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10
 11 **IN THE UNITED STATES DISTRICT COURT**
 12 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

13 **Dennis Hodges**, an individual;
 14 Plaintiff(s)

15 v.

16 **TODD GLORIA**, both in his personal
 17 capacity and in his official capacity as
 18 the Mayor of the City of San Diego
 19 Defendant(s)

Case No.: 23-cv-2065-LL-MSB

**PLAINTIFF’S OPPOSITION TO
 DEFENDANT’S MOTION TO
 DISMISS**

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I. INTRODUCTION

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2 The City of San Diego Mayor Todd Gloria’s (“Defendant”) motion to dismiss
3 (“Motion”) does not address the sufficiency of Plaintiff Dennis Hodges’ (“Plaintiff”
4 or “Pastor Hodges”) claims, or the elements pled by him in each of the causes of
5 action in his First Amended Complaint (“FAC”). Defendant’s Motion, EFC No. 8;
6 FAC, EFC No. 7. Instead, Defendant attempts to justify his own discriminatory
7 actions against Pastor Hodges and frame Pastor Hodges’ constitutional rights as
8 second-class. Plaintiff has devoted his life to ministry and public service, serving in
9 varying capacities as a pastor, a Commissioner on the San Diego County Human
10 Relations Commission (“Commission”), and a Board Member on the San Diego City
11 Citizens Advisory Board on Police/Community Relations (“Advisory Board”). He
12 has a heart for serving his community, but when he abstained from voting on a
13 Commission agenda item due to his religious beliefs and defended his decision to
14 abstain, Defendant wielded his authority against Pastor Hodges to effectively remove
15 him from the Advisory Board. Defendant did not remove Pastor Hodges because of
16 his qualifications or lack thereof, but he removed him solely because of Pastor
17 Hodges’ sincerely held religious beliefs. Defendant’s actions violated Pastor Hodges’
18 constitutional rights. For the following reasons, Defendant’s Motion should be
19 denied.

20 *First*, the FAC alleges facts sufficient to show that Defendant violated
21 Plaintiff’s rights under the Free Exercise Clause and Free Speech Clause and
22 retaliated against Plaintiff for exercising his First Amendment rights. Defendant
23 waived any right to address the sufficiency of Plaintiff’s constitutional claims by
24 failing to include his arguments in the Motion.

25 *Second*, Pastor Hodges is a public service volunteer protected by the First
26 Amendment. The FAC alleges facts that demonstrate that he is not a political
27 extension of Defendant, given that neither spoke on behalf of Defendant nor
28 implemented policies on behalf of Defendant. Pastor Hodges’ role required him to

1 advise and make recommendations to Defendant, the San Diego City Council (“City
2 Council”), and the San Diego City Manager (“City Manager”).

3 *Third*, the Court must take Pastor Hodges’ allegations as true and construe them
4 in the light most favorable to him. Defendant attempts to misconstrue the facts, but
5 the FAC clearly alleges facts sufficient to state valid constitutional claims.

6 *Finally*, the constitutional claims against Defendant in his individual capacity
7 are not barred by qualified immunity because Defendant should have known that
8 removing Pastor Hodges from his volunteer public service role for adhering to his
9 religious beliefs violated clearly established law.

10 In sum, Defendant does not proffer any legitimate arguments that should
11 preclude this Court from reaching the merits of this case. Defendant is simply
12 grasping at straws to avoid being held accountable of his numerous and obvious
13 constitutional transgressions again Pastor Hodges. Accordingly, this Court should
14 dismiss Defendant’s Motion.

15 **II. LEGAL STANDARD**

16 When deciding a Rule 12(b)(6) motion, “all well-pleaded allegations of
17 material fact are taken as true and construed in a light most favorable to the non-
18 moving party.” *Wylar Summit P’ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661
19 (9th Cir. 1998). If the complaint provides fair notice of the claim and the factual
20 allegations are sufficient to show that the right to relief is plausible, a court should
21 deny the defendant’s motion. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The
22 standard is especially liberal when applied to the constitutional claims alleged in this
23 action, which are governed by Rule 8. Rule 8’s burden is “minimal,” and requires
24 only that the plaintiff provide “a short and plain statement of the claim showing that
25 the pleader is entitled to relief.” *Westways World Travel v. AMR Corp.*, 182 F. Supp.
26 2d 952, 955 (C.D. Cal. 2001) (quotations omitted).

