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11

12 **UNITED STATES DISTRICT COURT**
13 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
14 **FRESNO DIVISION**
15

16 THE UNITARIAN UNIVERSALIST
17 CHURCH OF FRESNO

18 Plaintiff,

19 v.

20 BRANDI L. ORTH, Fresno County
21 Clerk/Registrar of Voters

22 Defendant.
23

Case No. 1:19-CV-00808-NONE-BAM

**FRESNO COUNTY
CLERK/REGISTRAR OF VOTERS
BRANDI L. ORTH'S MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM
UNDER FED. R. CIV. PROC 12(b)(6)
OR IN THE ALTERNATIVE, FOR A
MORE DEFINITE STATEMENT UNDER
FED. R. CIV. PROC 12(e)**

Hearing Date: March 11, 2020

Time: 8:30 a.m.

Department: Unknown

Judge: NONE

Trial Date: December 15, 2020

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Table of Contents

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Table of Authorities..... iii

I. Background Facts..... 1

II. Summary Of Argument..... 2

III. Legal Argument 5

 A. Legal Standard on Motion to Dismiss..... 5

 B. The Compelling Government Interest Involved in Running Fair Elections
 Outweighs Any Limited Interference with Plaintiff’s Free Speech. 6

 1. Government May Control It’s Own Speech 10

 2. Government May Reasonably Restrict Speech of Contractor/Agent in Public
 Program. 14

 3. Under Burson v. Freeman Defendant’s Actions Were Constitutional. 18

 4. Specific Issues on Causes of Action..... 20

 a. First Cause of Action – Content Discrimination 20

 b. Second Cause of Action – Viewpoint Discrimination..... 22

 c. Third Cause of Action – Retaliation 22

 d. Fourth Cause of Action – Vagueness/Overbreadth..... 23

 e. Fifth Cause of Action – Due Process 23

Table of Authorities

Cases

1

2

3 American Freedom Defense Initiative v. King County 796 F.3d 1165 (9th Cir. 2015)..... 10

4 Ashcroft v. Iqbal, (2009) 556 U.S. 662,..... 5, 6, 24

5 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters (1983) 459

6 U.S. 519..... 6

7 Balistreri v. Pacifica Police Dep’t, (9th Cir.1990) 901 F.2d 696 5

8 Barone v. City of Springfield, Oregon 902 F.3d 1091 (9th Cir. 2018) 15

9 Bell Atl. Corp. v. Twombly, (2007) 550 U.S. 544 5, 6, 24

10 Burson v. Freeman (1992) 504 U.S. 191 *passim*

11 Bustamante v. Intuit, Inc., (2006) 141 Cal.App.4th 199 12

12 Chiras v. Miller, 432 F.3d 606 (5th Cir. 2005)..... 10

13 City of Chicago v. Morales 527 U.S. 41 (1999)..... 6

14 Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788 (1985) 11, 14

15 County of Sacramento v. Lewis, 118 S.Ct. 1708 24

16 Downs v. Los Angeles Unified School District, 228 F.3d 1003 (9th Cir. 2000) 14

17 Elrod v. Burns, 427 U.S. 347 (1976)..... 7

18 F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239 (2012) 6

19 Hazelwood Sch. Dist. V. Kuhlmeier, 484 U.S. 260 (1988)..... 17

20 Hishon v. King & Spalding, (1984) 467 U.S. 69 5

21 Hudson v. Craven (9th Cir. 2005) 403 F.3d 691 3, 17

22 Hyland v. Wonder, 972 F.2d 1129 (9th Cir. 1992) 7

23 James v. Texas Collin County (5th Cir. 2008) 535 F.3d 365 3

24 Lee v. City of Los Angeles (9th Cir.2001) 250 F.3d 668 5

25 Love v. United States (9th Cir.1989) 915 F.2d 1242..... 5

26 Matal v. Tam, 137 S.Ct. 1744 (2017)..... 6

27 Minnesota Voters Alliance v. Mansky, 138 S.Ct. 1876 (2018)..... *passim*

28 N. Star Int’l v. Ariz. Corp. Comm’n, (9th Cir.1983) 720 F.2d 578..... 5

1 National Endowment for the Arts v. Finley 524 U.S. 569 (1998)..... 10

2 O’Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996)..... 7

3 Pacific Shores Props., LLC v. City of Newport Beach, 730 F.3d 1142 (9th Cir. 1142)..... 7

4 Perry v. Sindermann, 408 U.S. 593 (1972)..... 6

5 Pickering v. Bd. Of Education (1968) 391 U.S. 563..... 3, 14, 15

6 Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009)..... 2, 10

7 Porter v. Osborn, 546 F.3d 1131 (9th Cir. 2008) 24

8 Real v. City of Long Beach, 852 F.3d 929 (9th Cir. 2017) 6

9 Reed v. Town of Gilbert, 135 S.Ct. 2218 (2015)..... 6

10 Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819(1995)..... 6, 10

11 Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990)..... 7

12 Santa Monica Nativity Scenes Comm. v. City of Santa Monica, 784 F.3d 1286..... 7

13 Schirmer v. Edwards 2 F.3d 117 (5th Cir. 1993)..... 12

14 Tinker v. Des Moines Indep. Cmty. Sch. Dist. 393 U.S. 503 (1969) 7

15 United States ex rel. Chunie v. Ringrose (9th Cir. 1986) 788 F.2d 638..... 5

16 United States v. Nat’l Treasury Emps. Union (NTEU), 513 U.S. 454 (1995) 15

17 United States v. Williams, 553 U.S. 285 (2008)..... 6

18 Walker v. Texas Div., Sons of Confederate Veterans, Inc. (2015) 135 S.Ct. 2239... 2, 11

19 **State Statutes**

20 Cal. Civil Code Section 1550..... 12

21 Cal. Civil Code Section 1565..... 12

22 Cal. Civil Code Section 1580..... 12

23 Cal. Elections Code Section 319.5 1, 12

24 Cal. Elections Code Section 3017 3

25 Cal. Elections Code Section 4005 3

26 Cal. Elections Code Section 4006 3

27 Cal. Elections Code Section 4007 3

28 Cal. Elections Code Section 18370 1, 12

1 Cal. Elections Code Section 18541 1
2 **Federal Rules**
3 Fed. Rule of Civ. Procedure, Rule 8 (a)..... 6
4 Fed. Rule of Civ. Procedure, Rule 12 (b)(6) 5, 22, 23
5 Fed. Rule of Civ. Procedure, Rule 12 (e)..... 22, 23

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1 **I. BACKGROUND FACTS**

2 In November of 2016 and June of 2018, Plaintiff Unitarian Universalist Church of
 3 Fresno (hereinafter "Plaintiff") located on Alluvial Avenue in northeastern Fresno served
 4 as a precinct polling place. First Amended Complaint for Declaratory and Injunctive Relief
 5 and Damages (hereinafter "FAC"), ¶¶ 10, 21. In August of 2017 Plaintiff installed a
 6 prominent bright yellow banner sign immediately adjacent to its main church address sign
 7 along Alluvial Avenue proclaiming that "Black Lives Matter." FAC, ¶ 26. That sign was in
 8 place on the Plaintiff's property during the June 2018 primary election and is located more
 9 than 100 feet from the entrance to the room or facility actually utilized as a polling place
 10 on the Plaintiff's campus. FAC, ¶¶ 26, 35 (sign approximately 200 feet from entrance to
 11 polling place). Thus, by definition, it is not illegal "electioneering" prohibited within 100
 12 feet of a polling place under applicable provisions of the California Elections Code.¹

