

1 DANIEL C. CEDERBORG
 County Counsel – State Bar No. 124260
 2 CATHERINE E. BASHAM
 Chief Deputy County Counsel – State Bar No. 128408
 3 KATWYN T. DELAROSA
 Deputy County Counsel– State Bar No. 267157
 4 REBEKAH A. EROPTKIN
 Deputy County Counsel – State Bar No. 276416
 5 FRESNO COUNTY COUNSEL
 2220 Tulare Street, Suite 500
 Fresno, California 93721
 7 Telephone: (559) 600-3479
 Facsimile: (559) 600-3480
 8

9 Attorneys for Defendant
 BRANDI L. ORTH,
 10 Fresno County Clerk/Registrar of Voters

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

15
 16 THE UNITARIAN UNIVERSALIST
 CHURCH OF FRESNO

17 Plaintiff,

18 v.

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

21 Defendant.
 22
 23

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

**FRESNO COUNTY
 CLERK/REGISTRAR OF VOTERS
 BRANDI L. ORTH’S REPLY
 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 18, 2020
 Time: 8:30 a.m.
 Department: 4
 Judge: NONE
 Trial Date: December 15, 2020**

I. SUMMARY OF REPLY ARGUMENT

In Plaintiff's Opposition to Defendant's Motion to Dismiss (hereinafter "Opposition"), Plaintiff reiterates the unsupported claims alleged in the First Amended Complaint for Declaratory and Injunctive Relief and Damages (hereinafter "FAC") that this case involves the "regulation of speech near polling places." Plaintiff must make this assertion despite the absence of any statute, ordinance, regulation, fine, citation or other punitive act or requirement alleged to have been imposed on Plaintiff. That is because Plaintiff knows that, if properly analyzed, the facts alleged in the FAC show only the efforts of an elections official to maintain the political neutrality of facilities used by the government as official polling places and further efforts to persuade private owners of some of these facilities to voluntarily cooperate with the official's efforts to maintain that neutrality.¹ The efforts of an election official to avoid controversial permanent political advertising or signage associated with public polling places does not constitute a "regulation" of any kind. As will be discussed below, there is nothing in any of the facts alleged in the FAC showing any effort of the Defendant to prohibit or control political activity, political demonstrating, apparel, electioneering or any other activity that is allowed by Burson v. Freeman, 504 U.S. 191, 208-210 (1992), Minnesota Voters Alliance v. Mansky, 138 S.Ct. 1876 (2018) or California State law (California Elections Code § 319.5 (electioneering defined), 18370 (misdemeanor liability for electioneering activity) or

¹ The Opposition refers to Defendant's actions as constituting "an unprecedented attempt to regulate speech beyond the 100-foot campaign-free buffer zone established by state law." Opposition, p. 1. As an initial matter the author of this brief wishes to apologize to the Court for missing the decision by the Louisiana Supreme Court in State v. Schirmer, 646 So.2d 890 (La. 1994) that overturned the state law providing for a 600 foot campaign free buffer zone subsequent to the decision by the Fifth Circuit Court of Appeals in Schirmer v. Edwards, 2 F.3d 117 (5th Cir. 1993) which upheld the same statute. The Louisiana Supreme Court case is adverse authority that should have been brought to the attention of the Court. However, the point of the footnote citation to the Fifth Circuit Schirmer decision was to emphasize the holding in Burson, that the 100-foot campaign buffer zone approved by the U.S. Supreme Court was not the final constitutional standard even for punitive regulation of speech at polling places. Burson, supra, 504 U.S. at 210-211 (specifically refraining from ruling that restrictions outside the 100-foot limit were per se constitutional). In addition, it must be noted that the Louisiana State Supreme Court decision does not overrule the Fifth Circuit decision.

1 18541 (felony liability for electioneering and other activity with the intent of dissuading
2 others from voting)). The facts deal only with the selection of public polling places by the
3 elections official, and efforts to persuade the private owners of any such facilities utilized
4 as polling places to voluntarily cooperate with the fundamental governmental interest in
5 neutrality of the election process.

