

contexts" as the First Amendment "does not succor casualties of the regular functioning of the political process" or "shield public figures from the give-and-take of the political process." *Id.* at 543, 544, 545. Thus, the Ninth Circuit could not conceive of any "difference between what the Board's internal vote against [the plaintiff] accomplished and what voters in a general public election might do" and saw "no reason the Board members' votes here should be regulated in a way that the general public's are not." *Id.* at 545. The Court ultimately held when an employee's behavior undermines their ability to execute critical policy roles, the policymaker exception provides a defensible basis for termination. *Id.*

Following *Blair*, this Court reaffirmed its reasoning in *Lathus*, which is referenced throughout this brief. 56 F.4th 1238 (2023). As stated herein, *Lathus* is directly applicable to this case because the Ninth Circuit considered the same issue presented here: "[W]hether the First Amendment protects a volunteer member of a municipal advisory board from dismissal by the city councilperson who appointed her and is authorize under a city ordinance to remove her." *Id.* at 1239. After considering the issue, this Court held that "[b]ecause the advisory board member is the 'public face' of the elected official who appointed her to the body, we hold that she 'can be fired for purely political reasons.'" *Id.*

The facts here are strikingly similar. First, Appellant was appointed to the volunteer Advisory Board by the Mayor, just as the board member in *Lathus* was appointed by Councilmember Carr. Like the CPAB, the Advisory Board is tasked with promoting community trust, advising on community engagement, formulating plans for the implementation of broad goals under the Board's duties and responsibilities, and conducting meetings and other activities. Under clear Ninth Circuit precedent from *Blair* to *Lathus*, the Mayor had a right to have a political

appointee who represented his viewpoints and was allowed to distance himself for Appellant's public comments regarding the transgender community.

These statements directly undermine the Board's mission and the Mayor's efforts to maintain inclusive and respectful dialogue between police and the community, which include transgender individuals. Under *Lathus*, the Mayor was well within his authority to veto Appellant's reappointment based on the political and policy implications of those statements. Just as in *Blair* and *Lathus*, the First Amendment does not require a mayor to retain an appointee whose views conflict with the goals of a policymaking advisory role.

5. The Mayor is Entitled to Qualified Immunity Because There is No Clearly Established Case Law that Exercising a Lawful Veto on a Policymaking Position Violates the First Amendment.

Even if Appellant's arguments are correct that the Mayor acted unlawfully and violated his First Amendment rights, the Mayor is nevertheless immune from this lawsuit in his personal capacity under qualified immunity. Although the District Court never reached the merits of immunity in either Order, in reviewing district court decisions, the Ninth Circuit may affirm on any ground that has support in the record. *Logan v. U.S. Bank Nat'l Ass'n*, 722 F.3d 1163, 1169 (9th Cir. 2013). Here, the Mayor's immunity was fully briefed in the district court. (1-ER-100–101; 1-ER-74–76; 1-ER-56.)

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al–Kidd*, 563 U.S. 731, 742 (2011) "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, 'the contours of a right are sufficiently clear' that every

'reasonable official would have understood that what he is doing violates that right.'" *Id.* at 2083 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (internal alterations omitted).

Here, the critical question here is whether a reasonable official in the Mayor's position should have known that Appellant was not a policymaker whose political loyalty was important to the effective performance of his job. *See Hunt*, 672 F.3d 615–16 (citing *Lopez–Quinones v. Puerto Rico Nat'l Guard*, 526 F.3d 23, 27 (1st Cir. 2008)). If the Mayor "could . . . have reasonably but mistakenly believed that his [] conduct did not violate a clearly established constitutional right," he is entitled to qualified immunity. *Greene v. Camreta*, 588 F.3d 1011, 1031 (9th Cir. 2009); *Hunt*, 672 F.3d at 615–16. Government officials performing a discretionary function are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established law of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982).

Under the first prong, the Mayor exercised his discretion when he vetoed Appellant's reappointment to the Advisory Board. Appellant admits the Mayor had the authority to veto his reappointment. (1-ER-109–10 ¶61.) Moreover, as discussed above, Appellant failed to allege any First Amendment violations. Thus, as a matter of law, the Mayor is entitled to qualified immunity on this prong alone.

Second, even if Appellant made a colorable constitutional claim, there is no clearly established law holding that using a lawful veto authority on a volunteer advisory board member's reappointment by the person who appointed him in the first place for failing to represent his "political outlook and priorities," violates the First Amendment. In fact, *Lathus* holds just the opposite in finding the termination

of a volunteer to an advisory housing board fell squarely within the policymaker exception to the First Amendment's protections. *See Lathus*, 56 F.4th at 1240–42.

