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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DENNIS HODGES, an individual, Plaintiff, v. TODD GLORIA, both in his personal capacity and in his official capacity as the Mayor of the City of San Diego, Defendants.	Case No. 3:23-cv-02065-W-MSB **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES [FRCP RULE 12(B)(6)]** **PER CHAMBERS RULES, NO ORAL ARGUMENT UNLESS SEPARATELY ORDERED BY THE COURT** Date: February 12, 2024 Time: N/A Judge: Hon. Thomas J. Whelan Court Room: 3C

Defendant, Todd Gloria (Mayor Gloria), respectfully submits the following reply memorandum of points and authorities in support of his Motion to Dismiss Plaintiff Dennis Hodges' (Hodges) First Amended Verified Complaint (FAC) pursuant to Federal Rule of Civil Procedure 12(b)(6):

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I.

Mayor Gloria Did Not Waive His Challenge to the Sufficiency of Hodge's Constitutional Claims

Plaintiff claims that Mayor Gloria did not attempt, in his moving papers, to challenge the sufficiency of Hodges' constitutional claims. This claim is perplexing given the fact that the entire motion challenges the sufficiency of Hodges' constitutional claims. Page 9 of the motion specifically states that "the crux of all three of Hodges' causes of action is that the loss of his position on the Advisory Board was allegedly in response to or in retaliation for Hodges' 'protected speech,'" and that the basis of the motion is that "the speech was not protected, Mayor Gloria has qualified immunity for the claims, and none of the causes of action state a claim for relief."

Mayor Gloria contended in his moving papers, and contends in this reply, that the First Amendment does not protect Hodges from Mayor Gloria's veto of his reappointment to the Advisory Board. This motion relies, in large part, on the Ninth Circuit Court of Appeal's decision in *Lathus v. City of Huntington Beach*, 56 F. 4th 1238 (2023) (*Lathus*), which was an appeal from the district court's dismissal of plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The issue the Ninth Circuit specifically said it was addressing is nearly identical to the issue in this case:

> [W]hether the First Amendment protects a volunteer member of a municipal advisory board from dismissal by the city councilperson who appointed her and is authorized under a city ordinance to remove her."

Lathus, at p. 1239.

After considering the issue, the *Lathus* court concluded that, because it found the advisory board member to be "the 'public face' of the elected official who appointed her to the body," the board member could be fired "for purely political

reasons.'" *Id.* Even though the board member "plainly engaged in activity protected by the First Amendment," this did not protect her from being dismissed from the board for "lack of political compatibility." *Id*. at p. 1242.

It is unclear what "other prongs" Hodges claims Mayor Gloria did not address in his moving papers. The point of *Blair v. Bethel School District*, 608 F. 3d 540 (9th Cir. 2010), *Lathus*, and this motion is that "the First Amendment rights of government officials are not absolute." *Lathus*, at p. 1241. Hodges' reappointment could be vetoed, even if he was exercising his First Amendment rights, if he lacked "political compatibility" with Mayor Gloria. Indeed, it is quite clear, based on the allegations in the FAC, that Hodges and Mayor Gloria lack "political compatibility." Thus, contrary to Hodges' assertions, Mayor Gloria, just like the plaintiff in *Lathus*, did in fact challenge the sufficiency of Plaintiff's constitutional claims and did not waive that challenge.

II.

The Mayor's Veto of Hodges' Reappointment to the Advisory Board Did Not Violate Hodges' First Amendment Rights

As noted, Hodges' First Amendment rights with respect to his position on the Advisory Board are not absolute. Mayor Gloria's veto of Hodges' reappointment to that position did not violate his First Amendment rights. Hodges' attempt, in his moving papers, to distinguish the cases relied on by Mayor Gloria therefore fails.

First, Mayor Gloria's reliance on *Blair v. Bethel School District*, 608 F. 3d 540 (*Blair*), is not "misplaced." (Hodges' Opposition to Defendant's Motion to Dismiss (OB), at p. 7.) The moving papers do not deny the differences between the facts of this case and *Blair*. However, Mayor Gloria also explained that, despite the differences, *Blair* "makes clear that the First Amendment rights of government officials are not absolute. It is settled, for example, that an appointed public official can be removed for engaging in otherwise protected First Amendment activity if 'political affiliation is an appropriate requirement for the effective performance of

the public office involved.'" (Moving papers, at p. 13, quoting *Lathus*, at p. 1241.)

Second, Mayor Gloria's reliance on *Lathus* is also not "misplaced." *Lathus* did not, as Hodges claims, "reject" the *Blair* court's analysis. Rather, the Ninth Circuit found *Blair* to be "instructive," although not controlling. *Lathus*, at p. 1240.