6 As pointed out in the Defendant's original briefing on this motion, the facts alleged
7 in the FAC indicate this is a government speech case that should be governed by the
8 principles in case law concerning government speech which are more analogous to the
9 actual facts described in the FAC involving the County Elections Office's ability to
10 maintain neutrality of the speech and messages closely associated with its polling places.
11 (*See, Pleasant Grove City v. Summum*, 555 U.S. 460, 464, 467–468, (2009) (when
12 government speaks it is not barred by the First Amendment from determining the content
13 of what it says); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct.
14 2239, 2245-2246 (2009) (state not required to place Confederate flag logo on license
15 plates on first amendment grounds because the license plate was government speech)).

16 While the Defendant contends that even under the standard enunciated in *Burson*
17 and its progeny, the actions alleged in the FAC do not amount to a constitutional violation,
18 this case is fundamentally about an election official's ability to have polling places which
19 the public do not associate with any particular political position, whether overtly partisan
20 or only implicitly favoring one side or the other in political debate and competition. Without
21 this necessary ability, under Plaintiff's theory of the case elections officials would have to
22 allow permanent signs on the same parcel as a polling site and closely associated with
23 that polling site that could contain a host of political messages such as "Build the Wall!",
24 "#Unborn Lives Matter", "No Illegal Immigrants Are Allowed to Vote," and would be
25 forbidden from choosing a different polling place for a subsequent election on the basis
26 that the owner of the current polling place insisted on maintaining its permanent political
27 signage in place and prominently visible for the voting public on the election day.

28

1 **II. LEGAL ARGUMENT**

2 **A. Plaintiff’s Arguments Fail to Establish That The Government Speech**
3 **Doctrine Is Not Controlling In This Case**

4 Plaintiff makes several arguments in an attempt to defeat the application of the
5 government speech doctrine to the facts of this case. Each is deficient.

6 **1. Government Use of Signs to Convey Messages**

7 Plaintiff first attempts to limit the type of speech at issue here to “church signs”.
8 Opposition, pp. 12-13. Plaintiff states the simple truism that there is no tradition of
9 government using church signs to communicate governmental messages. Given the
10 Constitutional requirement of separation of church and state this assertion is
11 unremarkable. Government utilizes signs regularly to communicate with the public,
12 particularly in connection with polling places on election day. But the subcategory of
13 “church signs” does not really exist in any meaningful manner with respect to
14 communication by signs. Plaintiff’s argument does not engage the actual question here
15 as to whether the government can make any decision as to prominent messages that
16 are permanently displayed at a government polling place and are closely associated
17 with that polling place and therefore reasonably seen by the public as being approved of
18 or endorsed by the government. If Plaintiff was a non-religious organization with a
19 private facility and committed to civil rights or the abolition of abortion, the placing of a
20 permanent sign supporting those causes on the property of the polling place would not
21 raise the question of whether there is a “tradition of governments using private event
22 center signs to communicate government messages.” The question would remain as to
23 what extent the government may protect the neutrality of its polling places by exercising
24 the matters over which it does have control, such as asking the property owner to cover
25 the sign temporarily or to select another polling place where controversial political signs
26 are not an issue. In this case, it is merely incidental that the type of sign that is closely
27 associated with the polling place is a “church sign” rather than a “school sign,” a “store
28 sign” or a “veteran’s home sign.”

1 **2. The Polling Place Was Associated With The Church’s Message**

2 This case involves permanent signage displayed proudly by the Plaintiff since
3 August of 2017, closely and intentionally associated with the Plaintiff’s property on
4 which the polling place is located. FAC, ¶¶ 19-30, 35. By Plaintiff’s own admission the
5 signs are approximately 200 feet from the entrance to the polling place. FAC ¶ 35. But
6 the question here is not whether reasonable people would view the signs as
7 representing the Plaintiff Church’s message. That is not in doubt. The question is
8 whether reasonable people could or would view the permanent signs at the polling site
9 as being the government’s speech as well, or at least speech that is endorsed or
10 supported by the government. Plaintiff’s complaint admits that members of the public
11 objected to the Defendant regarding the controversial messaging near a public polling
12 place, which demonstrates the public associated the signs with the government use of
13 the site.

