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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

THE UNITARIAN UNIVERSALIST CHURCH OF FRESNO,

Plaintiff,

vs.

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

Defendant.

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

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

TRIAL DATE:	DECEMBER 15, 2020
TIME:	8:30 A.M.
DEPARTMENT:	4
JUDGE:	UNASSIGNED

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INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case about the regulation of speech near polling places. Defendant Brandi Orth ("Defendant") removed a polling place located at the Unitarian Universalist Church of Fresno ("Plaintiff" or "Church") because she decided that the Church's Black Lives Matter banners prevented the polling place from being "neutral." This is an unprecedented attempt to regulate speech beyond the 100-foot campaign-free buffer zone established by state law. It is subject to exacting scrutiny under *Burson v. Freeman*, 504 U.S. 191 (1992), and Defendant cannot make the factual showing that her actions were narrowly tailored to a compelling governmental interest. Nor can she meet the more lenient reasonableness standard that would apply if she had sought to regulate speech in the polling place itself. Under *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), regulation of speech inside a polling place must be guided by objective, workable standards, which are wholly lacking here.

Defendant first tries to escape any scrutiny for her policy by calling the Church's Black Lives Matter banner "government speech." *See* Defendant's Motion to Dismiss, Dkt. 30-1 ("MTD") at 10-14. This novel argument finds no support in case law or the pleadings. Defendant does not even cite the test for evaluating whether something is government speech, and application of that test makes clear that the Church's banners are its own speech, not the government's.

Defendant next argues that her actions against the Church are a permissible regulation of public contractor speech. Defendant does cite the correct test for First Amendment retaliation claims brought by a public contractor, but contrary to her argument, the factors in this test all weigh in favor of finding that she violated the Church's First Amendment rights.

Defendant's remaining arguments are equally unpersuasive. Plaintiff's claims contain the detail required by Federal Rule of Civil Procedure 12(e) and state claims for relief on all counts. In seeking to dismiss these claims under Rule 12(b)(6), Defendant relies heavily on improper and unsupported factual assertions that cannot be considered at the pleading stage. Her motion to dismiss should be denied.

I. BACKGROUND

A. Facts

Plaintiff Church believes in affirming and promoting "the right of conscience and the use of the democratic process within our congregations and in society at large." First Amended Complaint for Declaratory and Injunctive Relief and Damages, Dkt. 25 ("FAC"), ¶ 17. As part of upholding that principle, the Church hosted a polling place during the November 2016 and June 2018 elections. FAC, ¶ 15. The polling place at the Church operated without incident during both elections, and Defendant intended to use the Church as a polling place again during the November 2018 election. FAC, ¶¶ 15-16.

The Church is committed to racial justice, equality, and being an ally to Fresno's Black community. FAC, ¶¶ 23, 25, 28. As part of this commitment, the Church has displayed two Black Lives Matter banners on its property continuously since August 2017, including during the June 2018 election. FAC, ¶¶ 25, 26. The banners are located on the Church's private property, separate from the area used as a polling place. FAC, ¶ 36. The banners are approximately 200 feet from the entrances of the Church building that hosted the polling place, and about 225 feet from the "room in which voters . . . cast their ballots." FAC, ¶ 35.

In August 2018, Defendant received a message about the banners on Church property which stated in part: "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 …Will the sign remain for the general in November?" FAC, ¶ 40. In response to this message, Defendant and Rachel Lopez, an Elections Office staff member, discussed the banners. FAC, ¶ 41. Ms. Lopez stated that the banners were "beyond [the] 100' marker" and the speech in question was not "campaigning," but that it was supporting a "controversial movement." *Id*. Defendant contacted the Church around August 31, 2018 and asked the Church to remove the banners on election day. FAC, ¶ 42. The Church refused, FAC, ¶ 43, and Defendant responded by removing the Church as a polling place. FAC, ¶ 44.

Defendant removed the Church based on a then-unwritten policy that polling places must be "neutral." FAC, ¶¶ 52, 64. Beginning in March 2020, Fresno County will use vote centers

instead of polling places, *see* FAC, ¶ 56, and Defendant has now memorialized her neutrality policy in contracts that she requires vote centers to sign. FAC, ¶ 61. The relevant provision states:

> The path of travel on the Facility's property, including within the line of sight from the path of travel, to and from the Buildings/Rooms and Parking shall be free from signage, displays, audible dissemination of information and obstructions interfering with the neutrality or operations of the Facility with respect to election/voting purposes, whether or not within 100 feet of a polling place, a vote center, an elections official's office, or a satellite location.

Id. Defendant does not define "neutrality" in the vote center contract or in any other document. FAC, ¶ 62. Defendant has no protocol, procedure, or objective criteria to guide her determinations about whether a voting location is neutral. FAC, ¶¶ 52, 60, 63. She could not say whether messages such as "All Lives Matter," "Girl Power," or "recycle" would violate her neutrality policy. FAC ¶ 63. Defendant has allowed other churches to serve as polling places while displaying large signs with social or religious messages, as well as overtly political messages. FAC, ¶¶ 78-79. In November 2018, for example, Defendant operated a polling place at a church that displayed a large banner proclaiming "Vote According to Your Faith." FAC, ¶ 78. Defendant did ask that church to cover up its banner. *Id*. She was not concerned that this banner was political or controversial, or that it would make that church not neutral. *Id*.

Defendant has decided, however, that the statement "Black Lives Matter" makes the Plaintiff Church not neutral. FAC, ¶ 64. After removing the Church as a polling place for the November 2018 election, Defendant did not select the Church to be a polling place during the March 2019 special election or to be a vote center during the March 2020 election. FAC, ¶¶ 58-59. The Church is ready, willing, and able to serve as a voting location, but Defendant will not even consider the Church as long as it displays its Black Lives Matter banners. FAC, ¶ 64.

