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15 **IN THE UNITED STATES DISTRICT COURT**
16 **EASTERN DISTRICT OF CALIFORNIA**
17 **FRESNO DIVISION**

18 THE UNITARIAN UNIVERSALIST
19 CHURCH OF FRESNO,

20 Plaintiff,

21 vs.

22 BRANDI L. ORTH, Fresno County
23 Clerk/Registrar of Voters,

24 Defendant

Case No.: ____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF AND
DAMAGES**

Trial Date: None Set

1 Plaintiff The Unitarian Universalist Church of Fresno (“Plaintiff” or “the Church”) brings
2 this complaint against Defendant Fresno County Clerk/Registrar of Voters Brandi Orth
3 (“Defendant” or “the Registrar”) and alleges the following:

4 **JURISDICTION**

5 1. This action arises under the First Amendment to the United States Constitution
6 and 42 U.S.C. § 1983. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and
7 1343 because Plaintiff sues to address deprivations, under color of state authority, of rights,
8 privileges, and immunities secured by the United States Constitution. This Court has personal
9 jurisdiction over Defendant because she is a public official of Fresno County who resides within
10 this District and performs official duties within the State of California.
11

12 **INTRODUCTION**

13 2. Like many other parts of the country, Fresno County suffers from the legacy of
14 racism and ongoing practices that perpetuate racism. Segregation created intentionally through
15 redlining and other exclusionary practices continues to this day. In one recent example, a Fresno
16 Housing Authority Commissioner opposed a housing project in a predominately white
17 neighborhood near Plaintiff The Unitarian Universalist Church of Fresno, saying that the area
18 might not be the “best place” for diversity.
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20 3. The impacts of racism in Fresno County are pervasive and profoundly harmful.
21 There are stark differences in life expectancy, wealth, and other outcomes between Black
22 communities and other communities of color in southwest Fresno and people living in the
23 predominately white communities in north Fresno. A Black person living in the southwest part
24 of the City of Fresno can expect to live 20 years fewer than a white person in north Fresno.
25 Infant mortality rates for Black babies in Fresno County are similar to infant mortality rates in
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1 developing countries. The poverty rate for Black residents in the City of Fresno is over three
2 times that for white residents. A recent nationwide study found that Fresno is one of the ten
3 worst cities in the country for Black people, in terms of employment, educational attainment,
4 household income, and mortality rates. A Fresno Unified School District task force recently
5 determined the environment for the District’s Black students is in a state of emergency.

6 4. In order to express its support for movements to combat racism in Fresno and
7 more generally the United States, Plaintiff The Unitarian Universalist Church of Fresno displays
8 “Black Lives Matter” banners on its property. These banners express a view on a matter of
9 serious public concern and reflect the Church’s belief in the inherent dignity and worth of every
10 person; justice, equity and compassion in human relations; and respect for the interdependent
11 web of existence. They also communicate the Church’s belief that society does not value Black
12 lives as much as it values white lives and the Church’s desire to change this.

13 5. This lawsuit challenges Defendant’s decision to remove the Church as a polling
14 place because of its Black Lives Matter banners, even though the display of the banners complies
15 with all aspects of the California Elections Code. Prior to Defendant’s unlawful decision, the
16 Church had served as a polling place in two elections without incident.

17 6. Defendant’s actions violate the right of freedom of speech and expression as
18 guaranteed by the First Amendment. The Church respectfully requests that the Court enter
19 judgment declaring that Defendant has violated and is violating the Church’s First Amendment
20 rights, enjoining Defendant from continuing to engage in unlawful content and viewpoint
21 discrimination and retaliation against the Church, enjoining Defendant from requiring the Church
22 to remove its Black Lives Matter signs as a condition for serving as a voting location for future
23 elections, and awarding the Church nominal damages and attorneys’ fees.
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VENUE

7. Venue in this District is proper under 28 U.S.C. § 1391(b)(1) and (2) because Defendant is a resident of the District and a substantial part of the events or omissions giving rise to the claim occurred within this District.

PARTIES

8. Plaintiff The Unitarian Universalist Church of Fresno is a non-profit corporation organized and existing under the laws of the State of California, with its principal place of business in Fresno County, California.

9. Defendant Brandi Orth is the elected County Clerk/Registrar of Voters of Fresno County, California, an office created pursuant to Article 11, section 1 of the California Constitution; California Government Code sections 24000, 24009, 26802; and the Charter of the County of Fresno, section 14. Defendant Orth is sued in her official capacity as the Fresno County Clerk/Registrar of Voters.