14 Plaintiff’s permanent signs located prominently on polling place property are very
15 different in nature from the other kind of politically based speech that may take place
16 near polling places. Speaking, non-obstructionist demonstrating, smaller hand-held
17 signs, leaflets, utilized or clothing worn by individuals near polling places do not have
18 the specific relationship with the property that would imply any kind of government
19 approval or endorsement of any particular message. Permanent signs on the polling
20 place property, closely associated with the polling place do involve a situation where the
21 selection of a polling place with those permanent signs prominently visible to the voting
22 public will legitimately raise the issue of government approval or endorsement.

23 Moreover, Plaintiff is attempting in this lawsuit to obtain a privileged position with
24 respect to its speech “on its private property, separate and apart from the portion of the
25 property used as a polling place.” FAC, ¶ 36. Since Plaintiff alleges the signs are on its
26 private property, no other person would be allowed the same privilege as Plaintiff in
27 erecting permanent signs on that property near the polling place bearing messages that
28 contradicted Plaintiff’s preferred message. Thus, the County’s selection of Plaintiff’s

1 site as a polling location would come connected to permanent signage bearing a
2 particular view point held by the Plaintiff that no other private party would be allowed to
3 counter in an equivalent method. Under these circumstances members of the public
4 could, and in fact did, see the County Elections Office's continued use of a polling
5 facility containing such exclusive signage as government approval or endorsement of
6 the messages of the permanent signs. For the days that polling is actively taking place
7 at the polling site on Plaintiff's property under the auspices of the County government,
8 the presence of the permanent signs will "leave little chance that observers will fail to
9 appreciate the identity of the speaker", as stated in *Pleasant Grove City, supra*, 555
10 U.S. at 471, and that the County will be identified at least as a joint speaker with the
11 Plaintiff.

12 3. The County Is Seeking to Control Its Own Speech

13 The facial cleverness of Plaintiff's arguments concerning the Government
14 Speech Doctrine is manifest in its argument under section III.b.iii. of the Opposition
15 (p. 16). There Plaintiff reasons that the Defendant county election official did not control
16 the content of Plaintiff's signs. That is true. Plaintiff's argument is that because the
17 government Defendant did not control the content of its sign, which Defendant admits,
18 the Defendant is prohibited from moving to a different location that did not have the
19 sign. In other words, the fact that Defendant has no legal right, penalty or sanction it
20 can use to get Plaintiff to temporarily cover or alter the speech in its signs, the
21 Defendant has no choice but to continue using Plaintiff's site as a polling location
22 regardless of what speech Plaintiff may use and which the public will associate with the
23 government use of Plaintiff's facilities. Setting aside the circular reasoning engaged in
24 by Plaintiff here, this completely misses the point that Defendant is attempting to control
25 the government's own speech in its selection of polling places, and its request that
26 Plaintiff cover the sign for the single election day. It is the control over that decision to
27 select polling places that is at issue in this case. The reason this is a government
28 speech case is that the Defendant Registrar of Voters is seeking to provide controversy

1 free and politically neutral polling locations at least insofar as it applies to the facilities
2 selected by Defendant as the polling place itself. The only facts alleged in Plaintiff's
3 Complaint indicate that Defendant's attempts to do this involve her own decisions about
4 the selection of polling places. There are no allegations of the imposition of any policy,
5 regulation, statute, ordinance, fine or sanction by the Defendant against Plaintiff or any
6 other party for any speech allowed around polling places under state and federal law.
7 Defendant's efforts involve obtaining polling sites that voluntarily will support her efforts
8 in providing that neutral space for voters

9 **B. The Compelling Government Interest Involved In Running Fair Elections**
10 **Outweighs Any Limited Interference With Plaintiff's Free Speech**

11 **1. Neither *Burson v. Freeman* Nor *Minnesota Voter's Alliance* Are**
12 **Controlling In This Case**