B. Procedural history

Plaintiff filed its original complaint on June 10, 2019, with three claims for relief: content discrimination, viewpoint discrimination, and First Amendment retaliation. Dkt. No.1. Defendant answered the complaint on June 28, 2019. *See* Dkt. No. 6. The parties exchanged initial disclosures on August 19, 2019 and began serving discovery soon thereafter. *Id*. In response to

facts learned through discovery, and pursuant to stipulation, Plaintiff filed a First Amendment Complaint on January 22, 2020, that added additional claims based on overbreadth, vagueness and unbridled discretion. Dkt. No. 25. Defendant moved to dismiss the First Amended Complaint on February 12, 2020. Dkt. No. 30.

II. STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a complaint. *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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." *Id*. (citing *Twombly*, 550 U.S. at 556).

When considering a Rule 12(b)(6) motion to dismiss, the court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Capp v. Cty. of San Diego*, 940 F.3d 1046, 1052 (9th Cir. 2019) (quoting *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005)). "If there are two alternative explanations [for the challenged conduct], one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

Rule 12(e) allows a party to move for a more definite statement of a pleading where the statement "is so vague or ambiguous that the party cannot reasonably prepare a response." Fed. R. Civ. P. 12(e); *see Famolare, Inc. v. Edison Bros. Stores*, 525 F. Supp. 940, 949 (E.D. Cal. 1981) ("A motion for a more definite statement should not be granted unless the defendant cannot frame a responsive pleading . . .[i]n particular, where the information sought by the moving party is available and/or properly sought through discovery the motion should be denied.")

III. ARGUMENT

a. Defendant fails to establish that her actions were a constitutionally permissible regulation of speech near a polling place.

The Supreme Court has evaluated speech restrictions near polling places in two key cases, *Burson v. Freeman*, 504 U.S. 191 (1992), and *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018). Defendant argues that these cases are not controlling, *see* MTD at 8-10, and in the alternative, that her actions would survive review even under the exacting scrutiny applied in *Burson*, *see* MTD at 18-20. Both arguments fail.

In *Burson*, the Supreme Court upheld a Tennessee statute that banned campaign speech within 100 feet of a polling place. *Burson*, 504 U.S. at 194-95. A four-Justice plurality determined the statute was a content-based restriction on speech in a public forum.[1] *Id*. at 196-98. It therefore applied exacting scrutiny, requiring Tennessee to show that the statute was "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *Id*. at 198 (quoting *Perry Ed. Assn. v. Perry Local Educators' Assn*., 460 U.S. 37, 45 (1983)). The plurality held that Tennessee met this burden. *Id.* at 211. First, the Court found that the 100-foot zone was narrowly tailored because it was a "minor geographic limitation," amounting to the last 15 seconds before voters enter the polling place, and did not constitute a "significant impingement." *Id.* at 210. Further, the statute restricted only campaign speech, not other types of speech such as charitable and commercial solicitation or exit polling. The Court found that this restriction was narrowly tailored to "ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud" and there was a lack of evidence that those same dangers exist with "other forms of solicitation or exit polling to commit such electoral abuses." *Id.* at 207.

In *Mansky*, the Court invalidated a Minnesota law that banned individuals from wearing "political" material inside a polling place on Election Day. *Mansky*, 138 S. Ct. at 1883, 1892. The law applied only *inside* the polling place itself, which the court classified as a nonpublic

[1] Justice Scalia's concurrence found that the statute was a reasonable, viewpoint-neutral regulation of speech in a nonpublic forum. *Id*. at 216.

forum. *Id*. at 1886 ("It is, at least on Election Day, government-controlled property set aside for the sole purpose of voting."). The government could therefore impose content-based speech restrictions so long as the restrictions were "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id*. at 1885 (quoting *Perry Ed. Assn,* 460 U.S. at 46). The court found that the Minnesota statute failed to meet even this low bar:

> Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out. [citation omitted] Here, the unmoored use of the term "political" in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota's restriction to fail even this forgiving test.

Id. at 1888. The Court proclaimed it "self-evident" that Minnesota's indeterminate prohibition created "[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation." *Id*. at 1891 (quoting *Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987)). The Court instructed that "objective, workable standards" must guide an election official's discretion. *Id*. "Without them, an election judge's own politics may shape his views on what counts as 'political.'" *Id*.

Despite their clear application to the present case, Defendant attempts to distinguish *Burson* and *Mansky* because they concerned laws that restricted *all* private speech, while Defendant claims to restrict only the private speech of property owners who agree to host polling places. This argument is unpersuasive. As a threshold matter, it is not clear that Defendant's restriction is as limited as she claims. To the contrary, the vote center neutrality clause covers speech on "[t]he path of travel on the Facility's property, including within the line of sight from the path of travel, to and from the [vote center] Buildings/Rooms and Parking." FAC, ¶ 61. On its face, this is not limited to the property owner's speech,[2] and it applies to speech on public fora

[2] To the extent that Defendant seeks to have this provision enforced by property owners, rather than directly enforcing it herself, it is still subject to First Amendment scrutiny. *See Rutan v. Republican Party*, 497 U.S. 62, 77-78 (1990) ("[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly."); *Young v. City of Simi Valley*, 216 F.3d 807, 819 (9th Cir. 2000) (government "cannot accomplish through private parties that which it is forbidden to do directly under the First Amendment").

such as sidewalks that are visible from the "path of travel." Defendant's regulation is thus squarely governed by *Burson*, and it is invalid because it is not narrowly tailored to a compelling governmental interest. Defendant's restriction also fails *Mansky*'s more forgiving test for regulation of speech within the polling place itself because it does not contain any objective standards and is not capable of reasoned application. Further, for the reasons discussed in Sections I(d) and I(c)(2), *infra*, Defendant's neutrality requirement would fail even if it were construed to apply only to property owners who agree to host polling places.

i. There is no compelling government interest in maintaining "neutrality" 200 feet away from polling places.