10. Defendant is responsible for the conduct of elections in Fresno County and is the final decisionmaker and policymaker about which locations in Fresno will be polling places. Cal. Elec. Code §§ 320, 12286(a)(3).

11. Defendant resides in Fresno County, California.

12. Defendant acted under color of law at all times material to this complaint.

ALLEGATIONS

The Church's Service as a Polling Place

13. The Church served as a polling place in the November 2016 and June 2018 elections without incident.

1 23. After this conversation, and as part of its commitment to racial justice and
2 equality, the Church decided to display two Black Lives Matter banners on its property.

3 24. The Church has displayed these banners continuously since August 2017.

4 25. For the Church, the Black Lives Matter message is both a theological and civil
5 rights statement.

6 26. As a theological statement, Black Lives Matter expresses three of the core
7 Principles and Purposes of Unitarian Universalism: “The inherent worth and dignity of every
8 person,” “Justice, equity, and compassion in human relations,” and “Respect for the
9 interdependent web of all existence of which we are a part.”

10 27. As a civil rights statement, the banners communicate the Church’s belief that
11 society does not value Black lives as much as it values white lives and the Church’s desire to
12 confront and change this racism.
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14 28. The Church initially displayed its Black Lives Matter banners on poles
15 approximately three feet high. After the banners were vandalized several times, including with
16 graffiti changing the message to “All Lives Matter,” the Church elevated the banners on taller
17 poles to put them beyond easy reach of vandals.
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19 **Defendant’s Decision to Remove the Church as a Polling Place**

20 29. The California Elections Code prohibits “electioneering” within 100 feet of a
21 polling place. Cal. Elec. Code § 18370. This distance is measured from the room where voters
22 sign the roster and cast ballots. *Id.*

23 30. “Electioneering” is defined as “the visible display or audible dissemination of
24 information that advocates for or against any candidate or measure on the ballot within 100 feet
25 of a polling place....” Cal. Elec. Code § 319.5.
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- I inquired as to why it was okay to have a Black Lives Matter (a known domestic terrorist group) sign in front of our polling place. I spoke to a Ms. R.A. Lopez on May 22, and she assured me she would personally go by there and look at it, and contact me before the week was up. It has been three months. Is she that busy? I am a tax-paying citizen who has been ignored. ALL of the citizens deserve to be heard and their concerns looked into. Yes, it has been three months and our primary elections came and went. Will the sign remain for the general in November?

39. This complaint prompted a conversation via email among Defendant and her staff:

- 8/14/18, 6:10 p.m. email from Defendant to Fresno County Elections Program Manager Rachel Lopez (“Ms. Lopez”):

“Rachel – I think you may have been involved in this. Can you please respond? Do we need to chat first?”

- 8/15/18, 8:34 a.m. email from Ms. Lopez to Defendant:

“The banner that the voter is referring to is beyond 100’ marker of the entrance to the polling place; not that the slogan is campaigning but does support a controversial movement. In November, the Church willingly removed small signage supporting the movement posted within the 100’ of the polling place but they were adamant about keeping the banner. Grace Lally was the EC in June and she said there were no issues in June.”

- 8/15/18, 9:47 a.m. email from Defendant to Ms. Lopez:

1 “Can you ask the church if just for one day – could they cover or remove
2 the sign on election day? Tell them we have had complaints. That way,
3 when you call the voter you can say all the things you have done and what
4 the law is regarding 100’. Do you think we should cancel using that
5 polling place? Thanks.”

6 40. Defendant herself contacted the Church on or about August 31, 2018 and asked
7 the Church to remove its Black Lives Matter banners on election day.

8 41. On or about September 5, 2018, the Church informed Defendant that it would not
9 take down the Black Lives Matter banners.

10 42. Defendant responded by removing the Church as a polling place because it
11 refused to take down the banners. Defendant informed elections staff on September 5, 2018:
12 “The church will not take the “Black Lives Matter” sign down. Rossy – please do not use this
13 location for November. Put these voters somewhere else, nearby. Thanks.”

14 43. Later that day, elections staff responded to the person who had complained about
15 using the Church as a polling place, telling them that the County Clerk’s office had decided not
16 to use the Church in the upcoming election.

17 44. Defendant moved the polling place location from Plaintiff’s Church to CrossCity
18 Christian Church.

19 45. After Defendant moved the polling place, she received numerous messages
20 criticizing her decision and asking her to reinstate the Church as a polling place.

21 46. Defendant also received complaints about displays of messages at CrossCity
22 Christian Church. For example, one complaint stated: “I demand that the Registrar remove the
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1 Cross City Church from the rolls because the Church prominently displays controversial
2 religious symbols and slogans.”