13 Plaintiff recites standards from *Burson v. Freeman*, *Minnesota Voter's Alliance v.*
14 *Mansky* ("*MVA*") and other cases that apply to situations in which the government is
15 applying some type of sanction or restriction on the speech of voters or other members
16 of the public in various situations. Opposition, pp. 3-11. Those cases are not applicable
17 to the current facts alleged in Plaintiff's Complaint, either with respect to actions of
18 Defendant in 2018 or the alleged "neutrality" policy going forward because the alleged
19 facts do not involve the imposition of any civil or criminal liability or the interference with
20 a voter's right to vote. At most, the allegations here show some attempt by the
21 Defendant to obtain the voluntary consent of property owners to maintain the overall
22 neutrality of the actual polling facility. Under the Governmental Speech Doctrine,
23 Defendant contends this voluntary effort can extend beyond the 100-foot area provided
24 in California State law within which no electioneering can occur as that term is defined
25 in California Elections Code § 319.5 to the extent the speech is closely associated with
26 the polling place and located within the path of travel and vision of voters. Those
27 facilities that choose to be polling places become for that limited period of time adjunct
28 facilities of the government. To the extent that the facilities themselves could convey to

1 voters that the County Election's Office is favoring one controversial or political view
2 over another, the Defendant Registrar of Voters retains the prerogative to make her own
3 decisions

4 In this case, there is no attempt alleged to prevent any voter from voting based
5 on the voter's speech which was the situation in MVA. In that case the Supreme Court
6 was particularly concerned that the standard restricting political speech would be
7 applied on a snap basis by on site polling election judges being called upon to make
8 complex analyses of a myriad of various political and non-political statements. MVA,
9 supra, 138 S.Ct. at 1889-1890. There is no additional sanction or prohibition alleged
10 beyond what is already provided for in California Elections Code §§ 319.5
11 (electioneering defined), 18370 (misdemeanor liability for electioneering activity) or
12 18541 (felony liability for electioneering and other activity with the intent of dissuading
13 others from voting).² The allegations of the FAC, do not identify any restriction on any
14 other type of speech around a polling place. No person is prohibited or subject to civil
15 or criminal penalty for engaging in electioneering outside the 100 foot limit from the
16 polling facility itself. Plaintiff does not even allege that it would be prohibited by
17 Defendant from other methods of spreading its message about Black Lives Matter
18 under the alleged neutrality policy of the Defendant. Plaintiff alleges no restriction
19 against reasonable demonstrations, handing out of leaflets, or use of media by Plaintiff
20 to get its message out. Plaintiff just cannot force the Defendant to use its facility as a
21 Vote Center while still insisting on subjecting voters to its own social and political
22 opinions on the permanent sign that will be closely associated with the polling place
23 itself. That state of affairs is simply not a cognizable injury or wrong under the caselaw
24 cited by the Plaintiff in its Opposition.

25 _____
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27 ² The California scheme is mentioned favorably by the Supreme Court in MVA, supra, 138 S.Ct.
28 at 1891. It should be noted that even with respect to the California Elections Code sections
cited, the Registrar of Voters does not have police powers to enforce those statutes. The most
the Registrar or her staff could do is report any supposed violations to law enforcement. No
reports to law enforcement are alleged here.

1 Plaintiff's Opposition is misguided because Plaintiff appears to believe that
2 Defendant's main concern here is the protection of voters from political speech, which
3 as the Anderson v. Spear, 356 F.3d 651, 658 (6th Cir. 2004), cited by Plaintiff at page 7
4 of the Opposition makes clear is not reason by itself to restrict such political speech.
5 While cognizant of the Supreme Court's acknowledgment in MVA, that a state has an
6 interest in providing "an island of calm in which voters can peacefully contemplate their
7 choices" (MVA, supra, 128 S.Ct. at 1880), what the Defendant is attempting to
8 accomplish here is to assure the voting public that elections in the County of Fresno are
9 run by an Elections Office that is completely non-controversial and politically neutral.
10 There are no allegations in the FAC that anything done or proposed by the Defendant
11 would restrict the normal political or other speech that can take place in and around
12 polling places. Defendant is only concerned with the neutrality of the actual polling
13 place site on the date of the election. For instance, regardless of signage, the
14 Defendant would not choose the facility of a political party's county central committee
15 for a polling place, nor a business owned or operated by a candidate running for office
16 in that jurisdiction. The selection of polling sites that do not have permanent signage
17 taking controversial or political stances is merely an extension of this principle.