III. STATEMENT OF FACTS

A. Pastor Hodges' Public Service Background

Pastor Hodges has dedicated his life to public service, beginning in Chicago, where he worked as a corrections officer from 1976 to 1979. FAC, ¶ 17. He then moved to California in 1979 and worked his way up through the California Department of Corrections, retiring as a special agent/captain in 2008. *Id.*, ¶¶ 19.

In 2017, Myrtle Cole, then-San Diego City Councilmember, asked Pastor Hodges to join the Advisory Board given his significant experience in law enforcement. *Id.*, ¶ 21. Pastor Hodges agreed to serve, and the City Council subsequently appointed him on or about July 25, 2017. *Id.*, ¶ 22.

According to San Diego Municipal Code Section 26.0801(a) (“SDMC”), the purpose of the Advisory Board is to “study, consult and advise the Mayor, City Council and City Manager on Police/Community Relations crime prevention efforts.” *Id.*, ¶ 23. The Advisory Board “recommend[s] and review[s] policies and programs designed to make law enforcement sensitive, effective and responsive to the needs of the City.” SDMC § 26.0801(b); *id.*, ¶ 24. Members of the Advisory Board “serve until his or her successor is duly appointed and qualified.” SDMC § 26.0802(a); *id.*, ¶ 30.

Given his prior experience in law enforcement and his African American heritage, Pastor Hodges provided valuable insight to the development of these strategy recommendations. *Id.*, ¶ 26. In his Advisory Board appointment, Pastor Hodges, along with other members of the board, developed and recommended to the Mayor, San Diego City Council (“City Council”), and San Diego City Manager (“City Manager”) various strategies and programs for improving police relations and city safety. *Id.*, ¶ 25. As a member of the Advisory Board, Pastor Hodges neither spoke on behalf of the Mayor nor implemented any policies on behalf of the Mayor. *Id.*, ¶¶ 27-28. Pastor Hodges has served in this capacity since 2017 without incident and without complaint. *Id.*, ¶ 31.

1 While continuing to serve on the Advisory Board, on or about March 2021, Joel
2 Anderson, San Diego County Supervisor, asked Pastor Hodges to join the
3 Commission because he would bring diversity to the group as an African American.
4 *Id.*, ¶ 32. Pastor Hodges agreed to serve, and the Commission subsequently appointed
5 him. *Id.*, ¶ 33.

6 **B. Pastor Hodges' Religious Beliefs**

7 In addition to his public service, Pastor Hodges has also dedicated his life to
8 ministry. *Id.*, ¶ 34. His motto is “look up, look within, look ahead, and look around,
9 as you go to serve the Lord with gladness.” *Id.* As a Christian, Pastor Hodges believes
10 that God defines human sexuality, and that men and women are created in the image
11 of God. *Id.*, ¶ 38. He also believes that God created two sexes: male and female. *Id.*
12 As a result of his faith, Pastor Hodges believes that humans are to embrace their
13 biological and creational differences as men and women. *Id.*, ¶ 39. He is unashamed
14 of his Christian beliefs and has vocalized that transgenderism is a sin just like adultery
15 and fornication. *Id.*, ¶ 40. However, Pastor Hodges believes that Christians are to love
16 all people and treat all people with respect, regardless of sexual orientation. *Id.*, ¶ 41.

17 **C. The Commission's Discriminatory Actions**

18 On November 9, 2021, during Transgender Awareness Month, the Commission
19 discussed an agenda item to amplify the voices of the San Diego transgender
20 community. *Id.*, ¶ 42. Pursuant to the Commission's Rules of Order, Pastor Hodges
21 abstained from voting on the motion because of his sincerely held religious belief that
22 humans are to embrace their biological and creational differences as men and women.
23 *Id.*, ¶ 43.

