Court of Appeal No. 24-7093

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS HODGES, an individual
Appellant
v.
TODD GLORIA, both in his personal capacity and in his official capacity as the Mayor of the City of San Diego
Appellee

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

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellee's Answering Brief (Dkt. No. 19.1) mischaracterizes both the nature of Pastor Hodges' claims and the legal framework governing First Amendment protections. Contrary to Appellee's argument, this case is not about a mayor lawfully exercising political discretion. It is about whether the government can retaliate against a citizen-appointee to a public board for expressing his constitutionally protected religious views—views that do not disrupt board functions, violate law, or interfere with board operations. Pastor Hodges was not removed because of job performance, misconduct, or disruptive behavior. He was denied reappointment because he expressed his sincerely held religious belief, consistent with long-standing Christian doctrine, that transgender identity is incompatible with his faith. That is religious speech squarely protected by the First Amendment. Public service must not come at the cost of religious liberty. Yet, Appellee's actions—and the District Court's Dismissal Order[1] (1 ER 36-48)—impose an unconstitutional

[1] Appellee expresses confusion about which order is being appealed. Answering Br. at 1–3. While Appellant acknowledges that the Notice of Appeal (1 ER 134) references the District Court's Reconsideration Order (1 ER 4-12), the Opening Brief clearly identifies the Dismissal Order (1 ER 36-48) as the order under review. Appellant's Opening Brief (Dkt. No. 8.1), at 9 ("Opening Br."). In any event, an appeal from the Dismissal Order does not impact the timing or procedural validity of this appeal. *See* Fed. R. App. P. 3(7) ("An appeal must not be dismissed . . . for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and *designates an order that merged into that judgment*.") (emphasis added); *Munoz v. Small Bus. Admin.*, 644 F.2d 1361, 1364 (9th Cir. 1981) ("[T]he rule is well settled that a mistake in designating the judgment appealed from

religious test for public office, penalizing Pastor Hodges for his religious beliefs simply because they were unpopular.

This Court should reverse the District Court's Dismissal Order and affirm that Pastor Hodges has the right to live out and express his sincerely held religious beliefs without fear of government retaliation.

II. ARGUMENT

A. Appellee Has Failed To Show That Pastor Hodges, An Unpaid Volunteer Without Policy-Making Power, Is A Policymaker

Appellee's claim that the "policymaker" issue is newly raised on appeal (Answering Br. at 11) is both inaccurate and contradicted by the record. From the outset, Pastor Hodges squarely addressed this issue. In his opposition to Appellee's motion to dismiss, he directly challenged the assertion that he acted as the Mayor's "political extension" or "public face" and was thus not entitled to First Amendment protections. 1 ER 67–68. His use of the *Fazio* framework simply organizes existing arguments under the proper legal standard.[2] *See Fazio v. City & Cnty. of San Francisco*, 125 F.3d 1328, 1331 (9th Cir. 1997).

The policymaker exception is intentionally narrow, reserved for "high-

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should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake.").

[2] To the extent Appellee suggests a different standard—namely, whether "party affiliation is an appropriate requirement for the effective performance of the public office involved" (Answering Br., at 13)—Appellee fails to point to any evidence in the record indicating that party affiliation is a requirement for serving on the Police Advisory Board.

ranking" employees whose duties involve political discretion. *Elrod v. Burns*, 427 U.S. 347, 367 (1976); *Hunt v. Cnty. of Orange*, 672 F.3d 606, 613 (9th Cir. 2012). In *Lathus v. City of Huntington Beach*, 56 F.4th 1238 (9th Cir. 2023), the Ninth Circuit found that a Citizens Participation Advisory Board ("CPAB") member was a policymaker because the role included authority to "speak to the public and to other policymakers on behalf of the official." *Id.* at 1242. That finding was grounded in the perception that CPAB members publicly represented the views of their appointing officials.

Lathus is inapposite. Unlike in that case, neither the record nor the *Fazio* factors support treating Pastor Hodges as a policymaker:

1. **Vague or broad responsibilities**: The municipal code clearly limits a board member's role to making recommendations on police policy. *See* San Diego Municipal Code § 26.0803. Police Advisory Board members have no responsibility regarding implementing, adopting, or enforcing policies. The volunteer position held minimal authority and was limited to offering suggestions—not implementing or enforcing policy.
2. **Relative Pay**: Appellee does not contest that the position is unpaid.
3. **Technical Competence**: To satisfy this standard, it must be shown that technical competence is a prerequisite for appointment—not merely that the appointee possesses it. *See* Fazio, 125 F.3d at 1134 n.5. Membership on the Police Advisory Board does not require such technical expertise; the only qualification for Pastor Hodges' seat was being a "representative from a police employee group." *See* San Diego Municipal Code § 26.0802.
4. **Power to Control Others**: Appellee states that it is "unclear if Board members have the power to control or direct anyone." Answering Br., at 22. Yet, the governing statute does not give board members power to control others. San Diego Municipal Code § 26.0803 (providing the duties and

functions of the Police Advisory Board).