13 Starting before the June 2018 primary election and continuing through August of
 14 2018, the Fresno County Elections Office received complaints concerning the presence
 15 of the Black Lives Matter sign on Plaintiff's property being used as a County polling place.
 16 FAC, ¶¶ 40-41 (even the facts alleged in the FAC indicate the first complaint came in May
 17 of 2018). The Registrar and some staff investigated the nature of the signs and
 18 determined that the Black Lives Matter slogan was related to a controversial social and
 19 political movement. The Registrar was concerned that the County's polling place was
 20 being associated with controversial political issues in the minds of voters and about
 21 possible disruptions to the voting process that might occur. Therefore, she requested
 22 that Plaintiff consider covering or removing the sign during polling hours for the single day
 23 of the November 2018 general election. FAC, ¶¶ 41-42. When the Plaintiff refused this
 24

25 _____
 26 ¹ While there is a dispute between the parties over whether the sign is related at least implicitly to partisan
 27 candidates, political parties or issues on the ballot in June of 2018, both parties accept the fact that the
 28 sign was outside of the proscribed 100-foot distance from the actual "polling place." This means the sign
 did not constitute prohibited "electioneering" under California Elections Code §§ 319.5 (electioneering
 defined), 18370 (misdemeanor liability for electioneering activity) or 18541 (felony liability for
 electioneering and other activity with the intent of dissuading others from voting). Defendant Registrar
 has never asserted, during this litigation or in dealing with the Plaintiff before the litigation was filed, that
 the Black Lives Matter sign constituted electioneering under California law.

1 accommodation, the Registrar made the decision to place the precinct that had been
2 located on Plaintiff's property to another location. Plaintiff sued, filing its original complaint
3 in July of 2019, and then the FAC on January 22, 2020 alleging both facial and as-applied
4 challenges to the alleged "policy" of the Registrar to maintain the neutrality of polling
5 places used in Fresno County. Plaintiffs also allege viewpoint discrimination and
6 retaliation against the Recorder. FAC, *passim*.

7 II. SUMMARY OF ARGUMENT

8 This case requires that the Court balance the fundamental government interest in
9 neutral and accessible polling places for voters against the First Amendment free speech
10 rights of the Plaintiff. In the FAC Plaintiff attempts to frame this case as a straightforward
11 interference by a sovereign government actor with the First Amendment free speech
12 rights of a private Plaintiff engaged in private speech. But the facts alleged in the FAC
13 show a very different situation. Plaintiff is attempting to force the Elections Office of the
14 County of Fresno to endorse or support Plaintiff's religious and political speech and
15 impose that speech on voters at one of the Election Office's polling sites. Plaintiff
16 volunteered to have its property serve as a polling place for elections in November of
17 2016 and June of 2018. In doing so, Plaintiff became for that limited purpose part of the
18 elections process run by the Fresno County Elections Office. This is a government
19 speech case and should be governed by the principles in case law concerning
20 government speech. Those cases are more analogous to the actual facts described in
21 the FAC which involve the County Elections Office's ability to maintain neutrality of the
22 speech and messages closely associated with its polling places. See, *Pleasant Grove*
23 *City v. Summum* 555 U.S. 460, 464, 467–468, (2009) (when government speaks it is not
24 barred by the First Amendment from determining the content of what it says); *Walker v.*
25 *Texas Div., Sons of Confederate Veterans, Inc.* 135 S.Ct. 2239, 2245-2246 (2015) (state
26 not required to place Confederate flag logo on license plates on first amendment grounds
27 because the license plate was government speech). Despite clever drafting of
28 allegations, there are no facts indicating any kind of punitive action by the Registrar

1 against Plaintiff. There have been no fines or citations, and the Registrar has no general
2 power to require the Plaintiff to remove the sign in question. The Registrar's only options
3 were to ask the Plaintiff to voluntarily cover or remove the sign only during the times the
4 site was used as public polling place or to choose a different polling place where political
5 signs presented no issues. The only action that the FAC actually complains of is the effort
6 by the Registrar to select polling locations that provide an independent and neutral place
7 for voting. Going forward under the California Voter's Choice Act (Cal. Elec. Code §§
8 3017, 4005, 4006, and 4007) the FAC only alleges that the Registrar endeavors to obtain
9 contractual agreement of any Vote Center location to the Registrar's goal of providing
10 neutral voting locations. But under the government speech doctrine, the Registrar is fully
11 within her rights to make reasonable choices on what speech is displayed on or closely
12 associated with the Vote Center locations designated by the County of Fresno as public
13 polling places.

14 Alternatively, the Plaintiff is effectively an agent, contractor or employee of the
15 County Elections Office for the limited period that its property served as a polling place
16 and is subject to the same types of limited restrictions on such a public employee or agent
17 if certain speech would interfere with the purpose or operation of the public entity. See,
18 Hudson v. Craven 403 F.3d 691, 699-701 (9th Cir. 2005) (professor's First amendment
19 speech or association rights were strongly outweighed by employer college's interests in
20 student safety and the college's political neutrality); James v. Texas Collin County 535
21 F.3d 365, 379-380 (5th Cir. 2008) (viewpoint neutral policies against political activities on
22 public property or while performing public duties generally do not violate any First
23 Amendment rights of employees under the Pickering v. Bd. Of Education 391 U.S. 563
24 (1968) standard).

25 For this reason, Plaintiff is not in a comparable position to any of the plaintiffs in
26 the First Amendment cases cited in the FAC. Here a controversial sign with political
27 connotations was placed on the same property as a polling place by the property owner
28 who had also volunteered to serve as a polling place. The sign is in close visual proximity

1 to the polling place and paths of travel for voters, and closely associated with the church
2 that is serving as the polling place. FAC, ¶ 35. Members of the voting public will (and in
3 fact did) reasonably view the statement on such a sign as being affirmed or endorsed by
4 the Fresno County Elections Office. FAC, ¶¶ 40, 41. When faced with this situation,
5 Defendant Registrar of Voters balanced the governmental need for providing neutral
6 polling places for voters with the First Amendment rights of the Plaintiff and came up with
7 a narrowly tailored solution requesting the Plaintiff to cover or take down the sign during
8 polling hours on a single election day. Compliance would have been voluntary. Plaintiff
9 does not allege that Defendant threatened any legal action or detriment against Plaintiff
10 The only consequence was Defendant's decision to use a different polling place if Plaintiff
11 would not agree to temporarily cover its sign. Defendant engaged in the necessary
12 balancing of substantial government interests with the free speech rights asserted that is
13 part of nearly every First Amendment analysis in the caselaw. Even under the analysis
14 of voting place restrictions under Burson v. Freeman (1992) 504 U.S. 191, 208-210, and
15 its progeny, the actions alleged in the FAC do not amount to a constitutional violation.