3 47. Defendant did not remove CrossCity Christian Church as a polling place after
4 receiving these complaints. Defendant used CrossCity Christian Church as a polling place in the
5 November 2018 general election and again in a March 2019 special election.

6 48. Many other churches in Fresno serve as polling places and display expressive
7 messages on their property. Defendant did not remove any other polling place location in the
8 November 2018 or March 2019 election—except Plaintiff—because of complaints about
9 displays of messages.
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11 **The Church’s Request to Be Reinstated as a Polling Place**

12 49. On October 22, 2018, the Church requested that Defendant meet with an inter-
13 faith group of concerned clergy to discuss her decision to remove the Church as a polling place.
14 This meeting took place on January 16, 2019.

15 50. Defendant stated at the meeting that she moved the polling place because she
16 wanted to ensure a safe and neutral polling place. She also stated that she did not have a set
17 protocol to determine whether a place was safe and neutral.
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19 51. Clergy at the meeting explained that she was seeing “safe and neutral” through a
20 white primacy culture lens and making polling places more comfortable for some white people
21 and less comfortable for Black people.

22 52. Two Black pastors spoke about the pain that her decision inflicted in their
23 community.
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25 53. At this meeting, the Church’s Reverend Tim Kutzmark asked Defendant to
26 reinstate the Church as a polling place.
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1 54. Defendant informed Reverend Kutzmark and other participants that Fresno would
2 be moving to the Voter's Choice Act model in 2020. The Voter's Choice Act is a state law that
3 allows counties to replace traditional polling places with vote centers that offer expanded voting
4 options, as well as ballot drop-box locations. See Cal. Elec. Code § 4005.

5 55. Reverend Kutzmark asked Defendant if she would guarantee that the Church
6 could display its Black Lives Matter banners and still be under consideration to be a vote center
7 on an even playing field with other churches. Defendant would not commit to this.

8 56. Defendant did not reinstate the Church as a polling place for the March 2019
9 special election.

10 57. Defendant is currently evaluating locations for vote centers that will be used
11 beginning in 2020.

12 58. On information and belief, the Church is not on Defendant's tentative list of vote
13 centers.

14 59. The Church desires to serve as a vote center, polling place, or other voting
15 location.

16 60. There exists an actual, present and justiciable controversy between Plaintiff and
17 Defendant about whether Defendant may disqualify Plaintiff as a polling place or vote center
18 because of its Black Lives Matter banners. This controversy is ripe for judicial decision, and
19 declaratory relief is necessary and appropriate so that the parties may know the legal obligations
20 that govern their present and future conduct.

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1 the March 2019 special election in Fresno, Defendant used polling places that displayed large
2 signs on their property stating messages such as: “I AM ANGRY / JONAH 4: 1-11,”
3 “SOMEDAY YOU WILL REST IN PEACE, WHY NOT LIVE IN PEACE, TOO?,” and
4 “NOTHING IS BEYOND GODS POWER.”

5 First Amendment Retaliation

6 68. A public official “may not deny a benefit to a person on a basis that infringes his
7 constitutionally protected interests—especially, his interest in freedom of speech.” *Perry v.*
8 *Sindermann*, 408 U.S. 593, 597 (1972).
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10 69. This rule applies even where there is no affirmative right to a government benefit
11 and the benefit could be denied for any number of other reasons. *Id.* (“For at least a quarter-
12 century, this Court has made clear that even though a person has no ‘right’ to a valuable
13 governmental benefit and even though the government may deny him the benefit for any number
14 of reasons, there are some reasons upon which the government may not rely.”).

15 70. The lost benefit “need not be particularly great in order to find that rights have
16 been violated.” *Elrod v. Burns*, 427 U.S. 347, 359 n.13 (1976). The government violates the
17 First Amendment “both where [it] fines a person a penny for being a Republican and where it
18 withholds the grant of a penny for the same reason.” *Id.* Something “as trivial as failing to hold
19 a birthday party for a public employee” violates the First Amendment “when intended to punish
20 her for exercising her free speech rights.” *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 n.8
21 (1990) (quoting *Rutan v. Republican Party of Ill.*, 868 F.2d 943, 954 n.4 (7th Cir. 1989)).
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23 71. The government violates the First Amendment when it denies a person the
24 opportunity to serve as a contractor or volunteer because of protected First Amendment
25 expression. *See O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 725-26 (1996)
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1 (“Government officials may indeed terminate at-will relationships, unmodified by any legal
2 constraints, without cause; but it does not follow that this discretion can be exercised to impose
3 conditions on expressing, or not expressing, specific political views.”); *Hyland v. Wonder*, 972
4 F.2d 1129, 1135 (9th Cir. 1992) (“[T]he opportunity to serve as a volunteer constitutes the type
5 of governmental benefit or privilege the deprivation of which can trigger First Amendment
6 scrutiny.”).