The Ninth Circuit has made clear that qualified immunity is not to read at a high level of generality, but rather to determine "whether the violative nature of *particular* conduct is clearly established" within the case's specific context. *Vos v. City of Newport Beach*, 892 F.3d 1024, 1035 (9th Cir. 2018) (emphasis in original). Further, Appellant carries the burden establishing that "the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Kisela v. Hughes*, 584 U.S. 100, 105 (2018) (citation omitted).

In opposing the City's motion to dismiss, Appellant only relied on a single case to support his argument that the law was clearly established, however, that case is readily distinguishable. (1-ER-76.) In *Jones v. Williams*, the plaintiff was an inmate in the Oregon State Penitentiary who was a Muslim and a member of the religious organization, Nation of Islam. 791 F.3d 1023, 1028 (9th Cir. 2015). He sued the Oregon Department of Corrections after they forced him to consume and handle pork against his religion. *Id.* at 1028–29, 1032. Plaintiff alleged First Amendment violations including his right to free speech and free exercise of religion. *Id.* at 1030. As to Plaintiff's Free exercise claim, the Court found coercing him "to forego [his] sincerely held religious beliefs or to engage in conduct that violates those beliefs" violated clearly established rights to "avoid handling pork on the basis of his religious beliefs." *Id.* at 1034. Regarding Plaintiff's retaliation claim, the Court analyzed a line of cases discussing prisoners' First Amendment rights.

Here, the only similarity between *Jones* and Appellant is that they both have a religion; but the differences end there. Appellant is not a prisoner and thus case

law analyzing First Amendment issues under prison-based jurisprudence is inappropriate. Further, there are no factual allegations suggesting the Mayor coerced or attempted to coerce Appellant into forgoing his sincerely held beliefs or that the Mayor asked Appellant to engage in conduct violating those beliefs, like eating or handling pork. The Mayor did not fire or remove Appellant during his term due to his comments. Nor did he ask Appellant to retract his statements or publicly affirm a commitment against Appellant's own values. The Mayor did not do anything outside of his admitted lawful authority to exercise his veto against Appellant's reappointment. Because the Mayor did not coerce Appellant or ask him to engage in conduct violating Appellant's beliefs, *Jones* is distinguishable.

Appellant failed to carry the burden in opposing the Mayor's qualified argument in the District Court below. Moreover, Appellant cannot carry his burden because there is no clearly established law establishing a First Amendment violation when a Mayor exercises a lawful, discretionary duty over a volunteer member of an advisory board, whom he appointed, for sharing differing political beliefs when political loyalty is necessary for the position. There is no law suggesting a reasonable person in the Mayor's position would have known such an action violated clearly established law. Accordingly, the Mayor respectfully requests this Court find he is entitled to qualified immunity.

6. Leave to Amend Was Appropriately Denied Because Appellant Cannot State a First Amendment Claim.

Although Appellant fails to raise this argument in his Opening Brief, and thus waived it, the District Court properly denied leave to amend. Whether a District Court properly denied leave to amend is reviewed for abuse of discretion. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011). Although Federal Rule of Civil Procedure 15 states leave to amend should

be given freely, denying leave is not an abuse of discretion if "it is clear that granting leave to amend would have been futile." *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004).

Here, the Court held leave to amend was not required in this case because it was futile. (1-ER-47.) In making this determination, the Court found that under the Municipal Code and the City Charter, "commonality of political purpose is an appropriate requirement for Advisory Board Members." (1-ER-47.) The Court also noted Appellant failed to identify any facts that he could rely on in amendment that would state a First Amendment claim. (1-ER-47.) This finding is supported by *Lathus*, which came to the same conclusion.

The Ninth Circuit also found denying leave to amend was appropriate as the Court held, "an elected official is allowed to 'distance' herself from an appointee who might be a political liability." *Id.* at 1244 (quoting *Blair*, 608 F.3d at 545). The Court noted such a conclusion cannot "be altered by an amendment." *Id.*

Here, *Lathus* is virtually indistinguishable from this case. Accordingly, this complaint cannot be saved by amendment, and denying leave to amend based on futility was proper. Further, Appellant's new theories and arguments raised in his reconsideration motion and this appeal can be considered indicative of what Appellant would allege if given leave to amend. However, as demonstrated herein, these new theories and arguments substantively fail, further demonstrating that leave to amend would be futile. Thus, the Mayor requests this Court affirm the denying amendment, as it did not abuse its discretion in denying leave to amend.

VII. CONCLUSION

Appellant respectfully requests this Court to either affirm the Dismissal Order or affirm the Reconsideration Order, both of which dismissed Appellant's lawsuit. At bottom, ignoring the procedural defects in the Opening Brief, Appellant

cannot state a First Amendment violation as his role on the Advisory Board falls squarely within the policymaker exception. Further, many of Appellant's arguments are procedurally deficient and should not be considered on appeal.

Date: April 16, 2025

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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