Burson recognized just two compelling governmental interests in regulating speech outside of polling places: preventing voter intimidation and preventing election fraud. 504 U.S. at 206. Defendant does not argue the Black Lives Matter banners implicate either of these concerns. Instead, she has invoked a shifting set of interests to justify her action against the Church, first contending that the signs prevented the Church from being "safe and neutral," FAC, ¶ 52, then dropping safety and simply contending that "Black Lives Matter is a political and controversial statement that makes the Church not 'neutral.'" FAC, ¶ 64. Even in its instant motion, Defendant cannot settle on the basis for her determination to revoke the Church's status as a polling place, alternating between a desire for "neutral and accessible" polling places (MTD at 2); "efficient and neutral" polling locations (MTD at 9), or for polling places free of "possible disruptions to the voting process" (MTD at 9).

Defendant's primary concern appears to be that the banners would interfere with "neutrality" by exposing voters to speech about "controversial political issues" in the proximity of the polling place. *See* MTD at 1. Yet "[t]he right against voter intimidation is the right to cast a ballot free from threats or coercion; it is not the right to cast a vote free from distraction or opposing voices." *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1051 (6th Cir. 2015). Defendant may sincerely desire a bubble of neutrality in which voters are shielded from "controversial political issues" (*see* MTD at 1), but this is something "*Burson* simply does not permit." *Anderson v. Spear*, 356 F.3d 651, 658 (6th Cir. 2004).

In *Anderson*, a plaintiff challenged Kentucky's 500-foot campaign-free zone, claiming that the restriction distance was overbroad. *Id.* at 663. The court found that Kentucky impermissibly "sought to eliminate *all* electioneering on election day." *Id.* at 658 (emphasis added). This attempt to "accommodat[e] the desire of voters to completely avoid contact with anyone handing out legitimate electioneering communications," was a "far cry from preventing voter intimidation and voter fraud...the only justifications the Supreme Court recognized in *Burson* to meet the requirements of exacting scrutiny." *Id.* at 659-60. As the court explained, the "Supreme Court has long recognized that '[m]ere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the [First Amendment] rights so vital to the maintenance of democratic institutions.'" *Id.* at 660 (quoting *Schneider v. State of New Jersey, Town of Irvington,* 308 U.S. 147, 161 (1939)). Because Kentucky failed to provide evidence demonstrating that such a broad regulation was necessary to prevent corruption and voter intimidation, the court held the statute was unconstitutional. *Id.* at 665-66.[3]

Defendant also relies on *Mansky* to argue that there is a substantial government interest in maintaining neutrality outside of polling places (*see* MTD at 13), but *Mansky*'s analysis turned on the unique government interests *inside* of a polling place, 138 S. Ct. at 1885-88, and does not support Defendant's efforts to maintain an "island of calm" *outside* of polling places. MTD at 13. Defendant's reliance on cases discussing neutrality in schools is even further afield. *See* MTD at 17. As discussed in Section I(c), *infra*, the unique pedagogical interests discussed in these school speech cases have no bearing on the government interest in operating polling places.

[3] Defendant's reliance on *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), (MTD at 12, n.5) is a troubling misapplication of established jurisprudence. In that case, the Fifth Circuit addressed a now invalid Louisiana law that restricted speech related to items and candidates on the ballot as well as items not on the ballot, such as a recall petition, in a 600-foot zone. *Schirmer*, 2 F.3d. at 119. There, proponents of the statute provided specific reasons and a historical overview of the need for such an expansive restricted zone, which included the widespread harassment of voters by campaign poll workers well beyond a 300-foot radius. *Id.* at 121-22. Soon after this Fifth Circuit decision, however, the Louisiana Supreme Court held the statute unconstitutional under *Burson*, finding it "crossed th[e] line" as overinclusive and failed to be narrowly tailored. *State v. Schirmer*, 93-2631 (La. 11/30/94), 646 So. 2d 890, 902. This case has also been distinguished by other circuits and, not surprisingly, Defendant cites no cases following it.

ii. Defendant cannot meet her burden of showing there are no less restrictive alternatives.

When the government restricts speech, as it has done here, the government bears the "burden of proving the constitutionality of its actions." *U.S. v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816-17 (2000). Indeed, when it imposes a content-based restriction on speech, the government carries an "especially heavy burden…to explain why a less restrictive provision would not be as effective." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 879 (1997). Defendant cannot meet this burden with "general assertions" about the importance of elections, or conclusory statements that she has chosen the least restrictive means to meet those interests. *See Askins v. U.S. Dep't Homeland Sec.*, 899 F.3d 1035, 1045 (9th Cir. 2018). Nor can she base her motion on unsupported assertions that directly contradict Supreme Court precedent. *Compare* MTD at 20 (arguing that Defendant's "sought-after restriction was slight, involving only covering or removing the sign for the single election day") *with Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

The presence of numerous less restrictive alternatives is fatal to Defendant's narrow tailoring argument. A clear alternative way to maintain political neutrality around polling places would be to follow state law electioneering restrictions, *see* Cal. Elec. Code §§ 319.5, 18370, which track *Burson* and are narrower than Defendant's restriction in terms of both distance (100-foot buffer zone) and content of speech (restricting only speech that directly relates to a candidate or measure on the ballot). Further, to the extent Defendant seeks to prevent confusion about who is speaking, she could post signs explaining that polling places are located on private property and the property owner's speech does not represent the views of the government.