Lathus ***is***, however, controlling in this case. Like the plaintiff in *Lathus*, Hodges was an appointed volunteer in public service. (FAC, ¶¶ 2, 3, 21; SDMC §26.0802.) Hodges, like Lathus, neither gained nor lost his appointment through a vote of his fellow board members, nor was the veto of Hodges' reappointment "simply the result of an 'internal political leadership election.'" See, *Lathus* at p. 1241. Like the plaintiff in *Lathus*, Hodges' duties on the Advisory Board included influencing the City Council's decisions and serving as a "a conduit between the community and City Council." *Id*., at p. 1242. By advising "on matters of policy and solicit[ing] public feedback," Hodges, like Lathus, "necessarily" speaks to members of the public "and to other policymakers on behalf of the official who appointed them." *Id*. As such, Hodges, like Lathus, was a "political extension" of the mayor and therefore could "be fired for purely political reasons." *Id*. at p. 1239.

Hodges, however, cites *Lathus*, at p. 1239, to claim he was not the "public face" of Mayor Gloria because, unlike Lathus, he could not "speak on behalf of" the person who appointed him. (OB, at p. 9.) *Lathus* did not, however, at page 1239 or any other page, require the board member to be authorized to actually speak on behalf of the person who appointed them. Instead, *Lathus* says that "because the public could readily infer that a CPAB member's actions and statements …reflect the current views and goals of the appointing person, Lathus was Carr's 'public face' on the board, and ***the public was entitled to assume that she spoke on Carr's behalf***." *Id*. at p. 1242 (emphasis added.)

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It is also important to note that the Ninth Circuit, in *Lathus*, stressed the importance of looking "at the position in the abstract…and not at a snapshot of the position as it is being carried out by a given person at a given point in time under a given elected official." *Id*. at p. 1241. In this case, the stated purpose and intent of the Advisory Board is to "study, consult and advise the Mayor, City Council and City Manager on Police/Community Relations crime prevention efforts." SDMC §26.0801. In addition, the Board "shall function as a method of community participation" and to "promote and encourage open communication between the Police Department and residents of the City." *Id*.

Hodges omitted from the FAC his prior allegations that he "served as a bridge between law enforcement and the community and sought to build trust between the public and law enforcement" (ECF No. 1, ¶ 22), and that he "advised the community on shooting incidents and fostered police and community relations." (ECF No. 1, ¶ 26.) This omission, however, does not save the FAC. As *Lathus* instructs, it is not what Hodges claims to have been doing in his position on the board at any given time, it is what the local law, in this case the SDMC, specifies the duties of an Advisory Board member to include. *Lathus*, at p. 1241. And here the SDMC specifies those duties to include speaking and communicating with members of the public. As a result, the public was entitled to assume that he spoke on Mayor Gloria's behalf. See, *Id*. at p. 1242.

Hodges also contends, wrongly, that *Lathus* is distinguishable because Lathus was appointed and removed by the same councilperson, while he was allegedly appointed by the City Council but "effectively removed" from the board by Mayor Gloria. (OB, at p. 9.) First of all, SDMC §26.0802(a) states, in relevant part: "The members shall be appointed by the Mayor and confirmed by the Council." Here, Mayor Gloria vetoed his reappointment of Hodges after the Council's confirmation, which veto Hodges admits the mayor was authorized to do. (ECF 7, ¶ 61.) Secondly, Hodges was not "removed" from the Advisory Board, nor

does the FAC allege he was removed.[1]

Thus, the SDMC, the "local law" which "provides the best foundation" for classifying the board position for First Amendment purposes, specifically authorizes the mayor, not the Council, to appoint members to the Advisory Board. The City Council confirms these appointments which, as in this case, the Mayor is authorized to veto. (ECF No. 7, ¶ 61.)

Hodges also claims *Lathus* is distinguishable because the Huntington Beach Municipal Code in that case permitted the appointing councilperson to remove a board member without cause, while SDMC §26.0802 provides that an Advisory Board member serves until his successor "is duly appointed and qualified." (OB, at p. 9.) Again, Hodges was not "removed," nor does he allege in the FAC that he was removed. However, the person who appointed him, Mayor Gloria, ***was*** permitted to veto his appointment without cause. City Charter § 280.

Finally, Hodges claims his case is "more akin to *Hunt v. Cnty. of Orange*, 672 F. 3 606 (9th Cir. 2012.) He is wrong. The plaintiff deputy sheriff in that case was an employee, not a volunteer board member and, unlike Hodges, his "political outlook" was not relevant to the discharge of his duties. *Id*. at p. 612. Thus, *Hunt* is not at all similar to the facts of this case and not relevant to a determination of this motion.