24 On or around April 2022, the Commission revised their Bylaws and added a
25 code of conduct which was approved by the Board of Supervisors. Pursuant to the
26 Commission's Code of Conduct, Commissioners must refrain from discriminatory
27 and harassing remarks. *Id.*, ¶ 44. The Commission revised the Bylaws in light of
28

1 Pastor Hodges’ comments. *Id.*, ¶ 45. They hoped to rely on the Bylaws to prevent
2 Pastor Hodges from expressing his beliefs on transgenderism. *Id.*

3 On May 31, 2022, the Commission, spearheaded by Commission Chair Ellen
4 Nash, circulated a notice of removal of Pastor Hodges to all Commissioners. *Id.*, ¶ 46.
5 On June 9, 2022, the Commission held a special meeting to remove Pastor Hodges
6 from the Commission. *Id.*, ¶ 56. At the June 2022 special meeting, a majority of the
7 Commissioners refused to remove Pastor Hodges. *Id.*, ¶ 57.

8 **D. Defendant’s Veto Of Pastor Hodges’ Reappointment**

9 On August 8, 2023, more than a year and a half after Pastor Hodges exercised
10 his right to abstain from voting on a Commission agenda item and his public
11 comments related to his abstention, Defendant vetoed the reappointment of Pastor
12 Hodges to the Advisory Board because of his religious beliefs regarding the
13 transgender issues. *Id.*, ¶ 61.

14 Defendant explained that he vetoed Pastor Hodges’ reappointment because he
15 “has made repeated concerning public comments about LGBTQ people – specifically,
16 the transgender community.” *Id.*, ¶ 62. But Defendant had no evidence that Pastor
17 Hodges failed to promote a positive relationship between the Police Department and
18 the community while serving on the Advisory Board. *Id.*, ¶¶ 62-63. Defendant’s veto
19 of Pastor Hodges’ reappointment to the Advisory Board was not based on Pastor
20 Hodges’ credentials (or lack thereof). *Id.*, ¶ 63. Indeed, Pastor Hodges has a lengthy
21 background in not only public service, but law enforcement. *Id.* He is well-suited to
22 serve on the Advisory Board. *Id.*

23 Pastor Hodges’ decision to abstain from voting on a Commission agenda item
24 and his public comments related to his abstention did not interfere with the efficient
25 operation of the Advisory Board. *Id.*, ¶ 64. The Commission and Advisory Board are
26 two separate entities, and his actions and statements were solely related to his position
27 on the Commission. *Id.*, ¶ 65.

28

1 Defendant based his decision to exercise his veto authority against Pastor
 2 Hodges solely based on his biblical beliefs on human creation and transgenderism –
 3 issues that are unrelated to his role on the Advisory Board. *Id.*, ¶ 66.

4 IV. ARGUMENT

5 A. Defendant Waived Any Right To Challenge The Sufficiency Of Pastor 6 Hodges’ Constitutional Claims

7 Defendant argues that Pastor Hodges’ constitutional claims should be
 8 dismissed for failure to state a claim. Mot. at 9-20. However, Defendant does not
 9 attempt to challenge the sufficiency of Pastor Hodges’ constitutional claims. And he
 10 cannot do so on reply because “[i]t is improper for a moving party to introduce new
 11 facts or different legal arguments in the reply brief than those presented in the moving
 12 papers.” *United States ex rel. Giles v. Sardie*, 191 F.Supp.2d 1117, 1127 (C.D. Cal.
 13 2000); *see also State of Nev. v. Watkins*, 914 F.2d 1545, 1560 (9th Cir. 1990)
 14 (“[Parties] cannot raise a new issue for the first time in their reply briefs.” (Citations
 15 omitted.) *Cedano–Viera v. Ashcroft*, 324 F.3d 1062, 1066 n.5 (9th Cir. 2003) (same);
 16 *Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) (same). Indeed, Defendant addresses
 17 only one legal prong of one of Pastor Hodges’ three constitutional claims. Mot. at 9.
 18 Specifically, Defendant only addresses whether Pastor Hodges’ engaged in “protected
 19 speech,” but he fails to address any other prongs related to Pastor Hodges
 20 constitutional claims. *Id.*

21 Because Defendant did not address the sufficiency of Pastor Hodges’
 22 constitutional claims in his Motion and because he waived any right to challenge the
 23 sufficiency of Pastor Hodges’ constitutional claims in his reply, Pastor Hodges’
 24 constitutional claims should move forward.

