RECORD NO. 20-1162

[ORAL ARGUMENT REQUESTED]

In The

United States Court Of Appeals

For The Tenth Circuit

VDARE FOUNDATION,

Plaintiff - Appellant,

v.

CITY OF COLORADO SPRINGS; JOHN SUTHERS,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO - DENVER
THE HONORABLE CHRISTINE M. ARGUELLO, U.S. DISTRICT JUDGE
District: 1:18-CV-03305-CMA-KMT

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT

VDARE Foundation, Inc. is an educational 501c3 nonprofit corporation. It has no parent corporation. No publicly traded corporation owns any of its stock.

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STATEMENT OF RELATED APPEALS

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under 28 U.S.C. § 1332, 28 U.S.C. § 1331, and 28 U.S.C. § 1367. The District Court issued a memorandum opinion, Addendum ("Add.") at 15; Appellant's Appendix ("Aplt. App.") at 71, and final order, Add. at 48; Aplt. App. at 104, on March 30, 2020, dismissing all of VDARE Foundation, Inc. ("VDARE")'s claims. VDARE filed a timely notice of appeal on April 24, 2020. Aplt. App. at 106. This Court has appellate jurisdiction under 12 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the District Court erred in holding that there was no covert coercion or significant encouragement under the nexus test for state action where the City of Colorado Springs through its Mayor issued a thinly veiled threat to withhold police protection from a VDARE conference whose speech was disfavored by the City and Mayor?

2. Whether the District Court erred in invoking the so-called government speech doctrine as grounds for shielding the City and Mayor's thinly veiled threat to withhold police protection from the VDARE conference?

3. Whether the District Court erred in holding that VDARE had failed to allege a causal link between the City and Mayor's threat and the cancellation of the VDARE conference by the Cheyenne Resort, when VDARE's pleading specifically

alleges that the resort cancelled because of the fear it would be left to deal with violent protestors without the benefit of police protection and when the conference was cancelled the day after the Mayor's threat?

4. Whether the District Court erred in holding that the Mayor was entitled to Qualified Immunity because the City and Mayor, according to the court, were merely engaged in acceptable "government speech"?

STATEMENT OF THE CASE

When a group espousing a dissident viewpoint seeks to exercise its First Amendment rights to free speech and freedom of assembly by organizing a nonviolent conference, as VDARE did in this case, what is the government's proper response? A century of caselaw from the Supreme Court provides a clear answer: the government must adhere to viewpoint neutrality and, if necessary, affirmatively protect with the government's police power the group's First Amendment rights. As this appeal will show, the response by Defendants / Appellees City of Colorado Springs (the "City") and its mayor, John Suthers, was far removed – in fact, the polar opposite – from the government's Constitutionally-mandated response. Bowing to threats and pressure from supposed "members of the community," Mayor Suthers publicly announced that the City "will not provide any support or resources to this event, and does not condone hate speech in any fashion," thus vilifying VDARE as engaging in hate speech and sending the message that, despite credible threats of

violent disruption, VDARE and its resort venue would be left unprotected to cope with the threats on their own. Mayor Suthers further made clear that the City regarded VDARE as a threat to the civil right of a wide array of groups and that the City would "steadfast[ly]" protect those groups against VDARE's alleged (but non-existent) threat and also, by implication against those, such as the resort, who cooperated with VDARE. The resort got the message, as any reasonable person would, and immediately cancelled the conference.

The District Court in this case condoned this flagrantly unconstitutional conduct by dismissing VDARE's detailed amended complaint. The court's error-filled ruling, unless overturned, disregards and nullifies decades of Supreme Court and Tenth Circuit precedent, allowing the government to shut down speakers and associations it disagrees with simply by sending hostile messages and refusing to provide police protection it routinely provides to other persons. *See, e.g., Forsyth County. v. Nationalist Movement,* 505 U.S. 123, 135 (1992) ("Speech cannot be financially burdened, anymore than it can be punished or banned, simply because it might offend a hostile mob.").

As set forth in VDARE's amended complaint, VDARE is a non-profit educational organization. Aplt. App. at 6; Amended Compl. at ¶ 2. It seeks to educate the public on the unsustainability of current American immigration policy and whether the United States can survive as a nation-state. *Id*. On or about March 31, 2017, VDARE reserved

the Cheyenne Mountain Resort in Colorado Springs ("Cheyenne Resort") for a conference event featuring guest speakers and activities of interest and learning on subjects related to its mission. Aplt. App. at 8; Amended Compl. at ¶ 11. Approximately five months later, on August 14, 2017, after the conference became the subject of "threats and planned protests," *id*. at ¶ 1, Mayor Suthers issued a thinly veiled threat specifically referencing VDARE's planned conference. *Id*. at ¶ 12. The threat read:

> The City of Colorado Springs does not have the authority to restrict freedom of speech, nor to direct private businesses like the Cheyenne Mountain Resort as to which events they may host. *That said, I would encourage local businesses to be attentive to the types of events they accept and the groups that they invite to our great city*.
>
> The City of Colorado Springs *will not provide any support or resources to this event, and does not condone hate speech in any fashion*. The City remains steadfast in its commitment to the enforcement of Colorado law, which protects all individuals *regardless of race, religion, color, ancestry, national origin, physical or mental disability, or sexual orientation* to be secure and protected from fear, intimidation, harassment and physical harm. *Id.* (emphasis supplied)

Mayor Suthers' announcement that the City would not provide necessary municipal services, including police and fire protection, meant that participants in the Conference, the Cheyenne Resort's patrons and employees, and innocent bystanders would potentially be subjected to serious or even fatal injury in the event they were threatened or attacked by protestors. *Id.* at ¶¶ 22, 46-47. The threat created an obvious incentive for protestors to seek to shut down the event using violence or other illegal means, secure in the knowledge that police would not be

called to maintain order or protect persons or property. Indeed, Defendants' threat could only have served to encourage unlawful, violent or disorderly behavior. In addition, the Cheyenne Resort would be powerless to stop protestors from destroying its property, harassing or injuring its patrons, or disrupting its business operations. *Id.* It would be placing itself at a substantial risk of tort or even criminal liability if it proceeded to host the Conference while knowing that basic city services would not be provided in the event they were needed. *Id.*

Up until the threat, the Cheyenne Resort had been actively communicating and coordinating with VDARE about logistics and safety in connection with the conference for approximately five months. *Id.* at ¶ 14. On August 15, 2017, however, the very next day after Mayor Suthers' threat, the Cheyenne Resort announced it would not host VDARE's conference. *Id.* In a subsequent published interview, Mayor Suthers expressed satisfaction that the Cheyenne Resort had cancelled its contract to host VDARE'S conference. *Id.* at ¶ 14, 43. He also stated that he was "fairly confident" that the Cheyenne Resort had not known VDARE's true character when they allowed it to book the conference and then added, "I would appreciate if organizations in Colorado Springs do a little bit of due diligence before they contract with groups, if it's the type of folks that could generate controversy and be bad for their business and the community's business." *Id.* at ¶ 43. The City and Mayor thus effectively blacklisted VDARE.

On the facts set forth in its Amended Complaint, VDARE asserted three claims against Mayor Suthers and the City. In Count One, VDARE alleged that Defendants violated VDARE's rights to freedom of speech and freedom of association guaranteed by the First Amendment to the federal Constitution, and equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution, pursuant to 42 U.S.C. § 1983. *Id*. at ¶ 19. In Count Two, VDARE alleged Defendants retaliated against it for its "history of engaging in . . . publishing, speaking, and engaging in debate" by "characterize[ing] Plaintiff's constitutionally protected activity as 'Hate Speech,' and urg[ing] local businesses to 'be attentive to the types of events that they accept and the groups that they invite to our great city.'" *Id*. at ¶ 37. In Count Three, VDARE asserted a common law claim for Intentional Interference with Contract based on Defendants' use of improper means to pressure the Cheyenne Resort into cancelling its contract with VDARE. *Id.* at ¶ 45.

Defendants moved to dismiss VDARE's claims pursuant to FRCP 12(b)(1) and (6). Aplt. App. at 23. In their motion, Defendants made clear that substantial – indeed paramount -- factors motivating them to issue their threat were the "voic[ing of] opinions" by "members of the Colorado Springs community" about VDARE. *Id.* at 25. The main concern of such "members of the community" apparently was that the pandemonium and violence that had washed over Charlottesville, Virginia at the

"Unite the Right" events on August 11-12, 2017 -- just a few days before the Mayors' statement on August 14, 2017 -- might engulf Colorado Springs. *Id*. at 23-25.[1]

The Defendants also stated that "[t]he City does not customarily provide services or resources to private events." *Id*. at 24. This general statement, even if deemed true (which it should not be on a motion to dismiss), differs markedly from the statement the Defendants actually issued with regard to the VDARE conference, which pointedly singled out that conference and linked it to hate speech, which the City "does not condone in any fashion." As to their legal arguments, Defendants asserted that VDARE had failed plausibly to allege state action, that under the

[1] Although the Defendants improperly sought to link VDARE to the Charlottesville events, VDARE did not attend, promote or participate in those events, and in particular had no connection whatever with James Fields. The Defendants' Attorney's attempt to link VDARE to the Charlottesville debacle is ironic because as Charlottesville's own independent review (i.e. the report of Hunton & Williams by Attorney Timothy J. Heaphy dated November 24, 2017 -- the "Heaphy Report") makes clear, the violence and chaos in Charlottesville was largely the result of violent Antifa counter-protestors. *Heaphy Report, pp. 70, 71, 82, 87, 97-98, 135*. Moreover, the most significant reason the violence became possible was the deliberate decision by the Charlottesville Chief of Police to effectively withdraw police support when confronted by the violence of the Antifa counter-protestors. The ensuing chaos would provide an excuse "to declare the event unlawful and disperse the crowd." *Heaphy Report*, p. 98. To that end, on the morning of the UTR rally, in the face of reports of growing violence, Charlottesville's Chief of Police was quoted by his own officers as remarking "let them fight, it will make it easier to declare an unlawful assembly." *Heaphy Report, p. 133*. Thus, the debacle in Charlottesville is not a reason to withdraw police support from controversial demonstrations, but an object lesson in the importance of smart and effective police measures to protect dissident voices. Unfortunately, the Mayor in this case appears to have harbored intentions similar to the Charlottesville Chief of Police.