16 In addition to these substantive defects in Plaintiff's causes of action, three more
17 factors preclude the issuance of injunctive relief: the timing of complaint, a change of
18 circumstances, and the balancing of hardships. Under the new format of the Voter's
19 Choice Act, the Vote Centers need to be open multiple days including weekends which
20 makes houses of worship with their intense weekend usage less than favorable locations.
21 Among the 52 Vote Centers designated by the Registrar, there are no houses of worship.
22 Interference with the preparations for the biggest change to California election procedures
23 in decades occurring as the country heads into the November 2020 presidential election
24 would dramatically increase the burden on the already strained capacities of the Fresno
25 County Elections Office. Such a disruption would risk catastrophic harm to the larger
26 voting population of the entire County. All this so that the Plaintiff can force voters to walk
27 by its sign on the way to vote.

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III. LEGAL ARGUMENT

A. Legal Standard on Motion to Dismiss.

The purpose of a motion to dismiss pursuant to Rule 12 (b)(6) is to test the legal sufficiency of the complaint. N. Star Int'l v. Ariz. Corp. Comm'n, (9th Cir.1983) 720 F.2d 578, 581. “Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica Police Dep’t, (9th Cir.1990) 901 F.2d 696, 699. A plaintiff is required to allege “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, (2007) 550 U.S. 544, 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, (2009) 556 U.S. 662, 678.

In determining whether a complaint states a claim on which relief may be granted, the court accepts as true the allegations in the complaint and construes the allegations in the light most favorable to the plaintiff. Hishon v. King & Spalding, (1984) 467 U.S. 69, 73; Love v. United States (9th Cir.1989) 915 F.2d 1242, 1245. In ruling on a motion to dismiss brought pursuant to Rule 12(b)(6), the court is permitted to consider material which is properly submitted as part of the complaint, documents that are not physically attached to the complaint if their authenticity is not contested and the plaintiffs’ complaint necessarily relies on them, and matters of public record. Lee v. City of Los Angeles (9th Cir.2001) 250 F.3d 668, 688–89.

However, the court need not assume the truth of legal conclusions cast in the form of factual allegations. United States ex rel. Chunie v. Ringrose (9th Cir. 1986) 788

1 F.2d 638, 643 n.2. While Rule 8(a) does not require detailed factual allegations, “it
 2 demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.”
 3 Iqbal, 556 U.S. at 678. A pleading is insufficient if it offers mere “labels and conclusions”
 4 or “a formulaic recitation of the elements of a cause of action.” Twombly, 550 U.S. at
 5 555. See also Iqbal, 556 U.S. at 676 (“Threadbare recitals of the elements of a cause
 6 of action, supported by mere conclusory statements, do not suffice.”). Moreover, it is
 7 inappropriate to assume that the plaintiff “can prove facts which it has not alleged or that
 8 the defendants have violated the...laws in ways that have not been alleged.”
 9 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters (1983) 459
 10 U.S. 519, 526.

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 13 **B. The Compelling Government Interest Involved in Running Fair Elections**
 14 **Outweighs Any Limited Interference with Plaintiff’s Free Speech.**

15 Plaintiff has laid out much of its legal theory of this case in the FAC, citing cases
 16 dealing with restrictions by a government actor on private speech in various contexts.
 17 Unfortunately, none of these cases is factually similar to the situation alleged in the
 18 FAC.² While anyone can wholeheartedly affirm the generic First Amendment principles
 19

20 ² (Reed v. Town of Gilbert, 135 S.Ct. 2218 (2015) (sign code case in which various sign types were
 21 treated differently); United States v. Williams, 553 U.S. 285 (2008) (child pornography statue held to be
 22 overly broad); City of Chicago v. Morales 527 U.S. 41 (1999) (criminal street gang ordinance prohibiting
 23 loitering too vague to provide fair notice to public as to what would constitute a violation); F.C.C. v. Fox
 24 Television Stations, Inc., 567 U.S. 239 (2012) (FCC tried for the first time ever to impose sanctions for
 25 fleeting use of expletives on television network without providing any notice to broadcasters); Real v.
 26 City of Long Beach, 852 F.3d 929 (9th Cir. 2017) (complaint alleging overly burdensome zoning
 27 requirements for tattooing parlors to obtain conditional use permits stated a claim for prior restraint on
 28 protected expressive activity); Minnesota Voters Alliance v. Mansky, 138 S.Ct. 1876 (2018) (apparel ban
 in Minnesota polling place guidelines was not capable of reasonable application and represented an
 impermissible restriction under the First Amendment of members of the public going to polling places);
Rosenberger v. Rectors & Visitors of University of Virginia, 515 U.S. 819 (1995) (Christian newspaper run
 by established student organization was denied funds from Student Activities fees by public university
 constituting viewpoint discrimination); Matal v. Tam, 137 S.Ct. 1744 (2017) (government speech doctrine
 does not apply to trademarks and disparagement clause of Lanham Act was facially invalid under First
 Amendment); Perry v. Sindermann, 408 U.S. 593 (1972) (college instructor’s contract was not renewed
 after he testified before state legislature and he alleged the non-renewal was due to that fact; Court held
 that facts alleged required some procedural due process be provided prior to non-renewal despite fact

1 selected by Plaintiff for quotation in the FAC, they are not applicable to the facts alleged
2 by Plaintiff and do not assist Plaintiff in stating any valid legal claim.

3 The FAC alleges the following facts that are relevant to Defendant's Motion to
4 Dismiss. The Plaintiff's property was used as a polling place in November of 2016 and
5 June of 2018. FAC, ¶ 15. The Black Lives Matter banners in question in this lawsuit
6 were first put up on Plaintiff's property in August 2017 and were on display when the
7 property served as a polling place in June 2018. FAC, ¶¶ 26, 33. The banners are
8 approximately 200 feet from the entrances to the polling place. FAC, ¶ 35. As early as
9 May 2018, the Fresno County Office of Elections received complaints concerning the
10 Black Lives Matter signs at the polling place on Plaintiff's property. FAC, ¶ 40. In
11 August of 2018 Defendant and/or her staff contacted Plaintiff to request that they
12 consider covering or removing the banner for just the day of the election. FAC, ¶¶ 41,
13 42. Plaintiff church refused this accommodation and another polling location was used
14 for the November 2018 election. FAC, ¶¶ 43, 44. Fresno County adopted the Voters
15 Choice Act procedures for voting for elections commencing in 2020. FAC, ¶ 56; see,
16 also Defendant's Request for Judicial Notice, Exhibit B (Board of Supervisors action
17 item formally adopting Voters Choice Act in Fresno County). Plaintiff also alleges a
18 facial and as applied challenge to a "policy" that Defendant is alleged to apply to polling
19

20
21 that instructor was not contractually tenured); Elrod v. Burns, 427 U.S. 347 (1976) (Sheriff was alleged to
22 threaten discharge of civil-service protected employee based on political affiliation; the complaint stated a
23 valid claim for deprivation of a constitutional right); Rutan v. Republican Party of Illinois, 497 U.S. 62
24 (1990) (basing hiring and employment decisions for general public employees on political belief or
25 affiliation without compelling public need violated First Amendment); O'Hare Truck Serv., Inc. v. City of
26 Northlake, 518 U.S. 712 (1996) (towing company removed from regular rotation of tows after owner
27 donated to political opponent of mayor); Hyland v. Wonder, 972 F.2d 1129 (9th Cir. 1992) (volunteer
28 employee of probation department presented memorandum to superior court judges as individual citizen
critical of problems in the juvenile hall and was terminated as a volunteer by probation department);
Burson v. Freeman, (1992) 504 U.S. 191 (strict balancing test applied to determine that 100 foot ban on
political activity by members of the public around a polling place met First Amendment requirements);
Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (suspension of students wearing black
arm bands to protest Vietnam War was unconstitutional denial of students' right of expression of opinion);
Santa Monica Nativity Scenes Comm. v. City of Santa Monica, 784 F.3d 1286 (Plaintiff here cites dicta re
"heckler's veto"; actual opinion found no violation for a content neutral repeal of winter display exception
to ordinance rejecting a "heckler's veto" argument); Pacific Shores Props., LLC v. City of Newport Beach,
730 F.3d 1142 (9th Cir. 1142) (city ordinance prohibiting group homes in residential zones overturned).