18 Finally, no case cited by Plaintiff establishes any right to serve as a polling place.
19 While Plaintiff analogizes to certain volunteer efforts where governmental discrimination
20 based on speech was prohibited and emphasizes that minimal restrictions on free
21 speech rights can result in violations in situations involving strict scrutiny, Plaintiff
22 merely assumes that it can fully participate as a polling place and engage in whatever
23 speech it wants on the polling place property. Plaintiff never actually establishes that
24 there is a right to serve as a polling place that was interfered with by Defendant. Here it
25 is only the non-use of Plaintiff's property as a polling place that makes up Plaintiff's
26 complaint. There are no allegations that Defendant actually restricted Plaintiff's speech
27 in any way. If Plaintiff cannot demonstrate that it has a right to serve as a polling place,
28 then its action must fail.

1 **2. Defendant's Alleged Actions or Policy Are Not Vague For Purposes**
2 **of Constitutional Analysis**

3 Plaintiff's claim that Defendant's alleged policy of neutrality is too vague to
4 survive constitutional testing and that it creates a due process concern is similarly
5 based on Plaintiff's misunderstanding that there is no penalty attached to any alleged
6 act or policy on the part of Defendant. No one will be subject to any penalty or adverse
7 action after the fact by virtue of Defendant's alleged policy. The allegations show,
8 contrary to Plaintiff's arguments, that Defendant remained willing to use Plaintiff's facility
9 despite Plaintiff's support of the Black Lives Matter movement so long as the prominent
10 sign associated with the polling place would be covered for a single day. No allegation
11 in the complaint supports the idea advanced by Plaintiff that any person of reasonable
12 fortitude would be hesitant to engage in any particular speech for fear of the imposition
13 of any penalty by the Defendant under the alleged policy. Unlike the public employees
14 in the Baggett v. Bullitt, 377 U.S. 360, 372 (1964) case there will be no potential
15 imposition of a requirement that could suddenly cause Plaintiff to be subject to some
16 after-the-fact penalty for violation of an oath or loss of employment after the fact for
17 actions they had no notice would result in those penalties. In this case we are only
18 dealing with the efforts of the Defendant to protect the integrity of the County's voting
19 process. No entity wishing to serve as a polling place would find itself in a similar
20 situation to any of the cases cited by the Plaintiff in this regard.

21 Plaintiff's argument that the contractual terms between Defendant and potential
22 polling places subject other parties to denial of their free speech rights around polling
23 places is pure speculation. Opposition, pp. 6-7. The contractual provisions apply only
24 to the contracted party. Defendant's Request for Judicial Notice, Exhibits E & F. There
25 are no allegations in the FAC that the contracts or the policy would restrict any of the
26 normal speech activity of third parties or voters around polling places. Plaintiff is
27 straining here to squeeze Defendant's contractual efforts into the mold of a regulation,
28 ordinance or statute that imposes some civil or criminal penalty.

1 If one were to extend Plaintiff's arguments to all government functions, a
2 government could not take any action that involves judgment without an extensive
3 written policy that satisfies Plaintiff's interpretation of the standards in Burson and MVA.
4 Since there is no imposition of any civil or criminal penalty here, imposition of such a
5 standard would grind government functions to a halt.