Government Speech doctrine the Defendants' statements were not subject to the First Amendment, that VDARE had failed to state a plausible claim for First Amendment retaliation, and that Mayor Suthers was shielded by qualified immunity. *Id*. at 27-37.

After VDARE vigorously opposed the Defendants' motion to dismiss and the motion was fully briefed, on January 29, 2020, Magistrate Judge Tafoya issued a Recommendation that Defendants' motion be granted. Add. at 1; Aplt. App. at 38. The Recommendation largely accepted the Defendants' arguments, albeit without mention of the government speech doctrine. On February 12, 2020, VDARE timely filed Objections to the Magistrate Judge's Recommendation. Aplt. App. at 52. On March 27, 2020, District Court Judge Arguello issued an Order Adopting the Recommendation. Add. at 15; Aplt. App. at 71.

The District Court in its Order approached the state action issue by separate analyses of whether state action could be predicated on (1) the Cheyenne Resort's cancellation or (2) the Defendants' threat. As to the first, the court held that even though VDARE's allegations showed that the Cheyenne Resort booked and did not cancel the conference for over four months prior to the Defendants' statements despite knowing of VDARE's ideological stances, but cancelled within one day of the Mayor's threat; and even though the Mayor's statements, by Defendants' own admission, were hostile to VDARE, nonetheless VDARE's assertion of a causal link

between the statements and the cancellation was "merely conclusory." Add. at 30-31; Aplt. App. at 86-87. As to the second, the court held that "the statement itself is an exercise of permissible government speech." Add. at 32, 36; Aplt. App. at 88, 92.

Regarding VDARE's First Amendment retaliation claim, the court held that because "Defendants' Statement amounted to constitutionally permissible government speech" the second element of the claim, i.e., that the defendant's actions caused the plaintiff to suffer an injury, had been insufficiently pleaded. Add. at 42; Aplt. App. at 98. The court also held that VDARE's allegations were too "conclusory and speculative" to show a causal connection between the Defendants' statements and the Cheyenne Resort's cancellation, even though the pleading references the obvious danger of a private venue attempting to cope with violent protestors. *Id.*; *see also* Aplt. App. at 11, 20. Amended Compl. at ¶¶ 22, 45, 46. Having dismissed VDARE's federal claims, the court declined to accept supplemental jurisdiction over VDARE's tortious interference claim. Add. at 44-46; Aplt. App. at 100-102.

Final judgment was entered granting the Defendants' motion to dismiss on March 30, 2020. Add. at 48; Aplt. App. at 104. VDARE filed a timely notice of appeal on April 24, 2020. Aplt. App. at 106.

SUMMARY OF ARGUMENT

The allegations of VDARE's amended complaint plausibly allege covert state coercion by which the Mayor of Colorado Springs effectively forced the Cheyenne

Resort to cancel VDARE's conference when he threatened to withhold police protection from the event. Moreover, the Mayor's specific wording -- "I would encourage local businesses to be attentive to the types of events they accept and the groups that they invite to our great city" – and his subsequent comments provide a separate ground supporting a finding of state action (appropriately, the "significant encouragement" ground for state action).

The so-called government speech doctrine does not shield the City and Mayor's threat. The government speech doctrine may never be abused as cover for suppressing speech the government disfavors; and in any event, not even one of the three factors the Supreme Court has articulated to weigh government speech is present here. VDARE, accordingly, plausibly alleged a viable § 1983 claim against the City and Mayor.

VDARE also plausibly alleged its claim for First Amendment retaliation. The only ground stated by the District Court for dismissing this claim was VDARE's supposed pleading failure as to the second element, i.e. that defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity. VDARE's allegations, however, fully satisfied *Twombly* pleading standards as to this element and all other elements.

Finally, the Mayor is not entitled to Qualified Immunity. VDARE has plainly alleged the violation of a clearly defined right (the First Amendment Rights of

speech and association) and it would be clear to a reasonable man, from decades of Supreme Court and Tenth Circuit precedent, that he could not seek to suppress dissident views by issuing a thinly veiled threat to withhold police protection from VDARE's conference.

ARGUMENT

Standard of Review

The legal sufficiency of a complaint is a question of law and a Rule 12(b)(6) dismissal is reviewed *de novo*. *Straub v. BNSF Railway Co*., 909 F.3d 1280, 1287 (10th Cir. 2018). For purposes of resolving a Rule 12(b)(6) motion, this Court accepts as true all well-pleaded factual allegations in a complaint and views those allegations in the light most favorable to the plaintiff. *Id.* A well-pleaded complaint may proceed even if it strikes a judge that actual proof of those facts is improbable. *Id*. Moreover, "[i]n First Amendment cases, we have an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Leverington v. City of Colorado Springs*, 643 F.3d 719, 723 (10th Cir. 2011) *(quoting Dias v. City and County of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) and *Thomas v. City of Blanchard*, 548 F.3d 1317, 1322 (10th Cir. 2008)).

Discussion

I. THE ALLEGATIONS IN VDARE'S AMENDED COMPLAINT PLAUSIBLY ALLEGE STATE ACTION

The District Court's analysis of the state action requirement for a § 1983 claim veered off the path to a constitutionally-mandated result by two missteps. The first was a failure to apply the correct formulation of the applicable nexus test for state action. The second was separating the Cheyenne Resort's cancellation and the Defendants' statements into an artificial dichotomy, which diluted the all-important factor of context. When these missteps are corrected and the *Twombly* plausibility pleading standard properly applied, the conclusion is abundantly supported that VDARE's amended complaint properly alleged state action.

As the Supreme Court and higher federal courts, including this Court, have stated, the proper analysis of a state action question is highly fact-specific. *Blum v. Yarestsky*, 457 U.S. 991, 1004 (1982) (cautioning that "the factual setting of each case will be significant"); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance"). Consequently, as this Court explained in *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995), courts have applied a variety of tests to the different facts of different cases.

In this case, the District Court and the parties agreed that the "nexus test" applies. As explained in *Gallagher*, under the nexus test a state normally can be held responsible for a private decision "only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." 49 F.3d at 1448 (quoting *Blum*, 457 U.S. at 1004).

Here VDARE has plausibly alleged that Defendants were engaged in covert coercion. The "covert" veneer, indeed, was quite thin. The Mayor's clause, "*That said*…" effectively alerted his audience to true wishes (viz. "That said, I would encourage local businesses to be attentive to the types of events they accept and the groups that they invite to our great city). By such clause, the Mayor negated the bromide with which he had begun his threat and which immediately preceded the clause (viz. "The City of Colorado Springs does not have the authority to restrict freedom of speech, nor to direct private businesses like the Cheyenne Mountain Cheyenne Resort as to which events they may host") and conveyed his real message: that the Cheyenne Resort should cancel VDARE's conference. Then, lest there be any doubt, he drove the point home by declaring that for VDARE's conference, there would be no police protection or support, and then listed all the groups who would be protected, conspicuously omitting those who voice dissident views, such as VDARE, from the list of protected.

The facts in this case closely resemble in relevant respects those in *Bantam Books v. Sullivan*, 372 U.S. 58 (1963). In that case, it was the practice of a "Rhode Island Commission to Encourage Morality in Youth" to send notices to book publishers. *Id.* at 62. A typical notice either solicited or thanked the book publisher, in advance, for his 'cooperation' with the Commission, usually reminding the book publisher of the Commission's duty to recommend to the Attorney General prosecution of purveyors of obscenity. *Id.* In defending against a First Amendment challenge, the Commission contended there was no state action because it did not regulate or suppress obscenity but simply exhorted booksellers and advised them of their legal rights. The Supreme Court decisively rejected this argument:

> This contention, premised on the Commission's want of power to apply formal legal sanctions, is untenable. It is true that appellants' books have not been seized or banned by the State, and that no one has been prosecuted for their possession or sale. But though the Commission is limited to informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim. We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief.

The Court further stated:

> The [Commission's] acts and practices directly and designedly stopped the circulation of publications in many parts of Rhode Island. It is true . . . that Silverstein [the book publisher] was 'free' to ignore the Commission's notices, in the sense that his refusal to 'cooperate' would have violated no law. But it was found as a fact—and the finding, being amply supported by the record, binds us—that Silverstein's compliance

> with the Commission's directives was not voluntary. People do not lightly disregard public officers' thinly veiled threats . . .

372 U.S at 66-68.

Furthermore, given that Mayor Suthers' statement in this case explicitly used the word "encourage" – i.e., "I would encourage local businesses to be attentive to the types of events they accept and the groups that they invite to our great city" – the language of the nexus test referring to "significant encouragement, either overt or covert" has an obvious direct application to this case. The District Court, however, treated the "significant encouragement" language dismissively, as mere verbiage, never squarely confronting its singular relevance.

Precedent is against this. Following *Blum*, the Supreme Court has consistently included "significant encouragement" as a separate ground that can support a finding of state action, specifically delineating "significant encouragement" as something different from the "coercive power" portion of the test. *See Brentwood Academy v. Tenn. Secondary School Athletic Ass'n*, 531 U.S. 288, 296, 303 (2001) ("'coercion" and "encouragement" are like "entwinement" in referring to kinds of facts that can justify characterizing an ostensibly private action as public instead."); *see also San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 546-47 (1987) (no state action where there was no evidence that the Federal Government "coerced *or* encouraged" the private action at issue). Moreover, when dealing with the state action question in the Fourth Amendment context, the Supreme Court has

stated that "the fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 615 (1989). *See also id.* (finding state action where "the Government did more than adopt a passive position toward the underlying private conduct" and where it "made plain not only its strong preference for [the private conduct], but also its desire to share the fruits of such intrusions").