25 B. Pastor Hodges Is A Public Service Volunteer Protected By The First 26 Amendment

27 Instead of appropriately challenging the sufficiency of Pastor Hodges’ claims
 28 under Rule 12(b)(6), Defendant misconstrues the facts presented in Pastor Hodges’

1 FAC. Mot. at 9-20. Defendant relies on two cases to assert that Pastor Hodges was
2 “effectively a ‘political extension’ and the ‘public face’ of the Mayor while on the
3 Advisory Board,” and thus, a government worker not protected by the First
4 Amendment. Mot. at 9 (citing *Blair v. Bethel School District*, 608 F.3d 540 (2010);
5 Mot. at 11 (citing *Lathus v. City of Huntington Beach*, 56 F.4th 1238 (2023); Mot. at
6 18.

7 To begin, Defendant’s reliance on *Blair* is misplaced. Mot. at 9-11. In *Blair*,
8 the plaintiff brought suit against the school district alleging First Amendment
9 retaliation after fellow school board members voted to remove him as the board’s vice
10 president for repeatedly criticizing the school district’s superintendent. 608 F.3d at
11 542-43. The school board voted to remove him as vice president, but he still retained
12 his position as a board member. *Id.* at 544. The Ninth Circuit held that while Blair
13 was engaged in a constitutionally protected activity, he failed to show that the adverse
14 action by the defendant “would chill a person of ordinary firmness from continuing
15 to engage in the protected activity.” *Id.* The Ninth Circuit noted that Blair’s case was
16 “not a typical First Amendment retaliation case” because the adverse action “was a
17 rather minor indignity, and de minimis deprivations of benefits and privileges on
18 account of one’s speech do not give rise to a First Amendment claim.” *Id.* at 543-44.
19 The Ninth Circuit agreed with the district court that Blair’s speech was not chilled
20 because (1) he was “removed from a titular position on a school board” through an
21 electoral process and (2) “he retained the full range of rights and prerogatives that
22 came with having been publicly elected.” *Id.* at 544. Despite being removed as the
23 board’s vice president, Blair remained a member on the school board. *Id.*

24 Unlike in *Blair*, Pastor Hodges was not removed from a “titular position”
25 through an electoral process, and he did not retain “the full range of rights and
26 prerogatives” upon his removal from his Advisory Board position. *See* 608 F.3d at
27 544; FAC, ¶¶ 22-25, 29, 61. Blair was elected to his vice president position while
28 Pastor Hodges “was not an elected official, but rather an appointed volunteer in public

1 service.” *Lathus*, 56 F.4th at 1241 (differentiating plaintiff Lathus from plaintiff
2 Blair). As such, his “volunteer status does not by itself remove First Amendment
3 protection.” *Id.*

4 The *Blair* case *might* be applicable if Pastor Hodges had been removed from
5 his position as a Commissioner and was challenging the conduct of the Commission
6 rather than Defendant’s conduct. Indeed, Pastor Hodges’ fellow commissioners
7 exercised their electoral process to attempt to remove Pastor Hodges from the
8 Commission, but they failed to remove him when the majority of the Commissioners
9 refused to remove Pastor Hodges. FAC, ¶¶ 46-47, 56-57.

10 In contrast, Pastor Hodges was a volunteer appointed by the city council to
11 serve on the Advisory Board, but he was denied his reappointment, not by an electoral
12 process, but by a single individual—Defendant. *See* FAC, ¶¶ 22, 30. By wielding his
13 veto authority against Pastor Hodges, Defendant effectively removed Pastor Hodges
14 from his Advisory Board position, thereby chilling his speech as an Advisory Board
15 member, and revoking the full range of his rights and prerogatives as an Advisory
16 Board member.