Defendant's narrow tailoring arguments are especially unpersuasive in a motion to dismiss. The government bears the burden of proving there are no less restrictive alternatives, and this involves questions of fact that "cannot be answered without development of the record." *Askins*, 899 F.3d at 1046. The Ninth Circuit's analysis in *Askins* is instructive. There, advocates alleged that Customs and Border Patrol officers violated their First Amendment rights when the

officers stopped them from taking photographs at ports of entry on the border with Mexico. The district court dismissed the case, holding that the challenged "CBP policies survived strict scrutiny because of 'the extremely compelling interest of border security' and the government's general interest in 'protecting United States territorial sovereignty.'" *Id*. at 1044-45. "In conclusory fashion, the district court held that the policies were the least restrictive means of serving these interests." *Id*. at 1045. The Ninth Circuit reversed. It recognized that "[w]ithout question, protecting our territorial integrity is a compelling interest that could justify reasonable restrictions on speech activities at ports of entry." *Id.* However, "[i]t is the government's burden to prove that these specific restrictions are the least restrictive means available to further its compelling interest. They cannot do so through *general assertions* of national security, particularly where plaintiffs have alleged that CBP is restricting First Amendment activities in traditional public fora such as streets and sidewalks." *Id.* (emphasis added). Moreover, "determining whether a location is properly categorized as a public forum involves largely factual questions" that "cannot be answered without development of the record." *Id.*

iii. Defendant's proposed restriction lacks objective, workable standards and is not capable of reasoned application.

Even if strict scrutiny did not apply, Defendant's speech restriction would contravene *Manksy*'s instruction that regulation of speech must be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." 138 S. Ct. at 1885 (quoting *Perry Ed. Assn*, 460 U.S. at 46). In *Mansky*, the Court expressed concern that the term "political" was not defined by statute and could be "expansive." *Id*. at 1888. Without any parameters, the term could "encompass anything" related to the government or government affairs, including material that simply stated "Vote!" *Id.* The Court found that the state's guidance did little to clarify the prohibition on political speech.[4] Because the state failed to

[4] The state identified "issue oriented material designed to influence or impact voting" as a category of restricted speech, but the Court found this too broad because it would encompass "any subject on which a political candidate or party has taken a stance," including for example, "Support Our Troops" and "#MeToo." *Id.* at 1889-90. Even worse, the Court explained, was the overbroad guidance regarding items promoting groups with "well-known" political views because it "only increases the potential for erratic application. Well known by whom?" *Id.* at

"articulate some sensible basis for distinguishing" what speech was allowed, there was a high potential for abuse and arbitrary enforcement. *Id.* at 1888, 1891-92.

These concerns are only amplified in the present case. In contrast with the state defendant in *Mansky*, Defendant has not even attempted to offer guidance about what speech is "neutral." FAC, ¶ 62. She has no protocol, procedure, or objective criteria to guide her assessment of "neutrality." FAC, ¶¶ 52, 60, 63. Accordingly, it is not surprising that she has enforced this policy arbitrarily, demanding that the Church cover up its sign while allowing other churches to serve as polling places while displaying overtly political signs, such as "Vote According to Your Faith." *See* FAC, ¶ 78. This is precisely the outcome the Court sought to avoid in *Mansky*: without objective standards, "an election judge's own politics may shape his views on what counts as 'political.'" *Mansky*, 138 S. Ct. at 1891. "And if voters experience or witness episodes of unfair or inconsistent enforcement of the ban, the State's interest in maintaining a polling place free of distraction and disruption would be undermined by the very measure intended to further it." *Id*.

b. This case concerns Plaintiff's speech, not government speech.

Defendant first tries to escape any scrutiny for her policy by characterizing the Church's Black Lives Matter banners as "government speech." *See* MTD at 10-14. This argument lacks even superficial appeal, and Supreme Court precedent confirms that the Church's banners—erected by the Church on Church property—are indeed the Church's private speech. The Supreme Court uses a three-part test to determine whether speech is government speech: first, whether the speech is of a form governments have traditionally employed to convey messages to the public; second, whether a casual observer would reasonably interpret the speech as a government message; and third, whether the government "effectively controlled" the content of the speech "by exercising final approval authority over [its] selection." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.* 135 S. Ct. 2239, 2247 (2015) (citing *Pleasant Grove City, Utah v.*

1890. As a result, any "number of associations, educational institutions, businesses, and religious organizations could have an opinion on an 'issue confronting voters,'" which could lead to the ban of any insignia relating to groups like the World Wildlife Fund and Ben & Jerry's, as well as shirts declaring "All Lives Matter." *Id.*

Summum, 555 U.S. 460 (2009)). Defendant does not identify this government speech test, much less try to apply it to the facts alleged in the complaint. And as discussed below, all three factors demonstrate that the Church's Black Lives Matter banners are the Church's speech, not the government's speech.

i. There is no tradition of governments using church signs to communicate government messages.

The Supreme Court has found government speech where there is a clear history and tradition of that form of speech being used to convey government messages. *See, e.g.*, *Summum*, 555 U.S. 460 (holding that placement of a permanent monument in a public park is a form of government speech); *Walker*, 135 S. Ct. 2239 (holding that Texas specialty license plate designs were government speech). Defendant makes no effort to liken the Church's banners to these traditional methods of government speech, and the Supreme Court's government speech cases undermine Defendant's bald assertion that the Church's banners are government speech.