Nearly all the Circuit Courts have interpreted *Blum's* language to mean that government encouragement alone can potentially render a private decision to be state action. *See, e.g., Sanchez v. Pereira-Castillo*, 590 F.3d 31, 51-52 (1st Cir. 2009); *United States v. Stein*, 541 F.3d 130, 147-48 (2d Cir. 2008) ("The prosecutors thus steered KPMG toward their preferred fee advancement policy . . . Such 'overt' and 'significant encouragement' supports the conclusion that KPMG's conduct is properly attributed to the State"); *Harvey v. Plains Tp. Police Dept.*, 635 F.3d 606, 609-10 (3d Cir. 2011); *Mentalovos v. Anderson*, 249 F.3d 301, 318 (4th Cir. 2001); *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 555 (5th Cir. 1988); *Paige v. Coyner*, 614 F.3d 273, 286 (6th Cir. 2010) (concurring opinion) ("Neither *Blum* nor Sixth Circuit precedent requires that the state actor's conduct rise to the level of a direct order. Rather, the state compulsion test requires only that the state exercise 'such coercive power or provide such significant encouragement, either

over or covert, that in law the choice of the private actor is deemed to be that of the state.'"); *Chernin v. Lyng*, 874 F.2d 501, 507-08 (8th Cir. 1989) (finding state action on allegations that USDA refused to provide services to plaintiff's employer unless plaintiff was fired); *Roberts v. AT&T Mobility LLC*, 877 F.3d 833, 842 (9th Cir. 2017).

The Tenth Circuit's decision in *Marcus v. McCollum*, 394 F.3d 813 (10th Cir. 2004), shows that this Court also has treated "significant encouragement" as an independent, standalone basis for finding state action. In *Marcus*, the Court addressed whether the presence of police officers when a creditor repossessed the plaintiff's automobile could constitute "significant encouragement" of the repossession sufficient to find state action. Reversing the trial court's grant of summary judgment to the officers on the state action question, the Court held that even if unintended, the intimidating effect a police officer's involvement in the repossession of an automobile by a private party has could constitute police intervention and aid sufficient to establish state action, as required for a viable § 1983 claim. *Id*. at 823. *See also Brill v. Correct Care Solutions, LLC*, 286 F. Supp. 3d 1210, 1217 (D. Colo. 2018) (allegations of discharged employee, who worked as medical director at county detention facility, that county provided significant encouragement, both overt and covert, to his former employer and supervisors in their decision to illegally tamper with his testimony in litigation pertaining to

inmate's medical treatment, and retaliate against employee for his full and honest testimony in inmate's case, adequately stated that employer and supervisors were state actors under nexus test, in employee's § 1983 action).

Thus, under these many precedents it is exceedingly clear that government encouragement of a private decision alone, if significant, can make the decision state action. The focus then turns to whether VDARE's allegations plausibly support this ground for state action. For a host of reasons an affirmative answer is appropriate.

First, as noted, Mayor Suthers explicitly used the word "encourage" in his statement, and the point of that "encouragement" was indisputably to exhort and admonish local businesses not to accept VDARE's conference or to invite VDARE itself into Colorado Springs. Mayor Suthers' statement cannot fairly be read otherwise. Moreover, Mayor Suthers expressed satisfaction after the conference was cancelled, showing that cancellation was exactly the effect he encouraged and intended.

Second, after admonishing local businesses to shun VDARE, Mayor Suthers continued: "The City of Colorado Springs will not provide any support or resources to this event, and does not condone hate speech in any fashion. The City remains steadfast in its commitment to the enforcement of Colorado law, which protects all individuals regardless of race, religion, color, ancestry, national origin, physical or mental disability, or sexual orientation to be secure and protected from fear,

intimidation, harassment and physical harm." The logic of this statement is plain: VDARE practices "hate speech"; it seeks to intimidate, harass, and physically harm individuals based on their race religion, color, ancestry, national origin, physical or mental disability, or sexual orientation; and the City will steadfastly enforce Colorado law against VDARE, and by implication those who cooperate with VDARE, to prevent such evils. In thus insinuating that VDARE was a menace to Colorado law and the thinly-veiled threat to prosecute VDARE and those who cooperated with it, Mayor Suthers' statement not only "encourage[d]" pariah treatment for VDARE but exercised "coercive power" to that end. Furthermore, his statement conspicuously omitted any reference to "groups espousing unpopular opinions (dissident groups)" – such as VDARE -- in its enumeration of groups the City would protect from intimidation, harassment, and physical harm.

Third, the District Court agreed with Appellees' argument that the portion of the statement referencing City "support and resources" was nothing more than a neutral and generic expression of the City's policy of not providing "services or resources to private events." That, however, is not what the statement says. It is *not* generic, but rather singles out the proposed VDARE conference. And it states without qualification that the City "will not provide *any* resources or support to this event," i.e., even if violence or property destruction were to break out, thus presumably differing from the City's asserted generic policy. In any event, even

assuming – what VDARE denies -- that the Appellees did not intend to indicate a withdrawal of all municipal support and resources for the VDARE conference, state action may be predicated on inadvertently communicating that message. *See Marcus*, 394 F.3d at 823. Just as police must be sensitive to the impact of their mere presence at a car repossession (as this Court instructed in *Marcus*), so too must a municipality be sensitive to encouraging a heckler's veto. *Brown v. State of Louisiana*, 383 U.S. 131, 133 n.1 (1966); *Terminiello v City of Chicago*, 337 U.S. 1, 4 (1949).

Fourth, the surrounding circumstances – the overall context – of Mayor Suthers' statements must be considered. As Appellees admitted in their motion to dismiss below, this context was dominated by the dramatic civil unrest that had occurred just days before in Charlottesville, Virginia. The District Court's artificial separation of the Cheyenne Resort's cancellation and the City's announcement does not capture the full impact of this overarching context. It was a context in which the City, as it admits, felt the need to publicly appease concerns from community members that the Charlottesville breakdown of law and order might occur in Colorado Springs. It was a context in which fearful local businesses, including the Cheyenne Resort, needed reassurance that the City would protect their properties and keep the peace, and any statements from the City would be viewed through the lens of that fear and concern. Statements such as those of Mayor Suthers,

accordingly, even if artfully and equivocally expressed, would be interpreted the way they were intended – to cast VDARE as an outlaw that must be shunned.

There remains the question of whether VDARE's allegations plausibly allege a causal link between Mayor Suthers' threat and the Cheyenne Resort's cancellation. Here again a number of factors decisively favor an affirmative answer.

First, as explained above, the natural import of Mayor Suthers' threat was that the City regarded VDARE as *persona non grata* and expected local businesses to do so as well. Any rational local business would heed such an admonition, and there is no basis in VDARE's allegations to conclude the Cheyenne Resort was an outlier in this respect. In this regard, the Tenth Circuit has repeatedly recognized that the reaction generated by a statement is an important element adding context and providing meaning to the statement. *United States v. Stevens*, 881 F.3d 1249, 1253–1254 (10th Cir. 2018); *Nielander v. Board of Cnty. Comm'rs*, 582 F.3d 1155, 1167–68 (10th Cir. 2009). Here VDARE alleges that the Cheyenne Resort was motivated by the fear engendered by the Mayor's statement.

Second, the timing of the Cheyenne Resort's cancellation – i.e., one day after Mayor Suthers' announcement, even though the Cheyenne Resort had been aware of VDARE's ideology for months before that – amply supports an inference of causation. The District Court, without citing a case, held that this timing added nothing to the plausibility of a causal link, but this holding contradicts both common

sense and multiple holdings by this Court. *See, e.g.*, *Candelaria v. EG and G Energy Management, Inc*., 33 F.3d 1259, 1261-62 (10th Cir. 1994) (retaliatory motive can be inferred from fact an adverse employment action follows in close temporal proximity to charges by an employee against his or her employer); *Marx v. Schnuck Markets, Inc*., 76 F.3d 324, 329 (10th Cir. 1996) (same).

Third, there is the issue of basic fairness. Part of the District Court's rationale regarding the causation issue was that VDARE had not alleged with sufficient particularity that the Cheyenne Resort's decision to cancel VDARE's conference was a reaction to Mayor Suthers' announcement and not attributable to some other cause. But VDARE cannot without discovery know the particular facts of how the Cheyenne Resort reacted to the announcement. VDARE is at an informational disadvantage in this regard, and under such circumstances, as many courts have noted, it is contrary to the liberal spirit of the federal rules to dismiss its complaint without discovery. *See, e.g*, *United Technologies Corp. v. Mazer*, 556 F.3d 1260, 1272-73 (11th Cir. 2009) ("[A]t the pleading stage, [plaintiff] could not possibly have had access to the [defendant's] inside information necessary to prove conclusively—or even plead with greater specificity—the factual basis for holding [defendant] liable for Mazer's conduct. That is why we have discovery. . .); *Burrell v. Akinola*, No. 15-CV-3568-B, 2016 WL 3523781 at * 5 (N.D. Tex. June 27, 2016) (same). This would not be voluminous or tenuously relevant discovery, but elementary and

directly relevant document requests to and depositions of the Cheyenne Resort to determine the nature of its response to Mayor Suthers' announcement.

II. THE GOVERNMENT SPEECH DOCTRINE DOES NOT PROTECT A THREAT BY THE GOVERNMENT WHICH AIMS AT THE SUPPRESSION OF DISFAVORED IDEAS.

The District Court, in setting the stage for its holding that the government speech doctrine insulated Mayor Suthers' threat from First Amendment challenge, sought to characterize that threat as a neutral expression of government policy. Frankly, this is scandalous. The Mayor's words were less a "statement" than a thinly veiled threat. It is well settled that threats do not merit First Amendment protection. *Watts v. United States*, 394 U.S. 705, 707 (1969) ("What is a threat must be distinguished from what is constitutionally protected speech."); *Nielander*, 582 F.3d at 1168 ("It is well-established that political hyperbole is protected speech, but speech on political subjects may also contain unprotected threats…. A true threat 'convey[s] a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of [First Amendment protection]." Additionally, Mayor Suthers' statements were *not* generic, neutral expressions of government policy. To the contrary, they were directed specifically at VDARE and its proposed conference. In fact, they had the distinctive features of an adjudication, accusing and then convicting VDARE of practicing hate speech, then imposing the punishment of pariah status and withdrawal of municipal resources. *See, e.g., United States v.*

Iverson, 818 F.3d 1015 (10th Cir. 2016) (concurring opinion) (distinguishing particularistic adjudicative facts from general, policy-like legislative facts).