17 Defendant’s reliance on *Lathus* is likewise misplaced. Mot. at 11-12. Lathus, a
18 former volunteer municipal advisory board member, brought a suit against the city
19 alleging violations of her First Amendment rights after the city councilperson who
20 appointed her dismissed her from her advisory board position. *Lathus*, 56 F.4th at
21 1240. The *Lathus* court rejected the *Blair* court analysis because, in contrast to *Blair*,
22 “Lathus neither gained nor lost her appointment through a vote by her fellow board
23 members, nor was her dismissal simply the result of an ‘internal political leadership
24 election.” *Id.* at 1241. Lathus was not an elected official, but rather an appointed
25 volunteer in public service. *Id.* Thus, her volunteer status did not by itself remove
26 First Amendment protection.” *Id.*

27 Despite Pastor Hodges and Lathus both holding volunteer appointments, their
28 similarities end there. The primary issue the Ninth Circuit addressed in *Lathus* was

1 whether Lathus was the “political extension” of the councilperson who appointed her
2 to the Citizen Participation Advisory Board (“CPAB”). 56 F.4th at 1240. In
3 addressing this question, the Ninth Circuit reviewed the scope and nature of Lathus’s
4 advisory board position: (1) under the city’s municipal code, a city councilperson may
5 appoint one member to the CPAB and may remove that member without cause, and
6 (2) the CPAB’s “legal duty is to interface with the City Council’s constituents and
7 make recommendations concerning an important government function.” *Id.* at 1244-
8 45. The Ninth Circuit held that because Lathus could be appointed by the
9 councilperson and removed by the same without cause and because Lathus could
10 speak on behalf of the councilperson to the councilperson’s constituents, she was the
11 “‘public face’ of the elected official who appointed her to the body.” *Id.* at 1239. As
12 a “political extension” of the city councilperson, she was not protected by the First
13 Amendment, and thus, could “be fired for purely political reasons.” *Id.*

14 Pastor Hodges’ FAC shows that he was not the “public face” of Defendant.
15 FAC, ¶¶ 25, 27-29. Indeed, unlike in *Lathus*, in which the person who removed Lathus
16 was also the person who appointed Lathus, the City Council appointed Pastor Hodges
17 and Defendant—not City Council—effectively removed Pastor Hodges from his
18 position. FAC, ¶¶ 22, 61. Further, in *Lathus*, the city councilperson was permitted to
19 remove an appointment without cause. 56 F.4th at 1244. Here, SDMC provides that
20 an Advisory Board member serves *until* his successor is duly appointed and qualified.
21 *Id.*, ¶ 30. Additionally, in *Lathus*, the CPAB solicited public feedback and spoke to
22 the public on behalf of the official who appointed them. 56 F.4th at 1242. In contrast,
23 the Advisory Board is responsible for studying, consulting, and advising the Mayor,
24 City Council and City Manager—not the public. *See* FAC, ¶¶ 23-24. Further, Pastor
25 Hodges neither spoke on behalf of the Mayor nor implemented any policies on behalf
26 of the Mayor. FAC, ¶ 27. The cited municipal code sections in Defendant’s Motion
27 do not suggest anything different. Mot. at 18. The purpose of the Advisory Board is
28 to advise the Mayor, City Council, and City Manager, including by making

1 recommendations to those entities on how to assist with informing the community of
2 its rights and responsibilities. FAC, ¶¶ 23-24.

3 Pastor Hodges' case is more akin to *Hunt v. Cnty. of Orange*, 672 F.3d 606 (9th
4 Cir. 2012). Hunt, a deputy sheriff, was demoted in several ranks from his sheriff's
5 position by the sheriff-coroner for his campaign against the sheriff-coroner. *Id.* at 609.
6 The Ninth Circuit ruled this demotion violated the deputy sheriff's First Amendment
7 rights, noting that the record failed "to establish Hunt's party affiliation or political
8 outlook were relevant to the effective discharge of his professional duties." *Id.* at 612.
9 The Ninth Circuit focused on the jury's finding "that Hunt's political statements—
10 which were the basis of his demotion—did not cause, and could not have been
11 reasonably predicted to cause, a disruption in the efficient operation of the
12 department." *Id.*

13 Similarly, Pastor Hodges' comments regarding the transgender community and
14 abstention from voting on an agenda item were wholly unrelated to his duties and
15 responsibilities on the Advisory Board. FAC, ¶¶ 23-25, 65-66. Further, his actions in
16 no way interfered with the efficient operation of the Advisory Board. *Id.*, ¶ 64.

17 As such, because Pastor Hodges' FAC presents sufficient facts to demonstrate
18 that he is a public servant volunteer protected by the First Amendment, his claims
19 should be allowed to move forward.