6 3. Plaintiff Was Not Discriminated Against

7 Most of the FAC allegations concerning discrimination are conclusory. One
8 however, found in Paragraph 78 of the FAC and asserted quite vociferously by Plaintiff
9 in the Opposition involves the case of the sign located at a church in Reedley which,
10 during the November 2018 election displayed a banner on one of its buildings
11 proclaiming, "Vote According to Your Faith." FAC, ¶ 78; Opposition p. 3. Even in this
12 allegation Plaintiff includes the unfounded and argumentative allegation that Defendant
13 "was not concerned that this banner was political or controversial, or that it would make
14 that church not neutral." While Plaintiff does not allege when Defendant became aware
15 of the sign at the Reedley church, Plaintiff is well aware that this situation came to
16 Defendant's attention only days prior to the November 2018 election and that Plaintiff
17 has no actual evidence to back up any argument about Defendant's concern over the
18 banner, those issues will become obvious if this case proceeds to a later stage. What is
19 clear from the allegations in the FAC and the official records of polling places attached
20 to Defendant's Request for Judicial Notice at Exhibits D and G, is that Plaintiff and the
21 church in Reedley were treated exactly the same by Defendant. The FAC contains
22 allegations establishing that complaints were received about the Plaintiff's signs prior to
23 the June 2018 election. FAC, ¶¶ 40, 41. Yet the election proceeded and Plaintiff's site
24 was used during the June 2018 election. FAC, ¶¶ 15, 34-39. According to the FAC, the
25 issue over the sign was not raised with the Plaintiff until after the June 2018 election.
26 FAC, ¶¶ 40-42. Later the decision was made not to use the Plaintiff's location for the
27 November 2018 election. FAC, ¶ 43.

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1 During a busy election process near the dates of the election, the focus of the
2 Elections Office is in the efficient operation of the polling places. That means the
3 Elections Office has to balance the day to day operations of making sure that the polls
4 are accessible to voters, and that the votes are collected and accurately counted with
5 other concerns, such as potential disruption for voters if a polling place has to be moved
6 at the eleventh hour.

7 Just as occurred with Plaintiff's site, the Reedley Church served as a polling site
8 for the November 2018 election. The official polling site records indicate that the
9 Reedley church was not utilized again after the November 2018 election. Defendant's
10 Request for Judicial Notice Exhibits D and G. There are no allegations in the FAC that
11 actually establish that the Reedley church was treated substantially differently than
12 Plaintiff. If anything the allegations demonstrate that Plaintiff was given a chance to still
13 serve as a polling place despite its speech concerning the Black Lives Matter movement
14 if it would agree to a reasonable accommodation on the single day of polling. No such
15 opportunity was alleged to have been provided the church in Reedley.

16 This willingness of Defendant to continue to utilize Plaintiff's facility as a polling
17 location despite the Plaintiff's speech concerning the Black Lives Matter movement
18 defeats any contention by Plaintiff that there is any evidence of any disapproval by
19 Defendant of the particular content of Plaintiff's speech. See, FAC ¶¶ 41, 44, 55-57.
20 These allegations also are contrary to Plaintiff's assertion that it was discriminated
21 against or retaliated against due to its speech concerning the Black Lives Matter
22 movement.

23 **4. Even Under Burson Defendants Actions Are Constitutional**

24 As discussed above, the complete lack of any punitive policy, statute, ordinance,
25 regulation, fine or citation involved in Defendant's actions toward Plaintiff render the vast
26 majority of the cases cited by Plaintiff inapposite to the facts alleged in the complaint.
27 Moreover, the Defendant contends that this case should be analyzed under the
28 Government Speech Doctrine, not the analysis applied in Burson and its progeny dealing

1 with concrete restrictions on speech around polling places. Nevertheless, Defendant's
2 actions, given that they involved completely voluntary measures, were sufficiently
3 narrowly tailored to survive analysis even under the Burson standard.

4 First with respect to the alleged actions by Defendant in 2018, Defendant
5 requested a very minimal accommodation of covering or taking down the Black Lives
6 Matter signs for the single day of the November 2018 election. FAC, ¶ 40. No restrictions
7 on other modes of communication by Plaintiff were requested or sought to be imposed.
8 Plaintiff would, for instance, have remained free to pass out leaflets about Black Lives
9 Matter on election day. Plaintiff could (and did) pursue its message about the Black Lives
10 Matter signs in the media or through its website or preaching ministry. A single day of
11 covering the sign is a patently reasonable accommodation to the need for the government
12 polling place to remain neutral and non-partisan.