But most critically, as explained below, the Mayor's threat to withhold police protection from a dissident group with which he disagreed did not come close to satisfying the criteria – the limited and closely circumscribed criteria – for proper invocation of the government speech doctrine.

The so-called government speech doctrine is an outgrowth of cases such as *Rust v. Sullivan*, 500 U.S. 173 (1991), where the government chooses to spend money to fund certain activities or to convey certain messages.[2] In such cases, the government is acting not so much as sovereign but as a purchaser or even as participant in the general marketplace of ideas. Because it is wearing a hat other than sovereignty, the government's conduct is measured by a different set of rules. As Judge Scalia noted, "It is it preposterous to equate the denial of taxpayer subsidy with measures 'aimed at the suppression of dangerous ideas.'" *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 596 (1998). Yet in this case, suppressing allegedly dangerous ideas was precisely what the Mayor seems to have been about (note also the pleadings reference to the City's "Hate Speech" policy – Aplt. App. at 9-10, 12; Amended Compl. at ¶¶ 16, 24-25). And crucially, the Mayor invoked his ability to

[2] See *Legal Service Corp v. Velazquez*, 531 U.S. 533, 541 (2001) for an acknowledgement by the Supreme Court of *Rust* and similar cases in the development of the government speech doctrine.

supply or withhold police protection – perhaps the quintessential government activity associated with sovereignty – as the means of suppression. In covering this flagrant abuse of the First Amendment by invoking the government speech doctrine, the District Court committed exactly the kind of error the Supreme Court has warned against. *E.g., Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 473 (2009) ("Respondent voices *the legitimate concern* that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint.") (emphasis supplied).

In determining whether a statement or action is protected under the government speech doctrine, the Supreme Court has articulated a three-part test: 1) whether the forum has historically been used for government speech; 2) whether the public would take the speech as being conveyed by the government; and 3) who had control over the speech. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 209-210 (2015); *Summum*, 555 U.S. at 470-471, 472; *Matal v. Tam*, -- U.S. --, 137 S. Ct. 1744, 1760 (2017).

The *Matal* case is the Supreme Court's most recent pronouncement on government speech. Finding that none of the factors indicating government speech in *Walker*, *Summum*, or *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550 (2005) were present, the Court held that the United States Patent and Trademark Office's refusal to register marks it deemed offensive was not a form of government speech

and was not exempt from First Amendment challenge. 137 S. Ct. at 1757-60. The Court emphasized that

> [W]hile the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.

Id. at 1758. It warned that *Walker*'s holding allowing state regulation of license plate content "likely mark[s] the outer bounds of the government-speech doctrine." *Id.* at 1760.

Just as the factors supporting government speech were absent in *Matal*, so they are lacking here. Notably, the District Court never articulated the three factor test set forth by the Supreme Court; it simply asserted, as a bald conclusion, that the Mayor's threat was protected by the government speech doctrine.

First, there is nothing in this case analogous to the monuments in *Summum* or the license plates in *Walker* that has historically been treated by the government as a means for it to communicate to the public. Clearly, the government does not usually communicate its messages through private conferences, such as VDARE wished to hold.

Second, in contrast to the three precedents discussed in *Matal*, there is no basis for concluding that the public would perceive VDARE's conference as an expression

of a government speech. To the contrary, over a century of dramatic First Amendment decisions, from *Abrams v. United State*s, 250 U.S. 616 (1919) (Holmes dissent), to *Brandenburg v. Ohio*, 395 U.S. 444 (1969), to *R.A.V. v. City of St. Paul*, 506 U.S. 377, 391 (1992) ("The First Amendment does not permit [the government] to impose special prohibitions on those speakers who express views on disfavored subjects"), to *Snyder v. Phelps*, 562 U.S. 443 (2011), to *Matal*, 137 S. Ct. at 1750 ("speech may not be banned on the ground it expresses ideas that offend"), have embedded not only in American law but in American culture the recognition that the government's neutrality toward and protection of unpopular and offensive speech does not equate to government endorsement of that speech. In fact, the District Court's opinion, unless overturned, would be a step toward undermining that tradition. In any event, even assuming some members of the Colorado Springs community sought to hold the City government responsible for the contents of VDARE's conference, to validate such misinformed agitation as a basis for invoking the government speech doctrine would be the abuse of the doctrine the *Matal* decision warned against.

Third, unlike the messages for beef promotion in *Johanns*, the messages that would have emanated from the cancelled VDARE Conference were not messages established or controlled by the government. Much to the contrary, the Appellees'

improper attempt to control VDARE's messages is at the core of the Appellees' First Amendment violations.

In summary, no finding of government speech can be predicated on the allegations in VDARE's amended complaint. *See also Wandering Dago, Inc. v. Destito*, 879 F.3d 20 (2d Cir. 2018) (applying *Matal* elements and rejecting application of government speech doctrine); *New Hope Family Services, Inc. v. Poole*, --- F.3d -- , 2020 WL 4118201 (2d Cir. July 21, 2020) (same).

III. VDARE ALLEGED A PLAUSIBLE CLAIM FOR FIRST AMENDMENT RETALIATION BY PLEADING THE CHEYENNE RESORT'S FEAR OF BEING LEFT TO CONFRONT VIOLENT PROTESTORS WITHOUT POLICE PROTECTION AND NOTING THE RESORT'S CANCELLATION WITHIN ONE DAY OF THE MAYOR'S THREAT TO WITHHOLD SUCH PROTECTION.

The Tenth Circuit requires three elements to make out a claim for First Amendment retaliation: (1) that the plaintiff "was engaged in constitutionally protected activity"; (2) that the defendant's actions caused the plaintiff "to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity"; and (3) that the "defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct." *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000) (*quoting Lackey v. County of Bernalillo*, 1999 U.S. App. LEXIS 75, No. 97-2265, 1999 WL 2461, at **3 (10th Cir. Jan. 5, 1999)).

The issue here is whether VDARE plausibly pled the causation aspect of the second element: "defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity." The District Court found that VDARE's allegations were too conclusory to flesh out the allegation of causation. Add. at 42; Aplt. App. at 98; cf. Aplt. App. at 11-12, 20; Amended Compl. at ¶¶ ¶¶ 22, 45, 46

The District Court ignored the actual pleadings and then bent over backwards to draw inferences in favor Defendants, which it may not do for the proponent of a motion to dismiss. *Dias v. City and County of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009). Indeed, not only was it reasonable to conclude that Defendants had caused VDARE's injury, but that is perhaps the only plausible reading of the allegations. The Mayor singled out VDARE for invidious treatment and condemned it for a promoting "hate speech." That Mayor did so pursuant to an official "Hate Speech" policy effected by the City. Aplt. App. at 9-10, 12, 15-16; Amended Compl. at ¶¶ ¶¶ 16, 24, 34. In his long list of those whom he would protect – "all individuals regardless of race, religion, color, ancestry, national origin, physical or mental disability, or sexual orientation" – he pointedly omitted those who engaged in dissident speech. *Id.* at ¶12. As a result of the Mayor's threat, the Cheyenne Resort cancelled VDARE's conference because it knew full well, as anyone would, that it could not cope with violent protestors without the benefit of basic police protection.

The pleadings alleged this fully and with particularity. *Id*. at ¶¶ ¶¶ 22, 45, 46. (For the record, the pleadings are also sufficient for the third element, i.e., that defendant's actions were substantially motivated in response to VDARE's exercise of protected conduct. *Id*. at ¶¶ 12, 15, 16, 24, 26, 28, 37.)

It bears stress that the procedural posture of this case is the review of a Rule 12(b) motion. Thus, the court cannot "consider whether there is a genuine issue of material fact," as it would under FRCP 56; it must simply consider whether, accepting VDARE's allegations as true, VDARE has made out a plausible claim. *Straub*, 909 F.3d at 1287. VDARE is well beyond the minimum threshold for a claim that "raises a right to relief above the speculative level… even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely." *Id.*

Finally, in properly alleging First Amendment Retaliation, VDARE also addressed its Equal Protection Claim. "When a First Amendment and equal protection claim are intertwined, the First Amendment provides the proper framework for review of both claims." *Hill v. Kemp*, 645 F. Supp. 2d 992, 1007 (N.D. Okla. 2009) (*citing, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 n.3 (1987)). Cf. Add. at 18, 43-44; Aplt. App. at 74, 109-110.

IV. MAYOR SUTHERS IS NOT ENTITLED TO QUALIFIED IMMUNITY AS A MATTER OF LAW

Having erroneously determined that there was no First Amendment claim, the District Court hastily concluded that the Mayor was entitled to Qualified Immunity. This is error.

The Qualified Immunity inquiry requires two-steps. *Latta v. Keryte*, 118 F.3d 693, 697–98 (10th Cir. 1997); *Tonkovich v. Kansas Board of Regents*, 159 F.3d 504, 516 (10th Cir. 1998). First, the Court looks to "whether the plaintiff has sufficiently alleged that the defendant violated a statutory or constitutional right." *Latta*, 118 F.3d at 698; *Tonkovich*, 159 F.3d at 516. If the answer is yes, the court proceeds to the second step and "determine[s] whether the right was clearly established such that a reasonable person in the defendant's position would have known that his or her conduct violated that right." *Tonkovich*, 159 F.3d at 516. The second step requires an objective standard – it does not matter if the Mayor subjectively believed he was not violating a known right if an objective person would have realized he was violating a known right.

There can be no doubt that Mayor Suthers' conduct violated VDARE's clearly-established First Amendment rights. The government's targeted refusal to provide police protection or any other government "support or resources," made with the specific intent of forcing the cancellation of a lawful private conference because it features speech that the government "does not condone," violates First

Amendment law that has been clearly established for over 50 years. As this Court stated in *National Commodity & Barter Ass'n v. Archer*, 31 F.3d 1521, 1533 (10th Cir. 1994):

> Government actions that 'may have the effect of curtailing the freedom to associate [have been] subject to the closest scrutiny,' since at least 1958 when the Supreme Court decided *NAACP v. Alabama*, 357 U.S. at 460- 61. *See also NAACP v. Button*, 371 U.S. at 428-29 . . . . As stated by the District of Columbia Circuit in 1984: 'the constitutional right of association of the kind in which plaintiffs were engaged was well known, as was the degree of protection from direct interference that such lawful association was to be accorded.' *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984).