20 **C. The Court Must Take Pastor Hodges' Allegations As True And Construe**
21 **Them In The Light Most Favorable to Him**

22 Defendant argues that Pastor Hodges' original Complaint and FAC present
23 conflicting allegations, and as such, Pastor Hodges' FAC should be dismissed. Mot.
24 at 16-20. But this is disingenuous as Defendant repeatedly distorts and misconstrues
25 Pastor Hodges' well-pleaded facts and allegations. Mot. 16-20. As articulated in the
26 legal standard, *supra*, Section II, when deciding a Rule 12(b)(6) motion, "all well-
27 pleaded allegations of material fact are taken as true and construed in a light most
28 favorable to the non-moving party." *Wylar Summit P'ship v. Turner Broad. Sys., Inc.*,

1 135 F.3d 658, 661 (9th Cir. 1998). Defendant asks this Court to disregard Pastor
2 Hodges’ well-pleaded factual allegations in his FAC because the deletion of certain
3 factual allegations and the addition of certain factual allegations in the FAC conflict
4 with the original complaint. Mot. at 16-20. However, Pastor Hodges’ original
5 complaint and FAC are consistent.

6 After Defendant filed his first motion to dismiss in response to Pastor Hodges
7 original complaint, it became clear that Defendant was attempting to misconstrue the
8 true nature of Pastor Hodges’ position on the Advisory Board as articulated in the
9 original complaint and the referenced city municipal code sections. ECF No. 5.1. As
10 such, in response to Defendant’s first 12(b) motion, Pastor Hodge’s exercised his right
11 *as a matter of course* pursuant to the Federal Rule of Civil Procedure (“FRCP”) 15 to
12 file an amended pleading to provide clarification in support of his constitutional
13 claims concerning the scope of his role as an Advisory Board member. *See* FRCP
14 15(a)(1)(B) (“A party may amend its pleading once as a matter of course no later than
15 . . . (B) . . . 21 days after service of a motion under 12(b) . . .”).

16 In the string of cases that Defendant cites for the proposition that the Court need
17 not accept contradicting allegations (Mot. at 17), the courts considered whether leave
18 to amend should be granted in light of the proposed conflicting allegations—not
19 whether a plaintiff could exercise his right to amend as a matter of course as permitted
20 under FRCP 15. *See Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990)
21 (denying leave to amend); *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp.2d
22 1128, 1160 (N.D. Cal. 2010) (same); *Airs Aromatics, LLC v. Victoria's Secret Stores*
23 *Brand Mgmt., Inc.*, 744 F.3d 595, 600 (9th Cir. 2014) (same). Further, this string of
24 cases presents scenarios in which the asserted facts obviously conflicted with each
25 other, which, as discussed below, is not readily present here. *See Reddy*, 912 F.2d at
26 296-97 (denying leave to amend because plaintiff’s complaint made clear his injury
27 was caused by alleged wrongful termination and not the predicate acts of
28 racketeering); *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp.2d 1128, 1144-45

1 (N.D. Cal. 2010) (refusing to accept plaintiff’s new allegation in third amended
2 complaint that Dan Schlesinger *did not receive* a refund given that plaintiff’s first
3 amended complaint asserted that Schlesinger *did receive* a refund); *Airs Aromatics,*
4 *LLC*, 744 F.3d at 600 (denying leave to amend because plaintiff’s later assertion of
5 its continuous usage of a trademark conflicted with its earlier assertion that it was not
6 actively using trademarks during the specified period of time).