7
8 72. Plaintiff engaged in constitutionally protected speech by displaying Black Lives
9 Matter banners, which express a message about matters of serious public concern.

10 73. Serving as a polling place is a valuable benefit to the Church. Among other
11 things, it gives the Church “the satisfaction of making a contribution, or giving something back,
12 to society.” *Hyland*, 972 F.2d at 1136 (recognizing that making a contribution to society is a
13 valuable benefit, the loss of which can violate the First Amendment).

14 74. Defendant took adverse action against Plaintiff by removing Plaintiff as a polling
15 place.

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17 75. Defendant’s requirement that Plaintiff remove the Black Lives Matter banners in
18 order to continue serving as a polling place was and is an unconstitutional condition.

19 76. Plaintiff’s protected speech was a substantial motivating factor—indeed, the only
20 motivating factor—for Defendant’s action against Plaintiff.

21 77. Defendant would not have made the same decision in the absence of Plaintiff’s
22 protected speech.

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24 78. Defendant’s actions would chill a person of ordinary fitness from continuing to
25 engage in protected speech.

1 79. Defendant’s decision did not reflect any legitimate administrative analysis that
2 outweighed Plaintiff’s First Amendment rights.

3 80. Defendant violated the First Amendment by denying Plaintiff the opportunity to
4 serve as a polling place because of Plaintiff’s First Amendment expression.

5 Defendant’s Actions Were Not Justified by Law or Legitimate Administrative Concerns

6 81. Defendant’s actions were not a reasonable regulation of polling place activity.
7 California law prohibits electioneering within 100 feet of a polling place, *see* Cal. Elec. Code §
8 18370, an approach sanctioned by the Supreme Court. *See Burson v. Freeman*, 504 U.S. 191
9 (1992). Plaintiff’s message was not electioneering and was not within the 100-foot zone around
10 the polling place.
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12 82. Defendant’s actions were not justified by legitimate administrative concerns. The
13 government may not regulate a message merely because it is controversial or offensive to some.
14 *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393
15 U.S. 503, 508-10 (1969). The government may not subject protected speech to a heckler’s veto
16 by restricting speech based on the anticipated reaction of a listener. *See Santa Monica Nativity*
17 *Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1294 (9th Cir. 2015).
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19 83. Defendant’s actions were not narrowly tailored to a compelling state interest and
20 further, were not tailored to any legitimate state interest. Government officials “may not
21 ‘defer[] to the [discriminatory] wishes or objections of some fraction of the body politic.’” *Pac.*
22 *Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1163 n.26 (9th Cir. 2013) (quoting
23 *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985)).
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25 84. Defendant’s actions were not “guided by objective, workable standards.” *Minn.*
26 *Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018). “[I]f voters experience or witness episodes
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1 of unfair or inconsistent enforcement of [an elections law], the State’s interest in maintaining a
2 polling place free of distraction and disruption would be undermined by the very measure
3 intended to further it.” *Id.*

4 **FIRST CLAIM FOR RELIEF**

5 (Violation of the First Amendment, 42 U.S.C. § 1983)

6 (Content Discrimination)

7 85. Plaintiff realleges and incorporates by this reference each of the foregoing
8 paragraphs, as if fully set forth in this claim for relief.

9 86. The First Amendment to the United States Constitution guarantees individuals the
10 right to free speech.

11 87. Defendant violated Plaintiff’s right to free speech by removing Plaintiff as a
12 polling place because of the message, ideas, subject matter, and content expressed in Plaintiff’s
13 Black Lives Matter banners.

14 88. Plaintiff has no clear and adequate remedy at law for this violation of its
15 constitutional rights and has suffered irreparable injury as a result of Defendant’s conduct, which
16 will continue unless and until enjoined by appropriate order of this Court. Plaintiff is also
17 entitled to nominal damages as compensation for the violation of its constitutional rights.

18 **SECOND CLAIM FOR RELIEF**

19 (Violation of the First Amendment, 42 U.S.C. § 1983)

20 (Viewpoint Discrimination)

21 89. Plaintiff realleges and incorporates by this reference each of the foregoing
22 paragraphs, as if fully set forth in this claim for relief.