13 Plaintiff's suggestion that there were other less intrusive ways for Defendant to
14 accomplish its goals falls flat. Plaintiff would have Defendant engage in an active publicity
15 effort, either through signs or publications to disavow any connection to the Plaintiff's
16 signs. This alternative puts the Defendant in a potentially worse situation since it
17 affirmatively has to distance itself from an issue that many people feel is important, and
18 who would view any such distancing not as neutral but as hostile. This potential actually
19 came to fruition as the Defendant was criticized in person and in the press by the Plaintiff
20 and Plaintiff's supporters for among other things, taking the side of racist complainants.

21 With respect to the contracts with Vote Centers, the included language, which is
22 negotiable, merely puts up front the expectation that the portion of the utilized property
23 that is closely associated with the Defendant's use of it as a polling site remains neutral.
24 No restriction on the other speech of the owner of the site is requested or required. To
25 the extent there are any questions concerning the scope of the provisions over neutrality,
26 it must be presumed that the parties will work these out in negotiations.

27 While the Defendant believes she has adequately established the important
28 governmental interest in the neutrality of polling sites in its original brief, it bears repeating

1 that the public must retain its confidence in the neutrality of the elections system. Both
2 Burson and MVA recognize this important interest in addition to the interest the
3 government has in preventing voter fraud and intimidation. In this situation, the case law
4 dealing with government control of speech in the educational setting reinforces principles
5 that are directly applicable to the conduct of elections by governments were governmental
6 neutrality must be beyond reproach. In this, Plaintiff's summary dismissal of the
7 application of neutrality to being only applicable based on "unique interests in the
8 educational context," is not convincing. Opposition, p. 19. Plaintiff is more than happy to
9 cite numerous of cases involving government regulation of speech in various contexts,
10 but rejects one context in which the strong interest in government neutrality is particularly
11 similar to that at issue here.

12 III. CONCLUSION

13 Defendant commenced its argument on this motion to dismiss by acknowledging
14 that the Court will need to balance the fundamental government interest in maintain
15 neutrality in its election processes, including at polling places with the First Amendment
16 free speech rights of the Plaintiff. Plaintiff in its Opposition rejects all such balancing in
17 asserting its right to force the Defendant Elections Official to use a particular polling place
18 no matter what political or inflammatory speech the owner of the polling place chooses to
19 place permanently on its property in proximity to the polling place so long as it is outside
20 a magic 100-foot barrier. It is important to understand that the reasoning behind Plaintiff's
21 position would apply both to the moving of a polling place and to the selection of a polling
22 place in the first instance.

23 More critically, Plaintiff's extreme position would force an elections official to utilize
24 polling places with such diverse signs as "Build the Wall", "ID's Should be Required to
25 Vote," "Make America Great Again," "America Was Never Great," "Unborn Lives Matter,"
26 "God Hates Gays," or actual electioneering signs involving matters or candidates on the
27 ballot at the time. For instance, the Defendant would not be allowed to move to a more
28 neutral polling location after an election in which the owner of property on which a polling

1 place exists places hundreds of signs in support of only one candidate 10 feet apart right
2 up to the 100-foot barrier. Under Plaintiff's reasoning, if the Defendant decided not to
3 reuse that location again, the owner could claim viewpoint discrimination. Similarly if
4 Defendant opted not to use such a location in the first place because of the presence of
5 such signs or the likelihood that the owner would put up such signs on election day, the
6 owner could again claim all the violations alleged by Plaintiff in this action.

7 This cannot be the standard for the proper functioning of an Elections Office. The
8 Registrar of Voters must be able to utilize reasonable judgment in the selection of polling
9 places. There are no allegations in the FAC that indicate that Defendant did anything but
10 exercise reasonable and unprejudiced judgment and this action should be dismissed in
11 its entirety.

12
13 Dated: _____, 2020

Respectfully Submitted,
DANIEL C. CEDERBORG
County Counsel

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15
16 By: /S/ Daniel C. Cederborg

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

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