7 Pastor Hodges need not justify his factual statements at this stage of the
8 pleadings. The Court is required to construe the facts in the light most favorable to
9 the non-moving party. *Wylar Summit P’ship*, 135 F.3d 658 at 661. In any event,
10 Defendant contends that Pastor Hodges’ removal of the factual allegation that he
11 serves as “a bridge” between law enforcement and the community from the original
12 complaint conflicts with the addition of the factual allegation in the FAC that “he
13 neither spoke on behalf of the Mayor nor implemented any policies on behalf of the
14 Mayor.” Mot. at 16. This omission and addition are not in conflict. In his original
15 complaint, Pastor Hodges did not expand or provide further detail on what “bridge”
16 might mean or look like in relation to his Advisory Board position. ECF No. 1,
17 Complaint, ¶ 22. *Id.* In his FAC, he removed this statement because it is not helpful
18 and as is evident by Defendant’s Motion, the statement provides opportunity for
19 Defendant to misconstrue the full scope of Pastor Hodges’ Advisory Board role.
20 Defendant also points to the fact that Pastor Hodges removed a portion in his original
21 complaint in which he indicated he “advised the community on shooting incidents.”
22 Mot. at 16-17. Again, Pastor Hodges removed this statement because it is not helpful
23 in fully articulating the nature of his Advisory Board position. By “community,” it
24 could be interpreted in numerous ways—including advising the Mayor and the City
25 Council, the “community” he is required and intended to advise per municipal code
26 (FAC, ¶¶ 23, 25). Defendant incorrectly asserts that Pastor Hodges was “required” to
27 speak to the public, but the referenced statutes only indicate that he is to make
28 recommendations *to the Mayor, City Council, and City Manager*. Mot. at 18-19. As

1 has been made evident through Defendant’s motions to dismiss, Defendant both
2 misinterprets and stretches the nature of these assertions in the original complaint to
3 fit his narrative. ECF No. 5; Mot. at 16-20.

4 In his FAC, Pastor Hodges provided clarification as to what he did and did not
5 do in his position on the Advisory Board and what was required of him while serving
6 on the Advisory Board. FAC, ¶¶ 23-25, 27-29. Pastor Hodges amended his complaint
7 to further explain—not contradict—that he does not speak on behalf of Defendant and
8 that he does not implement any policies on behalf of Defendant. Defendant asks this
9 Court to make an absurd and unfounded conclusion based upon facts that are not
10 presented in the FAC. Mot. at 18 (“Hodges’ previous allegations . . . can be considered
11 by this Court as additional support for the conclusion that Hodges was ‘effectively a
12 political extension’ and the ‘public face’ of the Mayor while on the Advisory
13 Board.”). This requires the Court to participate in mental gymnastics and make
14 decisions that are not appropriate on a motion to dismiss where the alleged facts do
15 not support this conclusion and where there has been no factual discovery. Not only
16 does this proposed conclusion directly contradict the legal standard required of the
17 Court’s consideration on a motion to dismiss, but it grossly misconstrues the facts.

18 **D. Pastors Hodges’ Claims Are Not Barred By Qualified Immunity Because**
19 **Defendant Knew Or Should Have Known His Conduct Was Unlawful**

20 To the extent Defendant argues that qualified immunity shields him from
21 liability against Pastor Hodges’ constitutional claims (Mot. at 21-22), that “is an
22 affirmative defense that must be raised by a defendant.” *Groten v. Cal.*, 251 F.3d 844,
23 851 (9th Cir. 2001). “Thus, a Rule 12(b)(6) dismissal is not appropriate unless [a
24 court] can determine, based on the complaint itself, that qualified immunity applies.”
25 *Id.*; see also *Ethridge v. Doe*, No. 1:12-CV-02088-AWI, 2014 WL 6473654, at *6
26 (E.D. Cal. Nov. 18, 2014), report and recommendation adopted sub nom. *Ethridge v.*
27 *Lawrence*, No. 1:12-CV-02088-AWI, 2015 WL 153821 (E.D. Cal. Jan. 12, 2015)
28 (explaining that this is “because facts necessary to establish this affirmative defense

1 generally must be shown by matters outside the complaint”). Thus, Defendant must
2 raise qualified immunity as a defense and prove it at trial, after giving Pastor Hodges
3 an opportunity to gather evidence to support his claims.

4 Even if this Court addresses qualified immunity at this stage, Defendant’s
5 arguments fail. Qualified immunity is a defense available for government officials,
6 but only if their conduct does not violate clearly established rights of which a
7 reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 223, 231
8 (2009). Qualified immunity can be overcome by showing that two elements are met:
9 (1) a federal right (statutory or constitutional) has been violated, and (2) that right was
10 clearly established at the time the violation occurred. *Harlow v. Fitzgerald*, 457 U.S.
11 800, 818 (1982).