1 places requiring neutrality. FAC, ¶¶ 60-92. Specifically Plaintiff alleges that
2 Defendant's policy is stated in contracts with vote centers : "The path of travel on the
3 Facility's property, including within the line of sight from the path of travel, to and from
4 the Buildings/Rooms and Parking shall be free from signage, displays, audible
5 dissemination of information and obstructions interfering with the neutrality or operations
6 of the Facility with respect to election/voting purposes, whether or not within 100 feet of
7 a polling place, a vote center, an elections official's office, or a satellite location." FAC,
8 ¶ 61. Complete copies of two actual agreements of the type referred to by Plaintiff in
9 the FAC are submitted as Exhibits E and F to Defendants' Request for Judicial Notice.

10 The basic disagreement between the parties in this lawsuit arises from Plaintiff's
11 misunderstanding of its position as a polling place. Plaintiff wishes to maintain its
12 unlimited free speech rights as a private entity while it also serves the governmental
13 function of a public polling place. In doing so, it is seeking to impose an endorsement of
14 speech with a particular political message on the County of Fresno. It is in this context
15 that certain of the cases relied upon by Plaintiff can be distinguished from the alleged
16 facts.

17 In Minnesota Voters Alliance, supra, 138 S.Ct. at 1882-1885, plaintiff voter's
18 alliance alleged that an outright ban on the wearing of political buttons or apparel by
19 voters inside a polling place violated the First Amendment. The Supreme Court
20 considered the failure of any definition used by Minnesota of "political" provided
21 discretion to on site election officials that was not sufficiently guided by objective
22 workable standards. Id., at 1891. This case is not controlling on the allegations
23 asserted in the FAC by Plaintiff. The facts are completely different. The alleged actions
24 or policy by the Defendant Registrar are all directed at one of its own polling places and
25 limited to the date and operating times of said polling places. Nothing alleged applies to
26 the First Amendment rights of the public at large or voters. In Minnesota Voters
27 Alliance, voters faced screening at the door of the polling location. Id., at 1891. All the
28 alleged restrictions in this case relate to the Registrar's selection of its own polling

1 places not the control of speech by the public at the polling places. Plaintiff does not
2 allege direct action against its Black Lives Matter Signs. Plaintiff does not allege it was
3 subject to any fine or citation for violation of any law. Plaintiff does not allege that
4 Defendant forced Plaintiff to take down its sign. Indeed, the allegations make it clear
5 that the signs stayed up during the June 2018 primary elections, and stay up to this day
6 without interference or censure by the Defendant or any County official. Further, no
7 voter risks exclusion from the polling place nor insistence on removal of potentially
8 political attire as a prerequisite to voting either under the procedures followed by the
9 Registrar in 2018 or in any current policy or practice safeguarding the neutrality of the
10 vote center sites.

11 The other case that is distinguishable from Plaintiff's allegations is the Burson v.
12 Freeman decision. Burson is the seminal U.S. Supreme Court case setting out the
13 analysis for balancing government restrictions on the speech rights of the public and
14 voters against the government's fundamental interest in maintaining an efficient and
15 neutral polling location. The case involved a 100-foot barrier around a polling place
16 within which political campaigning was not allowed. Burson, supra, 504 U.S. at 193-
17 194. Even applying strict scrutiny (since the statute prohibited only political
18 campaigning and not other forms of speech) the Burson court found the state law
19 served a compelling state interest in "securing the right to vote freely and effectively"
20 and was constitutional under the First Amendment. Id. at 208-210. Defendant
21 contends the Burson analysis does not apply Plaintiff's allegations because the current
22 circumstances present a governmental speech question, not a question of the
23 regulation of the speech of members of the public or voters at a polling location. Here
24 the question is whether an elections office can take steps to ensure that the locations
25 used as polling locations remain sufficiently neutral to maintain the voting public's
26 confidence in the independence and integrity of the election system.³ Defendant's
27

28 ³ Defendant also contends that the actions it has taken would satisfy the analysis under both Burson and Minnesota Voters Alliance See, infra, Section III.B.3 of this Memorandum of P&A, pp. ____.

1 actions show only the choice of polling locations and the maintenance of public
2 confidence that the government remain neutral with respect to any purely political
3 matters particularly on election day. There is no question of the imposition of any civil
4 or criminal penalty or regulation of speech in general by a government acting as a
5 sovereign.

6 **1. Government May Control It's Own Speech**

7 Courts have repeatedly “permitted the government to regulate the content of
8 what is or is not expressed when it is the speaker *or when it enlists private entities to*
9 *convey its own message*....[W]hen the government appropriates funds to promote a
10 particular policy of its own it is entitled to say what it wishes.” Chiras v. Miller, 432 F.3d
11 606, 613 (5th Cir. 2005) (emphasis added by Chiras court) (quoting Rosenberger v.
12 Rector and Visitors of the University of Virginia, 515 U.S. 819, 833 (1995)). “A
13 government entity ‘is entitled to say what it wishes’...and to select the views that it
14 wants to express.” Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467-468
15 (2009) (citations omitted). It may exercise this same freedom when it receives private
16 assistance for the purpose of delivering a government-controlled message. Id. at 468.
17 As the U.S. Supreme Court has stated: “Indeed, it is not easy to imagine how
18 government could function if it lacked this freedom.” Id. at 468.

19 Under the government speech principle, courts have allowed restrictions on
20 advertising content on a nonpublic forum transit advertising board (American Freedom
21 Defense Initiative v. King County 796 F.3d 1165, 1168-1171 (9th Cir. 2015); government
22 imposed “decency” standards in funding of art (National Endowment for the Arts v.
23 Finley 524 U.S. 569, 587-588 (1998) (“...we note that the Government may allocate
24 competitive funding according to criteria that would be impermissible were direct
25 regulation of speech or a criminal penalty at stake.”); the choice of monuments to be
26 placed in a public park (Pleasant Grove City, Utah, supra, 555 U.S. at 472-473), the
27 choice of textbook content (Chiras, supra, 432 F.3d at 613); and barring the display of a
28 Confederate flag on car license plates (Walker, supra, 135 S.Ct. at 2245-2249).

1 The voting process is fundamental to our democratic republican form of
2 government. Courts recognize the substantial state interest in ensuring the efficiency
3 and neutrality of voting operations. Burson, supra, 504 U.S. at 199; Minnesota Voters
4 Alliance, supra, 138 S.Ct. at 1885-1886 (polling places are non-public forums; the space
5 is set aside as “a special enclave, subject to greater restriction.”).