Clearly-established First Amendment law, as of 1967, "at a minimum rendered absolutely unconstitutional *any* direct Government interference with persons *because* they participated in organizations, if those organizations did not advocate violence or other lawless action, or *because* they held certain views, if those views were not accompanied by incitement to illegal action or a specific intent to accomplish illegal ends by force and violence." *Hobson*, 737 F.2d at 28 (emphasis in original) (*overruled in part on other grounds by Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993)). "These principles leave no doubt that Government action, taken with the intent to disrupt or destroy lawful organizations, or to deter membership in those groups, *is absolutely unconstitutional*." *Id.* at 29 (emphasis added). That is exactly what VDARE has pled happened in this case. (Aplt. App. at 6-7, 8, 12, 20-21; Amended Compl. at ¶¶ 2, 4

11-12, 26, 46-47). At the time Mayor Suthers made the statement regarding the withholding of any "support or resources" from VDARE's conference based on alleged "hate speech," the U.S. Supreme Court had ruled explicitly that "hate speech" is protected by the First Amendment. *Matal*, 137 S. Ct. at 1764. It had further held that there is no legitimate government interest "in preventing speech expressing ideas that offend," and that the notion that the government has such an interest "strikes at the heart of the First Amendment." *Id*. Thus, it was clear at the time Mayor Suthers' conduct occurred that "a reasonable government employee would understand" singling out VDARE's lawful private gathering for denial of government services that would otherwise be available to it, including police protection, on the ground that the government "does not condone" its constitutionally protected speech, to be a clear violation of First Amendment rights. *National Commodity & Barter Ass'n*, 31 F.3d at 1533.

In *Forsyth County. v. Nationalist Movement*, 505 U.S. 123, 124 (1992), the U.S. Supreme Court held that the First Amendment bars municipalities from varying the permit fee charged to events based on "the cost of police protection from hostile crowds." *Id*. at 135 n. 12. The Court noted, "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Id*. at 134-135 (emphasis added). "This Court has held time and again: 'Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First

Amendment.'" *Id*. at 135 (emphasis added). *Forsyth County* makes clear that the government cannot seek to punish, ban or financially burden speech in any manner because it is controversial or offensive, or because it may require the state to bear "the cost of police protection from hostile crowds." *Id.* at 135 n. 12. The ordinance in Forsyth County capped any security fee at $1,000 per day, meaning that any burden on unpopular speech was extremely modest. The Court held that this was irrelevant. "A tax based on the content of speech does not become more constitutional because it is a small tax." *Id*. at 136. "Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Id*. at 135 (emphasis added). Thus, *Forsyth County* held that a municipal entity could not even impose a $1,000 fee for the cost of policing a highly controversial event, because doing so would discriminate on the basis of content in violation of the First Amendment. If a municipality cannot impose even a small fee on an event based on a good-faith estimate of the police protection it will require, a municipality clearly violates the First Amendment when it decides to withhold police protection entirely from an event based expressly on disapproval of the event's message. "[W]here it is apparent that less direct, and facially legitimate intrusions on plaintiffs' rights violate the Constitution, *it is beyond question* that sweeping, intentional intrusions do so as well." *Hobson*, 737 F.2d at 29 (emphasis added).

In sum, contrary to the District Court, VDARE has sufficiently alleged that the Mayor was violating clearly established Constitutional rights, specifically the rights of Freedom of Speech and Association under the First Amendment. The Supreme Court condemned such covert aggression as long ago as the 1940 case of *Cantwell v. State of Connecticut*, 310 U.S. 296, 308 (1940) ("a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."). Numerous cases within the Tenth Circuit likewise recognize the primacy of First Amendment rights, including *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000) ("We have stated that '[a]ny form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom.'"); *Owen v. Rush*, 654 F.2d 1370, 1379 (10th Cir. 1981). As this Court succinctly put it in *McCormick v. City of Lawrence, KS*, "Further, the right to be free of retaliation is clearly established." 99 Fed. Appx. 169, 175 (10th Cir. 2004).

Finally, once again it bears stress that the procedural posture of this case is the review of a Rule 12(b) motion, where the court must simply consider whether, accepting VDARE's allegations as true and construing them favorably to VDARE, it can rule for the Mayor as a matter of law. *Tonkovich*, 159 F.3d at 517. It cannot do so in light of VDARE's ample allegations.

V. THE DISTRICT COURT SHOULD EXERCISE SUPPLEMENTAL JURISDICTION OVER VDARE'S TORTIOUS INTERFERENCE CLAIM

The District Court declined to exercise supplemental jurisdiction over VDARE's tortious interference claim because, having dismissed VDARE's First Amendment and retaliation claims, it concluded that there were no federal claims in the case. Add. at 44-46; Aplt. App. at 100-102. Given, however, that the court erred in dismissing VDARE's federal claims it should be instructed to reconsider its decision to decline supplemental jurisdiction over VDARE's state law clam.

CONCLUSION

For the reasons stated, VDARE requests that the District Court's opinion and order dismissing VDARE's amended complaint be reversed and the case remanded to that court for further proceedings.

REQUEST FOR ORAL ARGUMENT

As this case presents complex and important issues, VDARE submits that oral argument would benefit the Court and accordingly requests it.

Respectfully Submitted,

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Dated: August 14, 2020

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I hereby certify that with respect to the foregoing:

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Dated: August 14, 2020

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 14, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

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ADDENDUM

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Addendum

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18–cv–03305–CMA–KMT

VDARE FOUNDATION,

Plaintiff,

v.

CITY OF COLORADO SPRINGS, and
JOHN SUTHERS,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Kathleen M. Tafoya

This case comes before the court on Defendants' "Motion to Dismiss First Amended Complaint" (Doc. No. 24 [Mot.], filed April 17, 2019), to which Plaintiff filed a response (Doc. No. 32 [Resp.], filed May 24, 2019), and Defendants filed a reply (Doc. No. 33 [Reply], filed June 7, 2019).

STATEMENT OF THE CASE

Plaintiff is a non-profit educational organization whose mission is education on "the unsustainability of current U.S. immigration policy" and "whether the U.S. can survive as a nation-state." (First Am. Compl., ¶ 2.) On March 31, 2017, Plaintiff reserved the Cheyenne Mountain Resort for a conference event featuring guest speakers and activities on subjects related to its mission. (*Id.*, ¶ 11.) On August 14, 2017, Defendant Mayor John Suthers and the

City of Colorado Springs issued the following public statement referencing the announcement of Plaintiff's conference at the Cheyenne Mountain Resort:

> The City of Colorado Springs does not have the authority to restrict freedom of speech, nor to direct private businesses like the Cheyenne Mountain Resort as to which events they may host. That said, I would encourage local businesses to be attentive to the types of events they accept and the groups that they invite to our great city.
>
> The City of Colorado Springs will not provide any support or resources to this event, and does not condone hate speech in any fashion. The City remains steadfast in its commitment to the enforcement of Colorado law, which protects all individuals regardless of race, religion, color, ancestry, national origin, physical or mental disability, or sexual orientation to be secure and protected from fear, intimidation, harassment and physical harm.

(*Id.*, ¶ 12.) Plaintiff contends that this statement "amounted to a refusal to provide city services, including police protection, for the Conference, due to . . . its controversial subject matter, [Plaintiff's] controversial viewpoints and published content in opposition to current immigration policies, . . . and the negative media attention that the Conference had attracted." (*Id.*, ¶ 13.)

On August 15, 2017, Cheyenne Mountain Resort issued a statement announcing it would not host Plaintiff's Conference and cancelled its contract with Plaintiff. (*Id.*, ¶ 14.) Plaintiff claims that Defendants intended to deprive it of its rights under the First Amendment to freedom of speech, assembly, and association. (*Id.*, ¶ 17.)

Plaintiff asserts three claims against the defendants. In Count One, Plaintiff alleges Defendants violated its "rights to freedom of speech and freedom of association as guaranteed by the First Amendment to the Constitution of the United States of America, [and] equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America" pursuant to 42 U.S.C. § 1983. (*Id.*, ¶ 19.) In Count Two, Plaintiff alleges Defendants retaliated against it for its "history of engaging in . . . publishing, speaking, and

engaging in debate" by "characterize[ing] Plaintiff's constitutionally protected activity as 'Hate Speech,' and urg[ing] local businesses to 'be attentive to the types of events that they accept and the groups that they invite to our great city.' " (*Id.*, ¶ 37.) In Count Three, Plaintiff asserts a common law claim for Intentional Interference with Contract based on Defendants' use of "improper means to pressure the Resort into cancelling its contract with Plaintiff." (*Id.*, ¶ 45.)

Defendants move to dismiss the claims against them in their entirety pursuant to Federal Rules of Procedure 12(b)(1)[1] and (6). (Mot.)

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003) (quotation marks omitted).

"A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff." *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991). "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) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pleaded facts which allow "the court to draw the reasonable inference that the

[1] The court does not recommend dismissal on the basis of lack of subject matter jurisdiction.

defendant is liable for the misconduct alleged." *Id.* The *Iqbal* evaluation requires two prongs of analysis. First, the court identifies "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusion, bare assertions, or merely conclusory. *Id*. at 679–81. Second, the Court considers the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id*. at 681. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id*. at 679.

Notwithstanding, the court need not accept conclusory allegations without supporting factual averments. *S. Disposal, Inc., v. Texas Waste*, 161 F.3d 1259, 1262 (10th Cir. 1998). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S at 678. Moreover, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does the complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " *Id.* (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.' " *Id.* (citation omitted).

ANALYSIS

A. State Action and First Amendment Free Speech/Association Claim

Defendants argue that private conduct that is not taken under color of state law is not actionable and that Cheyenne Mountain Resort's actions cannot be attributed to Defendants. (Mot. at 5–7.)