5. **Authority to Speak on Behalf of the Mayor**: Appellee misrepresents the statute in arguing that the position allows a Police Advisory Board member to speak on behalf of the Mayor. To support this claim, Appellee cites language stating the Police Advisory Board serves as a method of "community participation in recommending and reviewing policies, practices and programs." Answering Br., at 16. However, the statute clarifies that this participation is carried out not through public statements, but by "recommending and reviewing policies, practices and programs" directed to the mayor. *See* San Diego Municipal Code § 26.0801(b). Therefore, the provision cited grants authority to advise the mayor – not to speak on the mayor's behalf regarding substantive policy. The actual functions of the position are laid forth in San Diego Municipal Code § 26.0803 which does not grant any authority to speak on behalf of the mayor.
6. **Public Perception**: The statute does not empower the Police Advisory Board to formulate substantive policy, issue public statements, or take any action that would reasonably be perceived as speaking on the mayor's behalf. *See generally* San Diego Municipal Code § 26.0801-03.
7. **Influence on Programs**: Appellee does not dispute the facts showing this factor weighs in Pastor Hodges' favor. *Compare* Opening Br., at 18, *with* Answering Br., at 14-15. Members of the Police Advisory Board had no authority beyond offering recommendations to the Mayor and played no role in adopting policies or implementing plans.
8. **Contact with elected officials**: The record is unclear on this point because it was not addressed in the First Amended Complaint and the case was dismissed before discovery was completed. The relevant question is whether the position, by its nature, involved substantial contact with the Mayor – not

whether Pastor Hodges personally had such contact, as Appellee suggests. Answering Br., at 18; *see Fazio*, 125 F.3d at 1134. Appellee is in the best position to answer this question. Instead of offering vague assertions and relying on inference, Appellee could have provided a direct, substantive response. His failure to do so supports a strong inference that he had little meaningful contact with the Police Advisory Board as a whole.

9. **Responsiveness to Partisan Politics and Political Leaders:** Appellee argues that because Pastor Hodges was appointed by a political official, he was therefore required to be responsive to political leadership. However, there is no evidence in the record that the position was political in nature. Pastor Hodges was appointed to develop recommendations focused on improving communication with the public and enhancing crime prevention—not to advance a political agenda or respond to political directives. In fact, Appellee neither nominated Pastor Hodges nor appointed him to the Police Advisory Board. 1 ER 106, ¶¶ 21-22.

As Pastor Hodges has consistently shown, his position was neither directive nor discretionary. He was a volunteer member of a public advisory board with no authority to implement policy, control staff, or represent the Mayor publicly. Appellee's reliance on *Lathus* is misplaced: *Lathus* focused on the plaintiff's explicit role in speaking on behalf of city leadership. *Lathus*, 56 F.4th at 1242. There is no evidence that Pastor Hodges held—or was perceived to hold—a similar role.

Contrary to the District Court's conclusion that Pastor Hodges could "speak to the public and other policymakers on behalf of the mayor" (1 ER 45), the record shows no such authority. The *Lathus* court expressly noted that First Amendment protections extend to those who *lack* authority to speak publicly or shape policy implementation. *Lathus*, 56 F.4th at 1242. Pastor Hodges could do neither.

San Diego Municipal Code § 26.0803 confirms that the Police Advisory

Board's duties are strictly advisory. Actions such as "encouraging open communication" or recommending policies to the Mayor do not equate to policymaking or public representation. None of these responsibilities authorize a Police Advisory Board member to express views to the public—let alone views that could reasonably be attributed to the Mayor.

The District Court's finding that Pastor Hodges served as a "conduit" between the Mayor and community also misapplies *Lathus*. 1 ER 47. There, the plaintiff evaluated, prioritized, and implemented development plans. *Lathus*, 56 F.4th at 1242. Pastor Hodges did none of these things. Even Appellee, while asserting the "conduit" theory, offers no evidence to support it. Answering Br., at 15, 30.

Appellee also proposes a completely new standard, arguing that Pastor Hodges was a policymaker because his responsibilities "extended beyond passive or clerical functions and instead encompass a range of high-level functions involving policy development, strategic evaluation, and oversight." Answering Br., at 14. This is not the applicable standard, it was not applied by the District Court, and there is no supporting caselaw.