6 The facts alleged in the FAC show a situation in which a government entity is
7 attempting to limit the scope of political speech that is associated with its polling place,
8 not a government regulation of speech of the public in general, or even with respect to
9 the public’s exercise of its speech rights at a polling place. By agreeing to become a
10 polling place the Plaintiff and its property became for the limited time that the polling
11 place was open, operated under the imprimatur of the government. To the extent that
12 signage and other permanent expressions of opinion are present at that property in
13 close proximity to the government polling location, the public can reasonably be
14 expected to assume or interpret that the government is adopting, endorsing or
15 approving in some manner that particular opinion. If that opinion involves a
16 controversial political or social matter (such as Plaintiff’s Black Lives Matter signs), then
17 the public may reasonably question the overall neutrality of the government in running
18 the polling places in locations that appear to favor particular controversial political or
19 social opinion or movement. Under these circumstances, the government entity may
20 take reasonable steps to avoid being associated with the controversial political or social
21 speech.

22 “Nothing in the Constitution requires the Government freely to grant access to all
23 who wish to exercise their right to free speech on every type of Government property
24 without regard to the nature of the property or the disruption that might be caused by the
25 speaker’s activities.” Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S.
26 788, 799-800 (1985). “Accordingly, our decisions have long recognized the government
27 may impose some content-based restrictions on speech in nonpublic forums including
28

1 restrictions that exclude political advocates and forms of political advocacy.” Minnesota
2 Voters Alliance, supra, 138 S.Ct. at 1885-1886 (citations omitted).

3 It is important that the Fresno County Elections Office is acting here primarily as
4 a licensee of the property used as a polling place. The alleged actions and policy are
5 very mild restrictions on what a property owner may do when voluntarily allowing their
6 property to be used as a governmental polling place. Plaintiff does not allege that the
7 Registrar was acting as a sovereign power imposing civil or criminal penalties for any
8 form or content of speech. Plaintiff alleges only that Defendant “asked” Plaintiff to cover
9 or remove the sign in 2018. (FAC, ¶ 42). Similarly, the only allegations concerning the
10 implementation of Defendant’s alleged policy are related to a clause in the new
11 contractual agreements used between the Defendant and Vote Center sites. (FAC ¶¶
12 60-62). But no entity is forced to serve as a polling place, it is only voluntary. Because
13 the language related to neutrality is contractual, it must be the case that the parties to
14 those agreements will come to a meeting of the minds as to what this entails.⁴ Thus,
15 the vagueness and due process claims of Plaintiff’s complaint fall flat since no one
16 would be subject to any kind of adverse action due to a lack of understanding of any
17 part of the alleged policy. Furthermore, there is nothing in Defendants’ actions in 2018
18 nor in the policy as it is alleged in the FAC, that affects the general public’s right to
19 speech. Nothing alleged shows any attempted expansion of the criminal penalties that
20 attach to a violation of the 100-foot electioneering ban contained in California Elections
21 Code §§ 319.5 and 18370.⁵ The Defendant Registrar is without any legal governmental
22 authority to even attempt to control electioneering outside of that statutory limit. The
23

24
25 ⁴ See, Cal. Civ. Code, §§ 1580, 1550, and 1565; Bustamante v. Intuit, Inc. 141 Cal.app.4th 199, 208 (2006).

26 ⁵ Plaintiff’s position appears to be that because the Supreme Court in Burson upheld a 100-foot
27 exclusionary zone from polling places for political speech that an elections official has no say in what
28 goes on outside that zone under any circumstances. The Supreme Court in Burson, however, specifically refrained from ruling that restrictions beyond the 100-foot limit were per se unconstitutional. (Id. 504 U.S. at 210-211). After the Burson decision, the Fifth Circuit for example, upheld a similar ban on campaigning activity within a 600-foot radius of a polling place based in the state’s compelling interest in protecting the right to vote free from interference. Schirmer v. Edwards 2 F.3d 117, 121-122 (5th Cir. 1993).

1 Defendant must rely on the voluntary cooperation of Vote private Center sites to ensure
2 the appropriate neutrality of polling place locations. This is one reason why in the
3 selection of Vote Centers, publicly owned property sites make better polling locations
4 because government entites already prohibit or avoid controversial political speech.
5 See, Def.'s Request for Judicial Notice, Exhibit G.

6 Even assumimg that provisions in negotiated agreements amount to a policy, the
7 restriction in that alleged policy does not even apply to the entire property owned by any
8 entity acting as a Vote Center. Instead it is narrowly crafted to those areas that are
9 likely to impact voters.⁶ The provisions of the agreements put owners of potential Vote
10 Centers on notice concerning site neutrality expectations so that there would be no
11 surprises or issues with any of the entities serving as Vote Centers. Moreover, the
12 allegations in the FAC quote only one contractual provision in the agreements. FAC,
13 ¶¶61. Defendant's Request for Judicial notice attaches an example of an agreement that
14 was signed by one Vote Center location without any requested modifications and one
15 that contains requested modification by the Vote Center location. Def. Request for
16 Judicial Notice, Exhibits E and F (see differences in paragraph 3 of the agreements).
17 The terms of the agreements are entered into voluntarily and after arms-length
18 negotiation between the parties.⁷ Plaintiff does not allege that Defendant Registrar
19 restricted other valid methods of expressing whatever opinions members of the public or
20 the entities serving as Vote Centers choose to proclaim. The neutrality provision is
21 narrowly tailored to advance a specific substantial state interest in maintaining that
22 "island of calm" around polling places. (*Minnesota Voters Alliance*, *supra*, 138 S.Ct. at
23 1887).

24
25
26 _____
27 ⁶ The alleged policy is also compatible with the concurring opinion view in *Burson* that the nonpublic
28 forum status of polling places includes streets, sidewalks and paths of travel closely associated with the
polling place. 504 U.S. at 1859-1861 (concurring opinion by Justice Scalia).

⁷ There might be situations in which the critical need for a Vote Center in a particular area could outweigh
the Recorder's desire for the neutrality clause in the agreement and even an amendment to that clause
would have to be negotiated.

1 But the central point here is that none of the alleged actions of the Defendant
2 involve the government acting as a sovereign restricting speech or imposing criminal
3 penalties. The question here is whether a government polling place can be compelled
4 to host speech considered controversial or political by some portion of the voting public.
5 The answer to this question has been provided by the courts:

6 “We conclude that when [the government] is the speaker, its control of its
7 own speech is not subject to the constraints of constitutional safeguards
8 and forum analysis, but instead is measured by practical considerations
9 applicable to any individual’s choice of how to convey oneself: among
10 other things, content, timing, and purpose. Simply because the
11 government opens its mouth to speak does not give every outside
12 individual or group a First Amendment right to play ventriloquist.” Downs
13 v. Los Angeles Unified School District, 228 F.3d 1003, 1113 (9th Cir.
14 2000) (upholding restriction on teacher posting opposing opinion flyer on
15 bulletin board after District posted LGBTQ favorable civil rights posters).