In *Summum*, the city rejected Summum's request to display a religious monument in a public park, even though the park displayed a ten commandments monument and other privately donated monuments. 555 U.S. at 465. Summum argued that the city engaged in unconstitutional viewpoint discrimination, *id.* at 465-66, but the Supreme Court disagreed, holding that public park monuments constituted government speech and the government was entitled to say what it wished. *Id.* at 470. The Court recounted the long history of governments "us[ing] monuments to speak to the public" and noted that monuments are, by definition, structures "designed as a means of expression." *Id*. The Court reasoned that when governments proactively subsidize or direct the placement of a monument on city property, they do so because they specifically wish to spread the message conveyed by the monument. *Id.* Of particular relevance here, the court noted that "[i]t certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated." *Id.* In *Summum*, this observation weighed in favor of finding government speech because the property owner was the government; here, it weighs in favor of private speech because the property owner is the Church.

Six years later the Court applied the same analysis to car license plates. *Walker*, 135 S. Ct. at 2247. The state of Texas permits various specialty designs on Texas license plates, *id.* at 2243, but rejected a proposed specialty design containing the Confederate Flag. *Id.* at 2245. Plaintiff argued this violated free speech, but the Supreme Court disagreed, applying the *Summum* factors to find that Texas license plates constitute government speech. *Id.* at 2248. The Court observed that states have traditionally chosen license plates to convey certain messages. *Id.* Other examples included plates that read "Centennial" to commemorate the 100-year anniversary of Texas' statehood or an Idaho plate that read "Idaho potatoes" to celebrate the state's primary agriculture export. *Id.*

Unlike the park monuments in *Summum* and license plates in *Walker*, there is no tradition of governments using church signs to convey government messages. Nor is there a tradition of the government using polling places for expressive messaging. *Cf. Mansky*, 138 S. Ct. at 1886 (a polling place on election day serves "the sole purpose of voting"). Defendant nonetheless argues that the Black Lives Matter banner is government speech because it was "under the imprimatur" of the government and that she has the right to choose what speech is "closely associated" with vote center or polling place locations. MTD at 3, 11. She provides no authority for these assertions and the Supreme Court has rejected very similar arguments in other cases.

In *Matal v. Tam*, 137 S. Ct. 1744 (2017), for instance, the Supreme Court rejected the government's argument that trademarks are government speech. *Id.* at 1758. Although trademarks could be associated with the government, they "have not traditionally been used to convey a government message." *Id.* at 1760. Different trademarks express contradictory views, and if the government were speaking with each one, it would be "babbling prodigiously and incoherently…saying many unseemly things." *Id.* at 1758. This observation holds true for church signs, which frequently communicate divergent religious messages that would be unseemly for government speech. It is also true of signs near polling places, which often include competing campaign signs outside the 100-foot zone. Considering all signage around a polling place to be government speech would be nonsensical and is unsupported by history or tradition.

Similarly, in *Legal Services Corporation v. Velasquez*, 531 U.S. 533 (2001), the Supreme Court rejected the government's claim that publicly subsidized attorneys engage in government speech when they represent their clients. The court noted that the public attorney program was "designed to facilitate private speech, not to promote a governmental message." *Id.* at 542. The government thus sought to "use an existing medium of expression and to control it…in ways which distort its usual functioning." *Id.* at 543. The Court held that the legal services attorneys' association with a government-run program did not convert a historically private form of speech into a public one. *Id*. at 542-43.

ii. A reasonable person would understand that the Church's Black Lives Matter banners communicated the Church's message, not the government's message.

Defendant cannot establish that any reasonable person would be confused about who was speaking through the Church's Black Lives Matter banner. For many reasons, it would be clear to a casual observer that the banner communicated the views of the Church, not the government. Churches commonly use signs on church property to express their religious views or other messages (*See, e.g.*, FAC, ¶¶ 78-79), and the Black Lives Matter banners in this case are a longstanding feature of the Plaintiff Church's property (FAC, ¶ 26). As the Supreme Court recognized in *Summum*, such permanent expressions of speech are well understood to "convey[] some message on the property owner's behalf." *Summum*, 555 U.S. at 471. Therefore, "there is little chance that observers will fail to appreciate the identity of the speaker." *Id.*

Further, the banners are not a "governmental article" serving "governmental purposes." *Cf. Walker,* 135 S. Ct. at 2248 ("Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification."). In *Walker*, the governmental nature of the license plates was clear on their face: "The State places the name "TEXAS" in large letters at the top of every plate." *Id*. Further, Texas issued the license plates, required vehicle owners to display license plates, and dictated the manner of disposal for unused license plates. *Id.* Here, in contrast, there is nothing on the face of the banners connecting them to any government entity, and they are not used for a government purpose.

Defendant's argument that the Black Lives Matter banner might nonetheless be mistaken for government speech strains credulity. Defendant suggests that the banners were "closely associated" with the polling place, MTD at 16, but she made no attempt to regulate other signs equally "closely associated" with other polling places. FAC, ¶¶ 78-79. Moreover, the Church's Black Lives Matter banners were 200 feet away from the polling place and far outside the 100-foot buffer zone that prohibits campaign speech near polling places. FAC, ¶ 35; Cal. Elec. Code §§ 319.5, 18370. In contrast to temporary election signs, the banners were displayed for approximately one year before the time Defendant asked the Church to remove them. It is highly unlikely that any voters in the precinct saw the banners for the first time on election day or believed that they related to the election or the government in any way.

Defendant's sole support for her "mistaken identity" argument is that she received a complaint about the banner.[5] *See* MTD at 4 (citing FAC, ¶¶ 40-41). But there is no indication that the complainant believed that the banner was the Registrar's speech or was part of the government-run polling place. *See* FAC, ¶ 40 (quoting complaint, which inquired "why it was okay to have a Black Lives Matter (a known domestic terrorist group) sign *in front of* our polling place.") (emphasis added). Taken in the light most favorable to Plaintiff, this statement shows that the complainant understood the sign to be separate from—and in front of—the polling place, not part of the polling place itself. The complainant did not like the Black Lives Matter banners, but there is no evidence the complainant was confused about the speaker behind them. Indeed, as Defendant knows from recent discovery, the complainant attributed the sign to the church (not the government), had previously complained about the sign as a "neighborhood" issue, and had a longstanding campaign against the sign.