Finally, Appellee's reliance on *Bardzik v. Cnty. of Orange*, 635 F.3d 1138 (9th Cir. 2011), is unpersuasive. Answering Br., at 14-45. There, the plaintiff was a highly compensated sheriff's lieutenant responsible for initiating training programs for reserve officers, launching a decentralization effort that created new departmental positions, producing a newsletter, and implementing a new promotion system. *Id.* at 1146–47. Even then, the Ninth Circuit conducted a detailed *Fazio* analysis before concluding whether he qualified as a policymaker. Pastor Hodges, by contrast, had no supervisory authority, no control over policy, no budget, and no staff. He was an unpaid advisor with a community-facing, non-executive function.

Pastor Hodges is exactly the kind of public servant the First Amendment is designed to protect: a private citizen volunteering to serve his community—not a

political appointee wielding government power. The record does not support the conclusion that he was a policymaker under any accepted legal standard.

B. The District Court Failed To Independently Consider Pastor Hodges' Free Exercise Rights Alongside His Free Speech Rights

1. Pastor Hodges Clearly Preserved His Free Exercise Claim in Response to the Motion to Dismiss

Appellee's assertion that Pastor Hodges is improperly "recharacterizing" his speech as religious rather than political, and thereby raising a new issue, is plainly inaccurate. *See* Answering Br. at 31. From the outset, Pastor Hodges has consistently alleged that adverse action was taken against him "because of [his] religious beliefs." 1 ER 112, ¶ 87. This is not a new theory—it is the core of his Free Exercise claim.

Pastor Hodges' Opposition to the Motion to Dismiss explicitly invoked his Free Exercise rights. *See,* e.g., 1 ER 67 ("Defendant addresses only one legal prong of one of Pastor Hodges' three constitutional claims. . . . Defendant only addresses whether Pastor Hodges engaged in 'protected speech,' but fails to address any other prongs related to Pastor Hodges' constitutional claims."); 1 ER 75 ("There is no case law to support the proposition that exercising government authority justifies a government official's disregard and discrimination of a person's sincerely held religious beliefs."); 1 ER 76 ("Defendant effectively gave Pastor Hodges an ultimatum—adhere to Defendant's own ideology regarding transgenderism in violation of his religious beliefs to maintain his volunteer appointment or lose his position for adhering to his religious beliefs.").

Appellee's motion to dismiss made no substantive argument concerning the Free Exercise claim. Instead, it mischaracterized the allegations as purely speech based. *See* 1 ER 88 (asserting that the claim arose from "retaliation for . . . 'protected speech'"), despite the First Amended Complaint clearly stating that Pastor Hodges was targeted for his *religious beliefs*. 1 ER 112, ¶ 87. The motion failed to offer any

legal justification for dismissing the Free Exercise claim, and the District Court erred in adopting that incomplete framing.

Contrary to Appellee's suggestion, Pastor Hodges was not required to make detailed Free Exercise arguments in response to a motion that failed to substantively address them. To have done so would have risked waiving his ability to object to Appellee's failure to properly preserve the issue. *See Image Tech. Serv., Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1356–57 (9th Cir. 1998) ("[A]n issue raised for the first time in a reply brief is waived because the opposing party does not have an opportunity to respond.").

Moreover, Pastor Hodges identified this oversight again in his Motion for Reconsideration, explaining that both the Court and Appellee ignored the religious nature of his claims. *See* 1 ER 28 ("Markedly absent from Defendant's briefing and the Court's Order—but present in the FAC and Pastor Hodges' Opposition Brief—are facts related to Pastor Hodges' sincerely held religious beliefs."); 1 ER 31 ("The Court ignores or overlooks the dispositive facts alleged in Pastor Hodges' FAC regarding his sincerely held religious beliefs . . .").

Appellee's reliance on *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204 (9th Cir. 1996), is misplaced. That case involved only Free Speech claims and did not analyze Free Exercise protections. The language Appellee quotes concerns whether religious speech constitutes a matter of public concern – not whether religious beliefs warrant distinct constitutional protection. *Id.* at 1210. Because *Tucker* did not involve Free Exercise claims, it has no bearing on the issue at hand.

2. The District Court Erred in Failing to Independently Analyze Pastor Hodges' Free Exercise Claim

Appellee argues that there is "no legal basis for treating religious speech any differently than political speech." Answering Br. at 33. This ignores binding precedent and misrepresents the nature of Pastor Hodges' Free Exercise claim. The

Supreme Court has repeatedly affirmed that religious expression is entitled to heightened protection under the First Amendment. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022) (First Amendment "doubly protects religious speech"). By overlooking this precedent, Appellee's position and the District Court's decision effectively allows for the imposition of religious tests and fosters a discriminatory environment that fails to respect individuals' rights to live in accordance with their faith. *See* Opening Br., at 30-33. As such, Appellees' assertion that no legal basis is given for treating religious speech differently falls flat.