16 Considering the nature and purpose of the government polling place, the limited
17 actions by the Defendant alleged in the FAC to ensure some measure of governmental
18 neutrality at the polling sites certainly do not violate the First Amendment. Cornelius,
19 supra, 473 U.S. at 799-800. The Plaintiff may not use its voluntary status as a polling
20 place to “play ventriloquist” compelling the government to confront votes with Plaintiff’s
21 political message.

22 **2. Government May Reasonably Restrict Speech of Contractor/Agent in**
23 **Public Program.**

24 The Defendant’s actions also pass constitutional muster under the standard used
25 in Pickering v. Bd. Of Education (1968) 391 U.S. 563, and its progeny for determining
26 when a government employer can control the speech of its employees, or in this case of
27 its contractors or agents. Under the facts alleged, the Plaintiff takes on the role of
28 polling place as “badge of honor” and as a service to the public. (FAC, ¶ 17). Even

1 Plaintiff recognizes that it is becoming part of the election process by allowing its
2 facilities to be used as a public polling place. In doing so, Plaintiff becomes at least a
3 contractor or agent of the Fresno County Elections Office for the limited period in which
4 the polling place is open to the public on its premises. In that capacity, Plaintiff is
5 analogous to a public employee for purposes of the First Amendment

6 The government, in some instances, “may impose restraints on the job-related
7 speech of public employees that would be plainly unconstitutional if applied to the public
8 at large.” United States v. Nat’l Treasury Emps. Union (NTEU), 513 U.S. 454, 465
9 (1995). The Pickering Court developed a two-stage analysis to evaluate the competing
10 interests of a public employee’s speech rights and the governmental purposes that may
11 legitimately support a restriction on those rights. Id., 391 U.S. at 568. The Ninth Circuit
12 has described the test applied in Pickering as involving the following steps: “We ask
13 first whether the restriction affects a government employee’s speech ‘as a citizen on a
14 matter of public concern.’ [* * *] If it does, we inquire “whether the government entity had
15 an adequate justification for treating the employee differently from any other member of
16 the general public.” Barone v. City of Springfield, Oregon 902 F.3d 1091, 1102 (9th Cir.
17 2018) (citations omitted). The Ninth Circuit also articulated how this standard should be
18 applied in First Amendment retaliation claims through a five step analysis: (1) plaintiff
19 must show he or she spoke on a matter of public concern; (2) plaintiff must have spoken
20 as a private citizen rather than a public employee; (3) the relevant speech was a
21 substantial or motivating factor in the complained of action; (4) if plaintiff establishes a
22 prima facie case under the first three factors, then the public entity must demonstrate it
23 had an adequate justification for treating the plaintiff differently than a member of the
24 general public or (5) the public entity would have taken the action even absent the
25 protected speech. Id., 902 F.3d at 1098. Applying the Ninth Circuit’s the five-step
26 analysis here covers all the facial, as-applied and retaliation causes of action alleged in
27 the FAC as the general Pickering balancing test is fully incorporated into this analysis.

28

1 Defendant does not contest that the facts alleged in the FAC are adequate to
2 establish that Plaintiff was speaking on a matter of public concern. Defendant **does**
3 **contend** the particular method of speech, being the signs so closely associated with the
4 public polling place meant that Plaintiff was not speaking in a private capacity, at least
5 on the dates the polling place was active. As argued above concerning the
6 governmental speech nature of the issues involved in the FAC, Plaintiff was not
7 speaking purely as a private entity and therefore cannot satisfy the second factor of the
8 test. This also renders Plaintiff's FAC deficient for failing to meet the first prong of the
9 *Pickering* test.

10 Nevertheless, assuming for the sake of argument that Plaintiff's allegations are
11 adequate to establish it was speaking solely in its private capacity, we proceed with the
12 analysis laid out by the Ninth Circuit. On the third prong of the Ninth Circuit analysis,
13 the Defendant admits that it declined to use the Plaintiff's location in the November 2018
14 election because of Plaintiff's refusal to cover or remove the Black Lives Matter sign on
15 election day. However, it is apparent from Plaintiff's own allegations that it was not the
16 specific message on the sign or the fact that Plaintiff proclaimed that particular message
17 that warranted the selection of another polling place. Even though Plaintiff had placed
18 the Black Lives Matter sign on its property and would continue to do so at times other
19 than the date and times the polling place would be open, Defendant was still willing to
20 use the Plaintiff's facility as a polling place if Plaintiff would consent to covering or
21 removing the sign during polling hours. FAC, ¶¶ 40-41. It was not the substance or
22 type of speech, but the fact that Plaintiff insisted on having the sign in the path of voters
23 coming into the polling place, and refused to cover or take it down for election day that
24 required the Elections Office to find another site. FAC, ¶ 43.

25 Assuming the Plaintiff's FAC survives the problems discussed above, even more
26 serious defects in the FAC become apparent under the fourth and fifth factors in the
27 Ninth Circuit analysis. As set forth in the case law cited earlier in this brief concerning
28 the substantial state interest in maintaining the efficiency and neutrality of public polling

1 places, the Defendant has more than adequate justification under the fourth factor to
2 have moved polling places and to seek neutrality in the facilities used for polling places
3 in the future. Moreover, the alleged actions by the Defendant are very limited, resulting
4 only in the selection of polling places that would cooperate with the County's need for
5 neutral polling sites. In Hudson v. Craven, 403 F.3d 691, 700-701 (9th Cir. 2005) the
6 Ninth Circuit recognized the "strong and recognized interest" of a public community
7 college in "maintaining its political neutrality as an educational institution." This allowed
8 the college to constitutionally discipline a professor for attending an anti-World Trade
9 Organization protest and inviting students from her class to attend. (Accord, Hazelwood
10 Sch. Dist. V. Kuhlmeier, 484 U.S. 260, 272 (1988) ("A school must also retain the
11 authority to refuse... to associate the school with any position other than neutrality on
12 matters of political controversy.") What is true of educational institutions is even more
13 true of governmental entities responsible for running elections in light of the compelling
14 state interest in protecting the right to vote – "a right at the heart of our democracy."
15 Burson, supra, 504 U.S. at 198.

16 The fifth and final factor in the Ninth Circuit analysis is whether the public entity
17 would have taken the same action regardless of the allegedly protected speech. At
18 least prospectively, this is true. Under the Voter's Choice Act, instead of needing over
19 250 polling locations to serve approximately 280 precincts, the Fresno County Elections
20 Office will be using 52 Vote Centers. See, Defendant's Request for Judicial Notice,
21 Exhibits C, D and G. Under the Voter's Choice Act, some of the Vote Centers must be
22 open for 11 days prior to the election day and the remainder must be open for 4 days
23 prior to the election day. Because of this change in the law, some locations that had
24 previously been used as polling locations such as houses of worship, are no longer able
25 to be used effectively as Vote Centers. This is because the requirement of continuous
26 operation of a Vote Center for 4 or 11 days will require that the Vote Centers be open
27 either one or two weekends prior to the elections. This along with other scheduling
28 conflicts that arise from events normally held at houses of worship makes them

1 generally unfavorable sites for Vote Centers compared to the alternatives. In fact, no
 2 houses of worship were selected as Vote Centers or sites for drop-off boxes in Fresno
 3 County. Defendant's Request for Judicial Notice, Exhibits G and H. In addition, there
 4 have always been a few complaints concerning the use of houses of worship as polling
 5 places. Some of that can be seen in allegations in the FAC. FAC, ¶ 48.⁸ Furthermore,
 6 there is a reduced need for Vote Centers under the Voters Choice Act in relatively more
 7 affluent neighborhoods such as that surrounding Plaintiff's property (FAC, ¶¶ 21, 22),
 8 where historically more voters vote by mail and have easier access to transportation to
 9 reach polling places. There are no allegations in the FAC that Plaintiff's facility meets
 10 the many facility needs for a Vote Center. The Plaintiff does not allege facts indicating
 11 its facilities would be adequate to house a Vote Center.⁹ Therefore, Plaintiff has failed
 12 to allege sufficient facts establishing it would be able to be used as a Vote Center under
 13 all these changed circumstances.