12 Rather than addressing Pastor Hodges’ constitutional claims, Defendant seeks
13 to justify his improper and illegal actions against Pastor Hodges because he had
14 “undisputed authority to veto Hodges’ reappointment to the board.” Mot. at 22.
15 However, there is no case law to support the proposition that exercising government
16 authority justifies a government official’s disregard and discrimination of a person’s
17 sincerely held religious beliefs. And Defendant’s reliance on *Lathus* is mistaken (Mot.
18 at 22) since there, local law permitted Lathus to be removed without cause. *Lathus*,
19 56 F.4th at 1239. Here, under the SDMC, a member serves “until his or her successor
20 is duly appointed and qualified.” Pastor Hodges alleges in the FAC that Defendant
21 violated numerous federal rights, FAC, ¶¶ 71-119, yet Defendant makes no attempt
22 to analyze whether a federal right has been violated.

23 As to the second prong, to be clearly established law, the contours of a
24 constitutional right must be sufficiently clear so a reasonable official would
25 understand his actions violate it. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).
26 “Whether the law was clearly established is an objective standard; the defendant’s
27 subjective understanding of the constitutionality of his or her conduct is irrelevant.”
28 *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1109 (9th Cir. 2011) (internal

1 quotation marks and citation omitted). In this sense, the government official need only
2 have “fair warning” that his conduct would deprive plaintiff of a constitutional right.
3 *Hope v. Peizer*, 536 U.S. 730, 740 (2002) (citation omitted). Such warning was
4 evident here and Defendant should have heeded it.

5 Defendant knew or should have known his actions violated Pastor Hodges’
6 constitutional rights. *See Jones v. Williams*, 791 F.3d 1023, 1033 (9th Cir. 2015) (“It
7 was well established . . . and remains so today, that government action places a
8 substantial burden on an individual’s right to free exercise of religion when it tends
9 to coerce the individual to forego her sincerely held religious beliefs or to engage in
10 conduct that violates those beliefs.”). Defendant effectively gave Pastor Hodges an
11 ultimatum—adhere to Defendant’s own ideology regarding transgenderism in
12 violation of his religious beliefs to maintain his volunteer appointment or lose his
13 position for adhering to his religious beliefs. This is exactly the type of burden the
14 First Amendment protects against. As explained in the FAC, Defendant should have
15 known that his conduct was unlawful because the Commission, which consults with
16 and advises the Mayor, exists to eliminate prejudice and discrimination because of
17 religion. FAC, ¶¶ 83, 101, 113. Clearly established law prohibits government actors
18 from abridging an individual’s speech or burdening their religious exercise.

19 Because Defendant has not shown he could not have reasonably known his
20 actions violated Pastor Hodges’ constitutional rights, Defendant is not entitled to
21 qualified immunity. As such, Defendant is subject to liability in his personal capacity
22 for violating Pastor Hodges’ constitutional rights.

23 **E. Leave To Amend Should Be Granted**

24 In the alternative, Pastor Hodges should be granted leave to amend his FAC.
25 Leave to amend must be “freely given” unless it is clear that the proposed amendment
26 is brought after undue and unexplained delay; is offered in bad faith; would be futile;
27 or would be prejudicial to the other parties. *See Fed. R. Civ. P. 15(a)(2); Foman v.*
28 *Davis*, 371 U.S. 178, 182 (1962). None of those factors apply here.

1 Defendant asserts that it is “undisputed” that the Advisory Board position is
2 political in nature. Mot. at 22. Plaintiff disagrees, and while Plaintiff believes that the
3 FAC clearly shows it is not, Plaintiff respectfully requests leave to amend to further
4 demonstrate that he is a public servant volunteer protected by the First Amendment.
5 To promote judicial efficiency and ensure meaningful relief, the Court should grant
6 Pastor Hodges leave to amend.

7 **V. CONCLUSION**

8 For these reasons, Pastor Hodges respectfully requests that this Court deny
9 Defendant’s motion to dismiss, or in the alternative, grant leave to amend.

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11 DATED: January 29, 2024

ADVOCATES FOR FAITH & FREEDOM

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13 By: /s/ Julianne Fleischer
Julianne Fleischer

14 Attorney for **Plaintiff**

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