[5] Instead of supporting Defendant's arguments, her reliance on this complaint "appear[s] to be just the kind of accession to the heckler's veto outlawed by the case law." *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cty. Sheriff Dep't*, 533 F.3d 780, 789 (9th Cir. 2008). As in *Center for Bio-Ethical Reform*, "Plaintiffs' speech was permitted until [viewers] reacted to it, at which point the speech was deemed disruptive and ordered stopped . . ." *Id.* Here, the Church's speech was permitted until Defendant received a complaint. When the Church refused to stop its speech, Defendant took action against it by deeming it ineligible to host a polling place. FAC, ¶¶ 43- 44. As discussed further in Section I(c), *infra*, this retaliatory action is barred by the First Amendment.

iii. The government did not control the content of the Black Lives Matter banners.

Because the sign's content, design, and placement were dictated entirely by the Church, it cannot be said to contain government speech. The Church's control over the Black Lives Matter banners starkly contrasts with the government's role in selecting and approving the messages in *Summum* and *Walker*. In *Summum*, the city government "effectively controlled" the entire process of selecting monuments for display in the city park and had "final approval authority" over which monuments were displayed. *Summum*, 555 U.S. at 473 (quoting *Johanns v. Livestock Mktg. Ass'n.,* 544 U.S. 560, 560-61 (2005)). Similarly, in *Walker*, the state government exercised exclusive control over selecting and approving license plate designs. *Walker,* 135 S.Ct. at 2249. The state was required by law to "approve every specialty plate design proposal before the design can appear on a Texas plate." *Id.* This "authority allows Texas to choose how to present itself and its constituency." *Id.* The state's dominion over this process, and its ability to decide which plates to approve, placed the speech in the state's hands, not the hands of private citizens who happen to design a plate and submit it for approval. *Id.*

Here, in contrast, the Church controlled the entire process of selecting and displaying the Black Lives Matter message on its property. FAC ¶¶ 24-30. The government did not select, design, or construct the Church's Black Lives Matter banners.[6] Indeed, Defendant specifically disclaims any general interest in the content of this message. MTD 16.

c. Defendant's actions are not a constitutionally permissible restriction of public contractor or public employee speech.

Defendant removed the Church as a polling place because of the Church's private speech. As alleged in the complaint, this was content discrimination, viewpoint discrimination, and retaliation based on protected First Amendment expression. Defendant argues that none of this is actionable because the Church was analogous to a public employee and she could therefore control its speech by demanding that it remove the Black Lives Matter banners. MTD at 14-18.

[6] Defendant may argue that she controls selection of polling places or vote centers, but the relevant question is who controls the content of the *speech* at issue. Voting locations exist for the "the sole purpose of voting," *Mansky*, 138 S.Ct. at 1886, not for the purpose of expressing government speech.

This argument ignores clearly established precedent that "[g]overnment officials may indeed terminate at-will relationships, unmodified by any legal constraints, without cause; *but it does not follow that this discretion can be exercised to impose conditions on expressing, or not expressing, specific political views*." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 725-26 (1996) (emphasis added). Here, Defendant took action against the Church precisely because it expressed—according to her—specific political views. *See* FAC ¶ 64; MTD at 22. This is unconstitutional First Amendment retaliation.

As Defendant correctly notes, the Ninth Circuit uses a burden-shifting analysis to evaluate claims of First Amendment retaliation by employees, contractors, or volunteers. First, the Plaintiff must make a prima facie case that (1) it "spoke on a matter of public concern;" (2) it "spoke as a private citizen rather than a public employee;" and (3) "the relevant speech was a substantial or motivating factor in the adverse employment action." *Barone v. City of Springfield, Oregon*, 902 F.3d 1091, 1098 (9th Cir. 2018). The burden then shifts to the government to demonstrate that either: "(4) it had an adequate justification for treating [the plaintiff] differently than other members of the general public; or (5) it would have taken the adverse employment action even absent the protected speech." *Id.*; *see also Ortiz v. Alvarez*, 341 F. Supp. 3d 1087, 1097 (E.D. Cal. 2018) (applying this framework).

Here, Defendant concedes the first factor, "that Plaintiff was speaking on a matter of public concern." MTD at 16. Defendant contests the second factor, arguing that "Plaintiff was not speaking purely as a private entity" because "the signs [were] so closely associated with the public polling place." *Id*. This misunderstands the line between speech as a private citizen and speech as a public employee. The government as an employer may regulate speech that public employees make "pursuant to their official duties" or speech that "owes its existence to a public employee's professional responsibilities." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Neither element is present here. The Church did not display the banners as part of its polling place duties or responsibilities, and the speech did not owe its existence to the Church's service

as a polling place.[7] The banners' appearance further underscores that they were not made pursuant to any public duty. The banners bear no official seal, logo or wording that references Defendant or Fresno County. This contrasts with the flyer in *Barone* that proclaimed "Come Meet Thelma Barone from the Springfield Police Department," as well as the "official attire" that Barone wore while speaking. *Barone*, 902 F.3d at 1100. Nothing in the Church's banners connected them with the County.