14 If analyzed under the standards for governmental regulation of speech of an
 15 employee, agent or contractor, the FAC fails to establish any viable claims against
 16 Defendant.

17 **3. Defendant's Actions Were Constitutional Under Burson v. Freeman.**

18 Even if the fundamental issue in this case is whether the Defendant acting as a
 19 governmental sovereign could lawfully take the actions alleged, and even assuming that
 20 the Plaintiff's status under the alleged facts is simply one as a member of the general
 21 _____

22 ⁸ Plaintiffs have used very selective fact pleading in their FAC, particularly in light of the five months of
 23 discovery that the parties have engaged in since the filing of the original complaint in this action. For
 24 instance, the implication in ¶¶ 47 and 48 of the FAC is that there was a barrage of general complaints
 25 from the public about Cross City Church. The one complaint quoted was received on Friday, November
 26 2, 2018, just two working days before the Tuesday, November 6, 2018 mid-term election. Def.'s Request
 27 for Judicial Notice, Exhibit A. In fact all the complaints about the Cross City Church were received in a
 28 period just a few days before November 6, 2018 to a week after the election and were generated by
 efforts by Plaintiff in the press and within its own congregation to organize a complaint drive about the
 non-use of the Plaintiff's church as a polling place in November. The timing of this effort was clearly done
 for maximum disruptive effect on the actual election, since the Plaintiff knew since the beginning of
 September that it would not be utilized for a polling place in November unless it covered its signs. (FAC,
 ¶¶ 41-44).

⁹ The polling site on Plaintiff's property in 2018 was its sanctuary, which would clearly not be adequate
 under the requirements of a Vote Center for multiple day use or internet connectivity.

1 public, the FAC does not state a valid cause of action against the Defendant. That is
 2 because under Burson, the alleged actions by the Defendant were minimal intrusions
 3 into Plaintiff's free speech rights, were taken in support of a compelling state interest,
 4 and were narrowly tailored to meet the needs of that interest.

5 Discussion of this aspect of the FAC should differentiate between the allegations
 6 concerning Defendant's conduct in 2018 and the actions by Defendant in implementing
 7 the Voter's Choice Act and its alleged "policy" of neutrality. This is because the
 8 allegations concerning the 2018 elections involve at least nominally the reaction to
 9 specific speech by the Plaintiff, specifically the posting of the Black Lives Matter signs.
 10 The actions alleged with respect to prospective restrictions on future Vote Centers do
 11 not contain any factual allegation that Plaintiff would be entitled or adequate to serve as
 12 a Vote Center under the new requirements. In addition, the alleged policy challenged
 13 by Plaintiff (FAC ¶¶ 60, 61) is facially neutral and does not call out any particular type of
 14 speech that is to be restricted.¹⁰ It is only in the as-applied challenge that the
 15 allegations in the FAC can even be analyzed under the Burson test.

16 Assuming that the action alleged to have been taken by Defendant in 2018
 17 constituted a restriction on political speech in a public forum, the government must show
 18 that the action is necessary to serve a compelling state interest and that it is narrowly
 19 drawn to achieve that end. Burson, supra, 504 U.S. at 198. Plaintiff admits that
 20 complaints were received before and after the June 2018 election. (FAC, ¶ 40).¹¹ The
 21 FAC contains no allegation that Defendant made any request to cover or move the
 22 Black Lives Matter sign until after the June 2018 primary election and well in advance of
 23 the November 2018 election. The Defendant still wished to use Plaintiff's facility in the
 24

25 _____
 26 ¹⁰ Plaintiff attacks this policy on grounds of unconstitutional vagueness and as a due process violation.
 27 FAC ¶¶ 67-71, 112-124. The deficiencies in these claims is dealt with specifically in Section III.B.4. of this
 28 memorandum, below.

¹¹ Plaintiff conveniently avoids, through selective pleading of facts, that contact with the Plaintiff was
 made by the Fresno County Elections Office in early May 2018 regarding the Black Lives Matter signs,
 before the complaint referred to in the FAC was made. Plaintiff also ignores in its complaint the evidence
 it has received over several months of discovery of the multiple complaints received by Defendant both
 before and after the June 2018 primary concerning the Black Lives Matter signs on Plaintiff's property.

1 November 2018 election despite the fact that Plaintiff had made the statement reflected
2 by the Black Lives Matter sign. FAC, ¶ 41. The sought-after restriction was slight,
3 involving only covering or removing the sign for the single election day. FAC, ¶ 41.
4 Plaintiff does not allege that Defendant sought any other restriction on Plaintiff's speech
5 through other methods with respect to the Black Lives Matter sign or the issues it
6 represented either on election day or otherwise. Members of Plaintiff would even have
7 been able to make similar statements or carry similar non-permanent signs at the
8 polling location so long as they stayed outside the 100-foot barrier established by state
9 law. Plaintiff admits that although outside the 100-foot barrier, the signs were within
10 approximately 200 feet of the polling place. FAC, ¶ 35. The signs were placed in a
11 prominent position relative to the facility to ensure that Plaintiff's goal of sending a
12 strong "theological" and "civil rights" message to the community. FAC, ¶¶ 19-30.
13 Given the substantial government interest in ensuring that polling places are run
14 efficiently and neutrally, the minor accommodation requested by Defendant that Plaintiff
15 remove or cover the sign for a single election day was reasonable and narrowly tailored
16 under the strict scrutiny test applied in Burson. Likewise, the limited contractual
17 obligation, not subject to any civil or criminal sanction, requesting Vote Center locations
18 to limit signs or other obstacles is also narrowly tailored to accomplish this legitimate
19 state interest.

20 **4. Specific Issues on Causes of Action.**

21 Based on the arguments above, the court should dispose of all causes of action
22 pleaded by Plaintiff in this case. If the court finds that Plaintiff's alleged facts describe a
23 governmental speech scenario, then none of the Plaintiff's causes of action are viable.
24 However, there are a few other, more specific reasons why these causes of action are
25 deficient.