The Supreme Court has stated that it is a

> judicial obligation . . . to not only " 'preserv[e] an area of individual freedom by limiting the reach of federal law' and avoi[d] the imposition of responsibility on a State for conduct it could not control," [*Nat'l Collegiate Athletic Ass'n v.*] *Tarkanian*, [488 U.S. 179, 191 (2001)](quoting *Lugar* [*v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982)], but also to assure that constitutional standards are invoked "when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains," *Blum* [*v. Yaretsky*, 457 U.S. 991, 1004 (1982)](emphasis in original).

Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (first two alterations in *Brentwood Acad.*).

Most rights under the Constitution secure protection only against infringement through state action. *See*, *e.g.*, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) ("[M]ost rights secured by the Constitution are protected only against infringement by governments."). However, private parties' conduct may be deemed to be state action when "the conduct allegedly causing the deprivation of a federal right may be fairly attributable to the State." *Lugar*, 457 U.S. at 937. Whether the conduct may in fact be "fairly attributed" to the state requires a two-part inquiry. *Id.* "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Id.* "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* *See West v. Atkins*, 487 U.S. 42, 48 (1988) (to state a claim under § 1983, the plaintiff must show: (i) a deprivation of a right that the federal Constitution or federal laws secure; and (ii) that a person acting under color of state law caused the deprivation).

The Supreme Court has applied four different tests for courts to use in determining whether conduct by an otherwise private party is state action:

> [(1) when] there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself[; (2) when] the state has so far insinuated itself into a position of

> interdependence with the private party that there is a symbiotic relationship between them[; (3) when] a private party is a willful participant in joint activity with the State or its agents . . .. [; and (4) when] a private entity that exercises powers traditionally exclusively reserved to the State . . . .

Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1447 (10th Cir. 1995) (internal citations and quotation marks omitted).

Defendants argue that Plaintiff fails to meet any of the tests. In response, Plaintiff argues only that it meets the nexus test. "Under the nexus test, a plaintiff must demonstrate that 'there is a sufficiently close nexus' between the government and the challenged conduct such that the conduct 'may be fairly treated as that of the State itself.' " *Gallagher*, 49 F.3d at 1448 (quoting *Jackson*, 419 U.S. at 351). "[A] state normally can be held responsible for a private decision 'only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.' " *Id.* (quoting *Blum*, 457 U.S. at 1004). The Supreme Court has established that the existence of governmental regulations, standing alone, does not provide the required nexus. *Blum*, 457 U.S. at 1004. Moreover, "[m]ere approval or acquiescence in the initiatives of a private party is not sufficient to justify the State responsible for those initiatives . . . ." *Id.* at 1004-05.

Plaintiff argues, citing a single case—*Jackson v. Curry Cty.*, 343 F. Supp 3d 1103 (D.N.M. 2018)—that it satisfies the nexus test. (Resp. at 4-5.) In *Jackson*, the plaintiff sued Curry County, which owned the Curry County Fairgrounds. *Id.* at 1105. Curry County executed a management agreement with a private company to manage and operate the fairgrounds. *Id.* The management company was responsible for booking events and managing security and crowd control. *Id.* at 1105-06. The management company contracted with an entertainment company to put on a concert at the fairgrounds' event center. *Id.* at 1106. The day before the concert, the

Curry County attorney sent an email to the general manager of the events center, who was employed by the management company, expressing his disapproval and concerns about the concert promoters' criminal records and referenced cancelling the concert. *Id.* Several more emails were sent directly between representatives of the management company, the Curry County attorney, and others. *Id.* at 1106-07. The next morning, representatives of the management company, the Curry County attorney, the county manager, the county sheriff, and a deputy sheriff attended a conference call to discuss security for the concert. *Id.* at 1107. Despite the county manager's belief that all security concerns had been addressed and that the concert would be held as scheduled that evening, the other county representatives expressed their continued concerns. *Id.* at 1107-08. The management company made the decision to cancel the concert based on the concerns expressed by the county representatives. *Id.* at 1108. The general manager of the events center addressed a memo to the entertainment company on Curry County Events Center letterhead advising that the concert had been canceled due to safety concerns. *Id.*

The *Jackson* court addressed whether the County was sufficiently involved in the private management company's decision to cancel the concert to treat the County's conduct as state action for purposes of Section 1983. *Id.* at 1110. The court held that the cancellation of the concert "directly resulted" from the specific actions of the county representatives in "repeatedly expressing disapproval and concerns regarding the concert," and the evidence of a "specific causal connection" was sufficient to establish the nexus required to find state action. *Id.* at 1113.

This case is distinguishable from *Jackson.* In *Jackson*, the county contracted with the management company to manage events at a county-owned facility. The county representatives had several instances of direct contact with the management company by email and by telephone

prior to the concert's cancellation in which they repeatedly expressed their concerns and specifically referenced cancelling the concert. Hours after the conference call, the management company canceled the concert for the reasons expressed by the county representatives. Finally, the general manager notified the concert promotor by memorandum on County Events Center letterhead that the concert had been canceled for the reasons expressed by the county representatives.

Here, there are no allegations that the City had any contractual relationship with, control over, or direct contact with Cheyenne Mountain Resort before it canceled the conference. Defendant Suthers' statement noted the City's inability "to direct private businesses like the Cheyenne Mountain Resort as to which events they may host." (Compl., ¶ 12.) Finally, the Complaint alleges only one statement made by Defendant Suthers regarding the conference, as opposed to the repeated expressions of disapproval by county representatives noted by the *Jackson* court. At best, Defendant Suthers' statement amounts to "[m]ere approval of or acquiescence" in Cheyenne Mountain Resort's cancellation of the conference, which "is not sufficient to justify holding the [City Defendants] responsible." *Blum*, 457 U.S. at 1004.

Because Plaintiff has failed to satisfy the nexus test, the actions of Cheyenne Mountain Resort in cancelling Plaintiff's convention cannot be attributed to the defendants, and Plaintiff's First Amendment free speech/association claim should be dismissed.

B. Equal Protection Claim

Defendants argue that the Amended Complaint's cursory mention of equal protection is insufficient to survive a motion to dismiss. (Mot. at 11.) Plaintiff does not respond to this argument.

"[T]o assert a viable equal protection claim, [Plaintiff] must first make a threshold showing that [it] w[as] treated differently from others who were similarly situated to [it]." *Barney v. Pulsipher*, 143 F.3d 1299, 1312 (10th Cir. 1998). "A plaintiff in an equal protection action has the burden of demonstrating discriminatory intent." *Watson v. City of Kansas City, Kan.*, 857 F.2d 690, 694 (10th Cir. 1988). Here, Plaintiff has failed to allege any facts to support its contention that it was denied equal protection rights.

Accordingly, Plaintiff's equal protection claim should be dismissed. *See Iqbal*, 556 U.S. at 678 (A complaint is insufficient "if it tenders naked assertions devoid of further factual enhancement.").

C. Retaliation Claim

Defendants argue that Plaintiff fails to state a retaliation claim. (Mot. at 8–11.) To state a first amendment retaliation claim outside of the employment context, a plaintiff must allege "(1) that the plaintiff was engaged in constitutionally protected activity; (2) that the defendant[s'] actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing in that activity; and (3) that the defendant[s'] adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct." *Leverington v. City of Colorado Springs*, 643 F.3d 719, 729 (10th Cir. 2011). Defendants argue that Plaintiff fails to satisfy the second and third prongs of a retaliation claim. The court need not address the second prong because it finds Plaintiff has failed to satisfy the third prong.

Plaintiff alleges it reserved the event space at the Cheyenne Mountain Resort on or about March 31, 2017. (Am. Compl., ¶ 11.) The Complaint is devoid of any information about the specific dates on which the conference was to be held. Approximately four and one-half months

after Cheyenne Mountain Resort contracted to host the conference, on August 14, 2017, Defendant John Suthers issued his public statement. (*Id.*, ¶ 12.) Plaintiff alleges that Defendants refused to provide city services for the conference due to the conference's "controversial subject matter, VDARE's controversial viewpoints and published content in opposition to current immigration policies, which Defendants termed 'hate speech,' and the negative media attention that the Conference had attracted." (*Id.*, ¶ 13.) However, Plaintiff fails to allege any facts in support of this conclusory allegation.

Plaintiff appears to rely on temporal proximity to infer intent. However, temporal proximity between Plaintiff's speech and alleged adverse action is "insufficient, without more, to establish retaliatory motive." *Butler v. City of Prairie Village*, 172 F.3d 736, 746 (10th Cir. 1999). The Amended Complaint is devoid of any information about specific media reports or published content of which Defendant Suthers had specific knowledge *prior to* the August 14, 2017 statement. As such, Plaintiff has failed to allege even temporal proximity between Plaintiff's protected speech and the Defendants' alleged retaliatory action. Moreover, the court finds Plaintiff's Amended Complaint, aside from conclusory allegations, fails to allege a retaliatory motive, much less one that was the "but for" cause of the Defendants' statement. *Allen*, 2012 WL 1957298, at *6.

Because Plaintiff has failed to satisfy at least one element of a First Amendment retaliation claim, the claim should be dismissed.

D. Qualified Immunity

Plaintiff sues Defendant Suthers in his individual capacity. Qualified immunity is an affirmative defense against § 1983 damage claims available to public officials sued in their

individual capacities. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The doctrine protects officials from civil liability for conduct that does not violate clearly established rights of which a reasonable person would have known. *Id.* As government officials at the time the alleged wrongful acts occurred, being sued in their individual capacities, the defendants are entitled to invoke a qualified immunity defense to Plaintiff's claims. *See id.* at 231; *Johnson v. Jones*, 515 U.S. 304, 307 (1995) (noting that police officers were "government officials—entitled to assert a qualified immunity defense"). In resolving a motion to dismiss based on qualified immunity, a court looks at: "[1] whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right, and [2] whether the right at issue was clearly established at the time of defendant's alleged misconduct." *Leverington v. City of Colo. Springs*, 643 F.3d 719, 732 (10th Cir. 2011) (quoting *Pearson*, 555 U.S. at 232) (internal quotations omitted). Once a defendant invokes qualified immunity, the burden to prove both parts of this test rests with the plaintiff, and the court must grant the defendant qualified immunity if the plaintiff fails to satisfy either part. *Dodds v. Richardson*, 614 F.3d 1185, 1191 (10th Cir. 2010). Where no constitutional right has been violated "no further inquiry is necessary and the defendant is entitled to qualified immunity." *Hesse v. Town of Jackson, Wyo.*, 541 F.3d 1240, 1244 (10th Cir. 2008) (quotations omitted).