Turning to the third factor, there is no serious dispute that Plaintiff's speech was a motivating factor for Defendant's action. Defendant admits that she "declined [to] use the Plaintiff's location in the November 2018 election because of Plaintiff's refusal to cover or remove the Black Lives Matter sign on election day." MTD at 16. She attempts to argue that "[i]t was not the substance or type of speech" that prompted her decision, but instead the fact that the Church refused to take down the banners on election day. MTD at 16. This argument is untenable. Defendant asked the Church to remove the banners because she believed the message was "politically controversial" FAC ¶ 6; *see also* MTD 22 ("it was the explicit and implicit political *nature* of the sign" that caused concern for Defendant). This is the epitome of a content-based regulation. As the Supreme Court explained in *Burson*:

> The Tennessee restriction under consideration, however, is not a facially content-neutral time, place, or manner restriction. Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign. The statute does not reach other categories of speech, such as commercial solicitation, distribution, and display. This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic.

Burson, 504 U.S. at 197. Further evidence that Defendant's decision was not content-neutral comes from her failure to require other locations to remove all signage "in the path of voters coming into the polling place." MTD at 16. As the Complaint alleges, Defendant allowed numerous other locations to display signs and monuments at polling places. FAC ¶ 78-79.

[7] Defendant offers no support, because there is none, for her suggestion that the Church's motivation in displaying the banners or being a polling place is to "force voters to walk by its sign on the way to vote." MTD at 4.

The Church can thus demonstrate a prima facie case of First Amendment retaliation, and the burden shifts to the government to demonstrate the fourth or fifth factor: that it either had an adequate justification for the action or it would have taken the action absent the protected speech. Defendant cannot carry this burden, particularly at this stage of proceedings.

The fourth factor concerns the government interest in regulating speech near polling places, and as discussed in Section I(a), *supra*, that interest does not justify Defendant's actions here. Defendant attempts to bolster her argument with cases recognizing a government interest in neutrality at public schools, arguing that "[w]hat is true of educational institutions is even more true of governmental entities responsible for running elections in light of the compelling state interest in protecting the right to vote…." MTD at 17. There is no support for this assertion, and to the contrary, the cases Defendant cites relied on unique interests in the educational context. In *Hudson v. Craven*, 403 F.3d 691 (9th Cir. 2005), for example, the court discussed neutrality as part of the school's interest in "Pedagogical Oversight," finding that "educational institutions have a strong pedagogical interest in avoiding institutional association with potentially divisive political issues…." *Id*. at 700-01 (emphasis added). In reaching this conclusion, *Hudson* relied on *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), which explicitly distinguished the school environment from other settings. *Id*. at 266. *Hazelwood* recognized an interest in neutrality because of the school's role in "awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Id.* at 272 (quoting *Brown vv. Bd. of Educ.,* 347 U.S. 483, 493 (1954)). Defendant fails to explain how the reasoning of *Hudson* or *Hazelwood* applies to voters. Unlike educational institutions, which exist only for learning, Defendant has no interest exercising "pedagogical oversight," and is not charged with "awakening" voters to cultural values, preparing voters "for professional training" or allowing voters to "adjust normally to their environment." Defendant's effort to transpose a need for neutrality from the classroom to a polling place fails.

On the fifth factor, Defendant appears to concede that she would not have removed the polling place at the Church absent the protected speech. MTD at 17. She argues, however, that "[a]t least prospectively" she has other reasons not to use the Church as a vote center, stating a

general preference for not using any churches as vote centers. *Id*. As a threshold matter, Defendant's self-serving statements about churches being unsuitable vote centers are unsupported assumptions, not established facts. *See, e.g*., MTD at 4, 17-18 (assuming that all houses of worship have weekend activities that make them less favorable vote centers); *id*. at 18 n. 9 (assuming that Plaintiff's sanctuary could not have internet connectivity or be available for multiple day use as a vote center). There could easily be a church that does not have services every week, would cancel services in order to have the honor of serving as a polling place, or has additional space that could be used as a vote center.

Further, Defendant has repeatedly refused to agree that in selecting vote centers she would not penalize the Church because of its sign. At a January 2019 meeting with the Church and other faith leaders, Defendant would not commit to letting the Church "display its Black Lives Matter banners and still be under consideration to be a vote center on an even playing field with other churches." FAC ¶ 57. More recently, Defendant refused to stipulate that she would not discriminate against the Church because of its Black Lives Matter banners when selecting March 2020 voting locations. *See* Dkt. No. 14 at 10; Dkt. No. 14-1 at 2. In short, the Defendant cannot meet her burden of showing that she is not taking adverse action against the Church because of its speech. The Church is ready and able to serve as a vote center, but Defendant refuses to even consider the Church because of its speech. FAC ¶ 64.

d. Defendant's additional arguments are unpersuasive

i. Plaintiff's first, second and third causes of action adequately inform Defendant of the claims being asserted against her

Defendant seeks an order requiring Plaintiff to file a more definite statement of its content discrimination, viewpoint discrimination and First Amendment retaliation claims, without providing any legitimate basis for the request and while failing to state what vagueness or ambiguity exists in Plaintiff's complaint. Defendant's request is unsubstantiated and should be rejected. Rule 12(e) allows a party to move for a more definite statement of a pleading where the statement "is so vague or ambiguous that the party cannot reasonably prepare a response." Fed. R. Civ. P. 12(e). Plaintiff's First Amended Complaint is neither vague nor ambiguous and is pled

such that Defendant is adequately informed of the claims against her. Indeed, the allegations supporting the content discrimination, viewpoint discrimination and First Amendment retaliation claims in the First Amended Complaint closely track those in the Original Complaint, which provided sufficient detail for Defendant to prepare an answer. *See* Dkt. at 6.