III.

If Hodges is Contending He is Entitled to Serve Until His Successor is "Duly Appointed and Qualified," Then This Action is Premature

Hodges appears to be contending that SDMC §26.0802 prevented Mayor Gloria from vetoing his reappointment because he could only be removed for cause and was entitled to serve on the Advisory Board until his successor "is duly appointed and qualified," (OB, at p. 9.) As discussed above, this contention is

[1] Pursuant to San Diego City Charter section 43(c), the City Council actually "removes" advisory board members.

wrong for several reasons, including the fact that Hodges was not "removed" and the mayor was authorized by the City Charter to veto his reappointment. (ECF No. 7, ¶ 61.) However, even if Hodges' contention is correct, the motion to dismiss should still be granted because then this action is premature.

As Hodges notes in his opposition brief, an Advisory Board member serves a two-year term and serves "until his or her successor is duly appointed and qualified." SDMC section 26.0802(a). The expiration date of all terms "shall be January 1." (*Id*.) Thus, these are not open-ended appointments although the code allows for continuity on the Board by permitting a board member to serve after the January 1 end date of their term if a successor has not yet filled the position. The code does not say that a member must be reappointed, or that a member's reappointment cannot be vetoed. See §§ 26.0801-26.0803.

Hodges, however, now contends that Mayor Gloria could not "remove" him from the Advisory Board because he was entitled to remain on the board until his successor "is duly appointed and qualified." (OB, at pp. 9,14.) However, ***nowhere*** in the FAC does Hodges allege that Mayor Gloria "removed" him from the Advisory Board. Instead, he specifically alleges that the mayor vetoed his reappointment, which he is authorized to do under City Charter section 280. In fact, according to San Diego's City Charter section 43(c), it is only the City Council, not the mayor, who "may remove committee and board members by vote of a majority of the members of the Council."

Thus, even if the FAC could somehow be construed as alleging that the mayor could not exercise his veto power until Hodges' successor was duly appointed and qualified, this motion should still be granted because this action is not yet ripe for adjudication. In this regard, "'[t]he ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative and may never occur from those cases that are appropriate for federal court action.'" *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993) (internal

citations omitted.) According to Hodges, he retains his position on the Advisory Board unless and until a successor is duly appointed and qualified. (OB, at pp. 9, 14.) Thus, by Hodges' own admission, he has not yet suffered an injury. Whether he will suffer an injury is speculative, and this case is therefore not ripe for adjudication. Accordingly, it should be dismissed.

IV.

Hodges' Action Against Mayor Gloria in His Individual Capacity Is Barred by Qualified Immunity

Hodges is incorrect when he suggests that this Court cannot rule on qualified immunity at this stage of the proceedings. Contrary to his contention that qualified immunity must be raised as a defense and proven at trial, qualified immunity "is an immunity from suit rather than a mere defense to liability." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). As a result, the United States Supreme Court has "repeatedly … stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Id.* In fact, in *Hunter*, the Court said that, rather than qualified immunity being put in the hands of the jury, "[i]mmunity ordinarily should be decided by the court ***long before trial***." *Id*. (Emphasis added.)

Here, Mayor Gloria has established Hodges' failure to allege a violation of his constitutional rights under the First Amendment. Moreover, Hodges failed to meet his burden of showing that the rights allegedly violated were "clearly established." *Shafer v. Cty. of Santa Barbara*, 868 F. 3d 1110, 1118 (9th Cir. 2017). As a result, Hodges' action against Mayor Gloria in his personal capacity is barred by qualified immunity. See, *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

V.

Leave to Amend Should be Denied

Hodges has already amended his complaint once in an attempt to avoid dismissal. There are no allegations he can add that will save this action, nor did Hodges provide this Court with any proposed additional allegations. Leave to

amend should be denied.

VI.

Conclusion

Hodges was appointed to a volunteer advisory board where the duties of board members include consulting and advising with the mayor and promoting and encouraging "open communication between the Police Department and residents of the City." As a result, the public could assume he spoke on Mayor Gloria's behalf. Mayor Gloria was therefore authorized, as Hodges admits, to veto his reappointment to the board. Even if Hodges was entitled to remain on the board until a successor was appointed, Mayor Gloria's authorized veto of his reappointment did not violate his First Amendment rights. If anything, it only serves to establish this action is premature and not ripe for adjudication. Thus, this motion should be granted, and the action dismissed in its entirety with prejudice.

Dated: February 5, 2024

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