The District Court's failure to separately address Pastor Hodges' Free Exercise claim contravenes this controlling precedent. By collapsing his Free Exercise claim into a Free Speech framework, the Court ignored the unique constitutional analysis required. The First Amendment prohibits the government from imposing religious tests or penalizing individuals for their faith—a principle that applies even more forcefully when the government acts with hostility toward religious belief. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. 617, 634–38 (2018) (government action that departs "even subtly" from religious neutrality violates the Free Exercise Clause).

Appellee likewise fails to engage with Pastor Hodges' argument that *Pickering* and the policymaker exception have never been extended to permit adverse action based solely on religious belief. *See* Opening Br. at 20–30. The *Pickering* framework was designed for speech – not belief. Likewise, the policymaker exception addresses political affiliation, not constitutionally protected characteristics like religion, race, or gender. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 719–20 (1996).

Pastor Hodges does not seek to overturn Ninth Circuit precedent – he merely asks this Court to recognize that the existing speech-related frameworks do not govern claims alleging religious discrimination. As no controlling precedent

addresses this precise issue – i.e., a government volunteer removed *solely* for expressing constitutionally protected religious views – this Court should hold that the government may not take adverse action against an individual based on religious belief, regardless of that individual's policy role.

Pastor Hodges has never denied that his briefing below cited speech cases – because no published decision directly addresses a policymaker's religious Free Exercise rights in this context. However, the absence of precedent does not justify dismissal. Rather, it calls for principled application of core First Amendment doctrines – including the rule, emphasized in *Masterpiece*, that religious claims must be independently analyzed and neutrally adjudicated. 584 U.S. at 638–39.

Finally, this Court should recognize that even if religious expression overlaps with political speech, the constitutional analysis must still include a distinct Free Exercise inquiry. As the Supreme Court made clear in *Masterpiece*, Free Exercise claims do not disappear simply because speech is also involved. The religious dimension of Pastor Hodges' claim cannot be sidelined, and neither the District Court nor Appellee has offered a legally sufficient reason for doing so.

C. Appellee Is Not Entitled to Qualified Immunity and Took Adverse Action Against Pastor Hodges as a Final Policymaker

Qualified immunity protects government officials from liability for damages only when their "conduct does not violate clearly established constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The central question is not whether the constitutional principle was generally known, but whether a reasonable official in the defendant's position would have understood that their specific actions were unlawful under existing precedent. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *Houghton v. South*, 965 F.2d 1532, 1534 (9th Cir. 1992).

Although the District Court made no ruling on qualified immunity, the law was clearly established such that any reasonable official in Mayor Gloria's position would have known that retaliating against Pastor Hodges for expressing and adhering to his religious beliefs violated the First Amendment. The Supreme Court has repeatedly made clear that the Free Exercise Clause prohibits government actors from conditioning public benefits or participation in civic life on the renunciation of religious beliefs. The Supreme Court has stated unequivocally that "[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15–16 (1947). Likewise, in *Kennedy*, the Court confirmed that individuals do not forfeit their right to publicly express religious beliefs simply because they serve in a public role. 597 U.S. at 525. Mayor Gloria's conduct—demanding either silence or religious conformity from Pastor Hodges as a condition of reappointment—violated both *Everson* and *Kennedy*.

Appellee attempts to distinguish *Jones v. Williams*, 791 F.3d 1023 (9th Cir. 2015), as a case limited to "prison-based jurisprudence." Answering Br. at 43. That argument fails. *Jones* reaffirmed a broader constitutional principle that is directly applicable here: the government cannot force an individual to choose between public service and fidelity to sincerely held religious beliefs. *Id.* at 1033. If *Jones*—in the more deferential prison context—found a constitutional violation clear enough to preclude immunity, then the violation here, in the context of a volunteer civic board, is even more apparent. The absence of a literal prison wall does not dilute the force of constitutional protections.

Appellee also asserts that there can be no Free Exercise claim because no formal policy is at issue. This argument ignores binding precedent on the final policymaker doctrine. The Supreme Court has held that a municipality may be held liable for a "course of action tailored to a particular situation," even if the decision

was a one-time act, so long as it was made by a final policymaker. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). The relevant question is whether the official had final policymaking authority "in a particular area, or on a particular issue." *McMillian v. Monroe Cnty., Ala.*, 520 U.S. 781, 785 (1997).

There is no serious dispute that the Mayor had final authority over appointments to the Police Advisory Board. The Police Advisory Board's purpose was to advise the Mayor, and it was the Mayor who exercised discretion to veto reappointments. The adverse action against Pastor Hodges was not merely discretionary; it was taken by the ultimate decisionmaker. The absence of a formal written policy does not insulate a final policymaker's unconstitutional act from judicial review.

The law was clearly established, the Mayor acted with final authority, and Pastor Hodges' rights were violated. As such, qualified immunity does not apply.

III. CONCLUSION

For the reasons stated above, Appellant requests that this Court reverse the District Court's Dismissal Order.

Respectfully submitted,

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Julianne Fleischer

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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