In her motion, Defendant argues that the allegations in Plaintiff's First Amended Complaint do not allege "specific allegations … as to what content the Defendant apparently favored over the content of the Black Lives Matter sign[,]" or "that Defendant had any particular animus toward or disagreement with the Black Lives Matter movement," and "do not support a retaliation claim[.]" MTD at 20-22. These so-called deficiencies are insufficient to seek an order under FRCP 12(e). "A motion for a more definite statement attacks intelligibility, not simply lack of detail. For this reason, the motion fails where the complaint is specific enough to apprise the defendant of the substance of the claim being asserted." *Gregory Vill. Partners, L.P. v. Chevron U.S.A.*, Inc., 805 F.Supp.2d 888, 896 (N.D. Cal. 2011). Defendant cannot reasonably state she is unable to "ascertain the nature of the claim[s] being asserted." *Sagan v. Apple Computer, Inc.*, 874 F.Supp. 1072, 1077 (C.D. Cal. 1994). Moreover, to the extent Defendant seeks more specific details regarding Plaintiff's allegations, "[p]arties are expected to use discovery, not the pleadings, to learn the specifics of the claims being asserted." *True v. Am. Honda Motor Co.*, 520 F. Supp. 2d 1175, 1179–80 (C.D. Cal. 2007). Plaintiff's complaint clearly alleges Defendant "discriminated against the Church because of the message, ideas, subject matter, and content of its Black Lives Matter banners" and "singled out Plaintiff's message for disfavor by asking Plaintiff to cover up its Black Lives Matter banners, and when Plaintiff refused, removing Plaintiff as a polling place." FAC ¶¶ 73, 77. These allegations are not "so vague or ambiguous that [Defendant] cannot reasonably prepare a response" and for that reason Defendant's request for an order seeking a more definite statement should be denied. *See* Fed. R. Civ. P. 12(e).

ii. Plaintiff's fourth and fifth causes of action state claims for relief.

Plaintiff's fourth cause of action claims that Defendant's neutrality policy violates the First Amendment on its face and as applied because it is unconstitutionally vague and overbroad,

operates as a prior restraint on speech, and gives Defendant unbridled discretion to decide what speech is "neutral." FAC ¶¶ 112-15. Defendant argues that her policy is not a prior restraint because it has not yet stopped Plaintiff from speaking, MTD at 23, but that is not required to establish a prior restraint. *See, e.g.*, *Barone*, 902 F.3d at 1106 (holding that a contract provision imposed an unconstitutional prospective restriction on government employee speech). Defendant also argues that her neutrality policy is simply a contractual provision, and that any ambiguities would be worked out between the parties in the contract negotiation process, *see* MTD at 23-24, but this is inconsistent with allegations that Defendant has a general neutrality policy that she applies beyond the terms of a particular contract and with Defendant's own inability to explain whether particular speech would violate that policy. FAC ¶¶ 60-63. Finally, Defendant's actions against Plaintiff are sufficient "penalty" to trigger First Amendment scrutiny. *See Rutan v. Republican Party of Ill*., 497 U.S. 62, 75 n.8 (1990) (noting that "even an act of retaliation as trivial as failing to hold a birthday party for a public employee" violates the First Amendment "when intended to punish her for exercising her free speech rights" (quoting *Rutan v.Republican Party of Ill.*, 868 F.2d 943, 954 n.4 (7th Cir. 1989)); *Hyland v. Wonder*, 972 F.2d 1129, 1135 (9th Cir. 1992) ("[T]he opportunity to serve as a volunteer constitutes the type of governmental benefit or privilege the deprivation of which can trigger First Amendment scrutiny."). Defendant is not immune from this scrutiny simply because she has not threatened civil or criminal liability.

Plaintiff's fifth cause of action claims that Defendant's neutrality policy is so vague that it violates the Fourteenth Amendment on its face and as applied to Plaintiff. Defendant argues that "Plaintiff fails to allege exactly how any due process principles are violated by Defendant's alleged neutrality policy." MTD at 24. This ignores the specific allegations of Plaintiff's Fifth Cause of Action, FAC ¶¶ 120-24, which are further substantiated in detailed allegations throughout the Complaint that are incorporated by reference in Plaintiff's Fifth Cause of Action. *See, e.g.*, FAC ¶¶ 60-64, 69. These detailed factual allegations are easily distinguished from "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Defendant also argues that these allegations fail to state a claim for relief, but "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).[8] A vague statute "that nominally imposes only civil penalties but nonetheless carries a 'prohibitory and stigmatizing effect' may warrant a 'relatively strict test.'" *Kashem v. Barr*, 941 F.3d 358, 370 (9th Cir. 2019) (quoting *Hoffman Estates*, 455 U.S. at 499). This principle applies to restrictions imposed on public employees as well as to generally applicable laws. In *Baggett v. Bullitt*, 377 U.S. 360 (1964), for instance, Washington state employees challenged a state law requiring that they take a loyalty oath to be eligible for state employment. *Id.* at 361-62. The court found that the oath failed to "provides an ascertainable standard of conduct" and "require[d] more than a State may command under the guarantees of the First and Fourteenth Amendments." *Id*. at 372. Like the state employees in *Bullitt*, Plaintiff seeks to be eligible for government service without being forced to agree to a vague and undefined requirement. Plaintiff has stated a claim for relief under both the First and Fourteenth Amendments.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss should be denied.

By: /s/ Mollie M. Lee
Mollie M. Lee
Attorney for Plaintiff The Unitarian Universalist Church of Fresno

[8] Contrary to Defendant's argument, MTD at 24, Plaintiff's vagueness claim is not subject to a "shocks the conscience" standard. *See generally Kashem v. Barr*, 941 F.3d 358, 369 n. 5 (9th Cir. 2019) (distinguishing between procedural due process, substantive due process, and vagueness claims, and approaching vagueness as a distinct claim under the due process clause).

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2020 the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the attorneys of record in this case.

/s/ Mollie M. Lee
Mollie M. Lee