As the court has determined Plaintiff has failed to state an equal protection or First Amendment claim, Defendant Suthers is entitled to qualified immunity on those claims.

E. Supplemental Jurisdiction

Plaintiff's remaining claim is a common law claim for Intentional Interference with Contract.

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citations omitted). If a court does not have jurisdiction over the subject matter of an action, the court must dismiss the action. *Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1016 (10th Cir. 2013).

This court recommends herein that Plaintiff's constitutional claims be dismissed, and, thus, there is no basis for federal question jurisdiction. The pretrial dismissal of all federal claims—leaving only state-law claims—"generally prevents a district court from reviewing the merits of the state law claim[s]." *McWilliams v. Jefferson Cnty.*, 463 F.3d 1113, 1117 (10th Cir. 2006); s*ee also* 28 U.S.C. § 1367(c)(3) (stating that a district court may decline to exercise supplemental jurisdiction over state-law claims if "the district has dismissed all claims over which it has original jurisdiction"). This is not an inflexible rule, however, and a district court has discretion to adjudicate the merits of the state-law claims when "the values of judicial economy, convenience, fairness, and comity" indicate that retaining jurisdiction over the state-law claims would be appropriate. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349–50 (1988). Nevertheless, "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." *Cohill*, 484 U.S. at 350 n.7; *see also Thatcher Enters. v. Cache Cnty. Corp.*, 902 F.2d 1472, 1478 (10th Cir. 1990) ("Notions of comity and federalism demand that a state court try its own lawsuits, absent compelling reasons to the contrary.").

Here, because the court recommends dismissal of Plaintiff's federal claims, the court also recommends that the District Court decline to exercise jurisdiction over Plaintiff's state law claim.

WHEREFORE, for the foregoing reasons, this court respectfully

RECOMMENDS that "Defendants' "Motion to Dismiss First Amended Complaint" (Doc. No. 24) be **GRANTED** as follows:

1. Plaintiff's First Amendment freedom of speech/ freedom of association claim, equal protection claim, and First Amendment retaliation claim should be dismissed with prejudice for failure to state a claim upon which relief can be granted;
2. The District Court should decline supplemental jurisdiction over Plaintiff's Intentional Interference with Contract claim.

ADVISEMENT TO THE PARTIES

Within fourteen days after service of a copy of this Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings of fact, legal conclusions, and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *Griego v. Padilla (In re Griego)*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for de novo review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar de novo review by the district judge of the magistrate judge's

proposed findings of fact, legal conclusions, and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings of fact, legal conclusions, and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (holding that the district court's decision to review magistrate judge's recommendation de novo despite lack of an objection does not preclude application of "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (finding that cross-claimant waived right to appeal certain portions of magistrate judge's order by failing to object to those portions); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (finding that plaintiffs waived their right to appeal the magistrate judge's ruling by failing to file objections). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (holding that firm waiver rule does not apply when the interests of justice require review).

Dated this 29th day of January, 2020.

BY THE COURT:

Kathleen M. Tafoya
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello

Civil Action No. 18-cv-03305-CMA-KMT

VDARE FOUNDATION,

Plaintiff,

v.

CITY OF COLORADO SPRINGS, and
JOHN SUTHERS,

Defendants.

ORDER ADOPTING THE RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE KATHLEEN M. TAFOYA

This matter is before the Court on review of the Recommendation by United States Magistrate Judge Kathleen M. Tafoya (Doc. # 35), wherein she recommends that this Court grant Defendants City of Colorado Springs and John Suthers' (collectively, the "Defendants") Motion to Dismiss First Amended Complaint (Doc. # 24). On February 12, 2020, Plaintiff VDARE Foundation ("VDARE") filed an Objection to the Recommendation. (Doc. # 36.) Defendants responded to the Objection on March 4, 2020 (Doc. # 39). For the following reasons, VDARE's objections are overruled and the Court affirms and adopts the Recommendation.

I. BACKGROUND

A. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Magistrate Judge Tafoya provided a thorough recitation of the factual and procedural background in this case. The Recommendation is incorporated herein by reference, *see* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b), and the facts will be repeated only to the extent necessary to address Plaintiff's objections.

VDARE is a non-profit educational organization whose mission is to educate on two main issues: (1) "the unsustainability of current U.S. immigration policy[,]" and (2) "whether the U.S. can survive as a nation-state." (Doc. # 13 at 2, ¶ 2.) On or about March 31, 2017, VDARE reserved the Cheyenne Mountain Resort (the "Cheyenne Resort") for a conference event (the "Conference"). (*Id.* at 4, ¶ 11.) VDARE alleges that Cheyenne Resort was "fully aware of VDARE and its mission, as well as the potential for media attention and possible protests arising from the Conference." (*Id*.)

Nearly five months later, on August 14, 2017, Defendants, through Mayor Suthers, issued the following public statement:

> The City of Colorado Springs does not have the authority to restrict freedom of speech, nor to direct private businesses like the Cheyenne Mountain Resort as to which events they may host. That said, I would encourage local businesses to be attentive to the types of events they accept and the groups that they invite to our great city.
>
> The City of Colorado Springs will not provide any support or resources to this event, and does not condone hate speech in any fashion. The City remains steadfast in its commitment to the enforcement of Colorado law, which protects all individuals regardless of race, religion, color, ancestry, national origin, physical or mental disability, or sexual orientation to be secure and protected from fear, intimidation, harassment and physical harm.

(*Id.* at 4, ¶ 12) (the "Statement"). The next day, Cheyenne Resort announced that it would not host the Conference and cancelled its contract with VDARE. (*Id.* at 5, ¶ 14.) Sometime after Cheyenne Resort cancelled the Conference, VDARE alleges that Mayor Suthers "publicly expressed satisfaction that the Conference had been cancelled." (*Id.*)

VDARE alleges that Defendants' Statement that Colorado Springs "will not provide any support or resources to this event" constitutes a "refusal to provide city services, including police protection, for the Conference due to, among other things, its controversial subject matter, VDARE's controversial viewpoints and published content in opposition to current immigration policies, which Defendants termed "hate speech[.]" (*Id.* at 5, ¶ 13.) Further, VDARE asserts that Defendants "either knew or should have known" that the Conference "might give rise to protests or unrest by those who may not agree with VDARE's purpose, viewpoints or statements[,]" and, as such, Defendants' Statement, "given the obvious and foreseeable need for municipal police and fire services, had the effect of depriving VDARE of its First Amendment rights, chilling its speech on matters of public concern, and depriving VDARE and potential attendees of the conference from communicating on important national issues . . . ." (*Id.* at 6, ¶ 17.) As a result, VDARE alleges that Defendants' Statement in conjunction with Cheyenne Resort's cancellation of the Conference give rise to constitutional and common law tort claims. *See* (*id.* at 6–18).

On March 22, 2019, VDARE filed its Amended Complaint in which it asserts three claims for relief against Defendants: (1) violation of VDARE's First Amendment freedom of speech and association rights and the Equal Protection Clause under 42

U.S.C. § 1983; (2) First Amendment retaliation; and (3) intentional interference with a contract. (*Id.*)

On April 17, 2019, Defendants filed a Motion to Dismiss the First Amended Complaint (Doc. # 24) arguing that VDARE failed to state a claim as to its First Amendment, Equal Protection Clause ("EPC"), and retaliation claims under Federal Rule of Civil Procedure 12(b)(6), and that the Colorado Governmental Immunity Act ("CGIA") bars VDARE's tort claim. (*Id.* at 5–14.) VDARE responded to Defendants' Motion to Dismiss on May 24, 2019, and contends that it set forth plausible claims. (Doc. # 32 at 1–2.) Specifically, VDARE posits that it adequately pleaded state action by alleging that it was Defendants' Statement itself that caused Cheyenne Resort to cancel the Conference, which formed the basis of its First Amendment and retaliation claims. (*Id.* at 3–6.) Moreover, VDARE suggests that its tort claim against Mayor Suthers survives under the CGIA because it pleaded sufficient factual allegations showing that Mayor Suthers' made the Statement in a "willful and wanton" manner as he "knew" that his conduct "violated Plaintiff's First Amendment rights and placed the rights and safety of conference-goers and the Resort's patrons and employees at serious risk." (*Id.* at 19.) VDARE did not address its EPC claim. On June 6, 2019, Defendants replied and reiterated that VDARE's omission of factual allegations in support of elements necessary to establish First Amendment and retaliation claims and conclusory allegations about Mayor Suthers' willful and wanton conduct require this Court to dismiss Amended Complaint. (Doc. # 33.)

B. THE MAGISTRATE JUDGE'S RECOMMENDATION

As discussed in greater detail below, Magistrate Judge Tafoya issued her Recommendation that the Court grant Defendants' Motion to Dismiss on January 29, 2020. (Doc. # 35.) The Magistrate Judge recommended that the Court grant Defendants' Motion to Dismiss as to VDARE's First Amendment claim because, under the Tenth Circuit's nexus test, VDARE failed to allege facts showing that Cheyenne Resort's cancellation of the Conference can be "attributed to the [D]efendants[.]" (*Id.* at 8, 9–11.) Because state action was not adequately pleaded, Magistrate Judge Tafoya determined that VDARE did not sufficiently plead violations of its First Amendment rights. (*Id.* 5–8.) Given that VDARE did not adequately plead a constitutional violation, the Magistrate Judge concluded that Mayor Suthers was entitled to qualified immunity. (*Id.* at 10–11.) Moreover, she determined that VDARE's retaliation claim should be dismissed because VDARE failed to adequately plead the third element of that claim. (*Id.* at 9–10.) She also agreed with Defendants that VDARE's EPC claim should be dismissed for failure to state a claim based on VDARE's failure "to allege any facts to support its contention that it was denied equal protection rights." (*Id.* at 9.) Because the Magistrate Judge recommended dismissal of VDARE's federal claims, she further recommended that this Court decline to exercise jurisdiction over VDARE's tortious interference claim. (*Id.* at 11–12.)