26 **a. First Cause of Action – Content Discrimination**

27 In addition to the general deficiencies described above, there are no specific
28 allegations in the FAC as to what content the Defendant apparently favored over the

1 content of the Black Lives matter sign. There are general allegations that other
2 churches have content-laden signs but the examples of the statements quoted are
3 devoid of anything political in contrast to the Black Lives Matter sign which even Plaintiff
4 admits conveys civil rights message. FAC ¶¶ 48 (hearsay statement of complainant
5 regarding “controversial religious symbols and slogans” at Cross City Church); 78 (sign
6 at other church in Reedley during November 2018 election); 79 (general religious and
7 scriptural quotes). With respect to religious symbols, there are no allegations that the
8 Defendant discriminated between religious symbols. Plaintiff was never asked to cover
9 its flaming chalice motif on its entrance sign, the symbol of Unitarian-Universalist
10 churches. The allegations regarding the sign at the Reedley church merely indicates
11 that church was treated exactly the same as Plaintiff. As discussed above, Defendant
12 received complaints about Plaintiff’s sign prior to the June 2018 election but took no
13 action until after the election, when following research that confirmed the controversial
14 political and social nature of the Black Lives Matter sign, Plaintiff was asked to cover or
15 remove it for the single election day. There is no allegation that the Reedley church
16 was used as a polling place again after the November 2018 election. In fact, no
17 houses of worship will be used in that area for a Vote Center. Def’s Request for Judicial
18 Notice, Exhibit G. Due to the number of polling locations required to serve all the
19 precincts under the old method of voting in Fresno County, several houses of worship of
20 different types were used. Def’s Request for Judicial Notice, Exhibits C and D. Along
21 with that necessary use there has always been some acknowledgement that some
22 churches may have religious symbols or signs on them. There is no allegation that any
23 member of the public raised any issue concerning the signs quoted in FAC ¶ 79.
24 Further, the signs quoted are readily distinguishable from Plaintiff’s sign, which, in
25 addition to any religious meaning attached to it by Plaintiff, is recognizably connected to
26 a political and social movement. Finally, the particular issues raised by Plaintiff are now
27 moot under the Fresno County implementation of the Voter’s Choice Act and the more
28

1 limited number of Vote Centers. No houses of worship are being utilized as Vote
2 Centers and there is no current expectation any will be used in the future.

3 In the alternative to Defendant's motion to dismiss pursuant to Rule 12 (b)(6),
4 Defendant has moved for a more definite statement with respect to the First Cause of
5 Action under Rule 12 (e) requiring Plaintiff to state with more particularity what speech
6 specifically was allegedly favored or selected by Defendant in unlawful discrimination
7 against the content of Plaintiff's speech.

8 **b. Second Cause of Action – Viewpoint Discrimination**

9 The specific issues for the Second Cause of Action are similar to those
10 discussed under the First Cause of Action. However, it is clear that the *particular*
11 *message* of the Black Lives Matter sign was not what caused concern for the
12 Defendant. Instead, it was the explicit and implicit political *nature* of the sign. The
13 Defendant only requested covering or removing the sign during polling operation hours.
14 The Plaintiff remained free to make the identical statements or even more emphatic
15 statements in support of the Black Lives Matter movement, or the cause of racial justice
16 more generally, in any other manner at any other time. There are also no allegations
17 that Defendant had any particular animus toward or disagreement with the Black Lives
18 Matter movement, or the cause of racial justice more generally.

19 In the alternative to Defendant's motion to dismiss pursuant to Rule 12 (b)(6),
20 Defendant has moved for a more definite statement with respect to the Second Cause
21 of Action under Rule 12 (e) requiring Plaintiff to state with more particularity what
22 speech or viewpoint specifically was allegedly favored or selected by Defendant in
23 unlawful discrimination against the viewpoint expressed by Plaintiff's speech.

24 **c. Third Cause of Action – Retaliation**

25 As discussed above the allegations of the FAC do not support a retaliation claim.
26 Defendant was willing to continue to use Plaintiff as a polling site despite the position
27 Plaintiff had taken in support of the Black Lives Matter movement. FAC, ¶ 41. Plaintiff
28 was not barred from participating as a polling place in retaliation for the *content* of its

1 speech, or its support of the Black Lives Matter movement. Defendant chose another
2 polling place in November 2018 because Plaintiff refused to cover or remove the sign
3 on a single day for the hourst that the polling place was open for the election. FAC, ¶¶
4 42-43. The allegations showing Defendant's willingness to continue using Plaintiff's site
5 demonstrate that there is no retaliatory intent on the part of Defendant in any of the
6 alleged actions.

7 In the alternative to Defendant's motion to dismiss pursuant to Rule 12 (b)(6),
8 Defendant has moved for a more definite statement with respect to the Third Cause of
9 Action under Rule 12 (e) requiring Plaintiff to state with more particularity for what action
10 it was retaliated against and to state with more particularity the factual specifics of that
11 retaliation

12 **d. Fourth Cause of Action – Vagueness/Overbreadth**

13 The allegations of the FAC simply do not reasonably make out a case that the
14 Defendant's actions or alleged policy would act as any kind of prior restraint speech.
15 Indeed, the alleged actions by Defendant have not stopped or altered Plaintiff's speech.
16 The only thing that is affected for Plaintiff is its ability to act as a polling place (assuming
17 it meets the requirements for a Vote Center, and is needed for a Vote Center, which is
18 nowhere alleged) while simultaneously compelling the County to affirm, endorse or
19 support particular speech and the voting public to encounter that speech.

20 Plaintiff alleges no potential penalty or risk for not complying with Defendant's
21 allegedly vague policy. There is no civil or criminal penalty that would apply. The use
22 of the neutrality clause in the agreements with Vote Centers is a contractually
23 negotiated term. It must be presumed that in order for there to be a meeting of the
24 minds over the terms of the contract the parties thereto understand them. There are no
25 allegations that any particular speech would forever bar Plaintiff or any other potential
26 polling site from serving as a Vote Center provided they comply with the basic neutrality
27 requirements in a specifically described area for a limited period of time while the Vote
28 Centers were open. Those neutrality requirements, to the extent there is any question

1 as to their scope, would be reasonably worked out between the parties in the contract
2 negotiation process. Along with the absence of any allegation supporting any risk of
3 civil or criminal liability as a result of violating the alleged policy this vitiates Plaintiff's
4 vagueness and overbreadth attack.

5 **e. Fifth Cause of Action – Due Process**

6 Plaintiff fails to allege exactly how any due process principles are violated by
7 Defendant's alleged neutrality policy. There is no right to serve as a polling place under
8 any state or federal law. Plaintiff currently is subject to no due process defect as it is
9 not at risk of any governmental action or sanction with respect to any speech or act it
10 has alleged in the FAC. The conclusory allegations making up this cause of action are
11 the kind rejected by the Supreme Court. *Twombly*, *supra*, 550 U.S. at 555 (pleading is
12 insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the
13 elements of a cause of action."); *Iqbal*, *supra*, 556 U.S. at 676 ("Threadbare recitals of
14 the elements of a cause of action, supported by mere conclusory statements, do not
15 suffice."). "The Supreme Court has made it clear...that only official conduct that 'shocks
16 the conscience' is cognizable as a due process violation." *Porter v. Osborn*, 546 F.3d
17 1131, 1137 (9th Cir. 2008) (citing *County of Sacramento v. Lewis*, 118 S.Ct. 1708).
18 Plaintiff has failed to make the requisite factual allegations here and the Fifth Cause of
19 Action should be dismissed.

20
21 Dated: February 12, 2020

Respectfully Submitted,
DANIEL C. CEDERBORG
County Counsel

22
23
24 By: /s/ Daniel C. Cederborg

25 Attorneys for Defendant
26 BRANDI L. ORTH, County
27 Clerk/Registrar of Voters for the County
28 of Fresno