On February 12, 2020, VDARE filed an Objection[1] to the Recommendation as to all three claims, although VDARE did not address the EPC claim. (Doc. # 36.) Because VDARE argues that the Magistrate Judge erred with respect to its First Amendment and retaliation claims, it also asserts that the Court need not decline to consider the state law claim. (*Id.* at 16.) Defendants responded to VDARE's Objection on March 4, 2020. (Doc. # 39.) For the following reasons, the Court adopts the Recommendation.

II. STANDARD OF REVIEW

A. REVIEW OF A RECOMMENDATION

When a magistrate judge issues a recommendation on a dispositive matter, Federal Rule of Civil Procedure 72(b)(3) requires that the district judge "determine *de novo* any part of the magistrate judge's [recommended] disposition that has been properly objected to." An objection is properly made if it is both timely and specific. *United States v. One Parcel of Real Property Known As 2121 East 30th Street*, 73 F.3d 1057, 1059 (10th Cir. 1996). In conducting its review, "[t]he district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

[1] VDARE is undeniably wrong when it asserts that its Objection "is not subject to, or is an exception to, the page limitations set forth in the Court's Practice Standards. (Doc. # 36 at 1.) The Court's Civil Practice Standard 10.1(d)(1) expressly provides: "[e]xcept for motions for summary judgment, **all motions, objections** (including objections to the recommendations or orders of United States Magistrate Judges), and **responses shall not exceed 15 pages**." (Emphasis added). Thus, it baffles this Court as to how VDARE could both violate this Court's Civil Practice Standards and represent a position that is incontrovertibly contradicted by the plain language of the very practice standard to which VDARE cites. And VDARE's explanation in its *Post Factum* Motion to Exceed Page Limitation (Doc. # 41) is unsatisfactory. Nonetheless, given the dispositive nature of the Recommendation, the Court declines to strike VDARE's excess pages. However, VDARE is admonished that any future noncompliance with this Court's Civil Practice Standards may result in summary denials or other sanctions.

When there are no objections filed to a magistrate judge's recommendation, "the district court is accorded considerable discretion with respect to the treatment of unchallenged magistrate reports. In the absence of timely objection, the district court may review a magistrate [judge's] report under any standard it deems appropriate." *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991).

B. RULE 12(B)(6)

Rule 12(b)(6) provides that a defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003) (citations and quotation marks omitted).

"A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff." *Hall*, 935 F.2d at 1198. "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 Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility means that the plaintiff pleaded facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. "Plausibility refers 'to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible.'"

Barrett-Taylor v. Birch Care Community, LLC, Case No. 19-cv-02454-MEH, 2020 WL 1274448, at *2 (D. Colo. Mar. 17, 2020) (quoting *S.E.C. v. Shields*, 744 F.3d 633, 640 (10th Cir. 2014). "The nature and specificity of the allegations required to state a plausible claim will vary based on context." *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 878 (10th Cir. 2017). Although the "Rule 12(b)(6) standard does not require that a plaintiff establish a prima facie case in a complaint, the elements of each alleged cause of action may help to determine whether the plaintiff has set forth a plausible claim." *Barrett-Taylor*, 2020 WL 1274448, at *2 (citing *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012)).

The *Iqbal* evaluation requires two prongs of analysis. First, the court identifies "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Iqbal*, 556 U.S. at 679–81. Second, the Court considers the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id*. at 681. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id*. at 679.

However, the court need not accept conclusory allegations without supporting factual averments. *S. Disposal, Inc., v. Texas Waste*, 161 F.3d 1259, 1262 (10th Cir. 1998). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. "Nor does the complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Id.* (citation omitted). Indeed, the complaint must provide

"more than labels and conclusions" or merely "a formulaic recitation of the elements of a cause of action," so that "courts are not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555 (internal quotations omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (citation omitted). Additionally, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint has made an allegation, "but it has not shown that the pleader is entitled to relief." *Id.* at 679 (internal quotation marks and citations omitted). This pleading standard ensures "that a defendant is placed on notice of his or her alleged misconduct sufficient to prepare an adequate defense" and avoids "ginning up the costly machinery associated with our civil discovery regime on the basis of a largely groundless claim." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011).

III. DISCUSSION

A. RELEVANT LAW

1. State Action Doctrine and Section 1983 Claims

The Fourteenth Amendment provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. "That language establishes an 'essential dichotomy' between governmental action, which is subject to scrutiny under the Fourteenth Amendment, and private conduct, which 'however discriminatory or wrongful,' is not subject to the Fourteenth Amendment's prohibitions." *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442,

1446 (10th Cir. 1995) (quoting *Jackson v. Metro. Edison Co.,* 419 U.S. 345, 349 (1974)) (internal quotation omitted). The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble[.]" U.S. Const. amend. I. The Fourteenth Amendment renders the First Amendment's Free Speech Clause applicable against the States. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). "The text and original meaning of those Amendments, as well [the Supreme] Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgement of speech. The Free Speech Clause does not prohibit *private* abridgement of speech." *Id.* (collecting cases) (emphasis in original).

Pursuant to the text and structure of the Constitution, the Supreme Court's "state-action doctrine distinguishes the government from individuals and private entities." *Id.* (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assn.*, 531 U.S. 288, 295–96 (2001)). There is a judicial obligation "not only to preserv[e] an area of individual freedom by limiting the reach of federal law and avoi[d] the imposition of responsibility on a State for conduct it could not control," *Brentwood Acad.*, 531 U.S. at 295 (quoting *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988)) (internal quotations omitted), "but also to assure that constitutional standards are invoked when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complaints," *id.* (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)) (internal quotation marks omitted) (emphasis in original). "Thus, we say that state action may be found if, though only if, there is such a 'close nexus between the State and the

challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Id.* (quoting *Jackson*, 419 U.S. at 349).

42 U.S.C. § 1983 provides a remedy for constitutional violations committed by state officials. There are two elements to a Section 1983 claim—first, a plaintiff must "show that they have been deprived of a right secured by the Constitution and the laws of the United States[,]" and second, a plaintiff must "show that defendants deprived them of this right acting under color of [] statute of the state." *Johnson v. Rodrigues*, 293 F.3d 1196, 1202 (10th Cir. 2002). The Supreme Court has articulated a two-part test to determine whether a private party's action constitutes state action: (1) "the deprivation must be caused by the exercise of some right to privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the state is responsible . . . [(2)] the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state." *Brill v. Correct Care Solutions, LLC*, 286 F. Supp. 3d 1210, 1216 (D. Colo. 2018) (quoting *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 937 (1982)). Accordingly, conduct that constitutes state action under the First and Fourteenth Amendments necessarily constitutes conduct "under color of law" pursuant to Section 1983—even if a private actor commits the conduct. *Id.* (citing *Lugar*, 457 U.S. at 935).

The Supreme Court has observed that a fundamental threshold issue with constitutional claims predicated upon private conduct is whether such conduct can be considered truly the action of the State. *See Manhattan Cmty. Access Corp.*, 139 S. Ct.

at 1929. Although there are several tests for determining whether state action is present, the parties do not dispute that the "nexus test" applies to instant action. *Brill*, 286 F. Supp. 3d at 1215; (Doc. # 35 at 6; Doc. # 32 at 3; Doc. # 39 at 4). Under the nexus test, a plaintiff must demonstrate that "there is a sufficiently close nexus" between the government and the challenged conduct such that the conduct "may be fairly treated as that of the State itself." *Gallagher*, 49 F.3d at 1448. Under this approach, a state normally can be held responsible for a private decision "only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* (quoting *Blum*, 457 U.S. at 1004). This test ensures that the state will be held liable for constitutional violations only if it is responsible for the specific conduct of which the plaintiff complains." *Id.* Although the "required inquiry is fact-specific[,]" the Supreme Court has articulated general principles guiding whether the requisite nexus exists:

- The existence of governmental regulations, standing alone, does not provide the required nexus. *Blum*, 457 U.S. at 1004 (citing *Jackson,* 419 U.S. at 350);
- The fact that a private entity contracts with the government or receives governmental funds or other kinds of governmental assistance does not automatically transform the conduct of that entity into state action. *Rendell–Baker v. Kohn,* 457 U.S. 830, 840–42, (1982); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.,* 483 U.S. 522, 544 (1987) ("The Government may subsidize private entities without assuming constitutional responsibility for their actions.");
- Under the nexus test, "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." *Blum*, 457 U.S. at 1004–05.

Gallagher, 49 F.3d at 1448.

2. Government Speech

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009) (citing *Johanns v. Livestock Marketing Assn.,* 544 U.S. 550, 553 (2005) ("[T]he Government's own speech ... is exempt from First Amendment scrutiny"); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94, 139, n. 7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression")). "A government entity has the right to 'speak for itself.'" *Id.* (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth,* 529 U.S. 217, 229 (2000)). The Government is "entitled to say what it wishes," *id.* at 467–78 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 833 (1995)), "and to select the views that it wants to express[.]" *Id.* (collecting cases). Indeed, "[i]t is the very business of government to favor and disfavor points of view[.]" *Nat'l Endowment for Arts v. Finley,* 524 U.S. 569, 598 (1998) (Scalia, J., concurring).

However, there are restraints on government speech. "For example, government speech must comport with the Establishment Clause. The involvement of public officials in advocacy may be limited by law, regulation, or practice. And of course, a government entity is ultimately 'accountable to the electorate and the political process for its advocacy.'" *Id.* at 468 (quoting *Southworth,* 529 U.S. at 235). "If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Id.* The Government's freedom to speak "in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech."

Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015). "And the Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech." *Id.* at 2246.

When the "government speaks it is entitled to promote a program, to espouse a policy, or take a position. In doing so, it represents its citizens and it carries out its duties on their behalf." *Id.* Indeed, the Free Speech Clause "helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate." *Id.* at 2245 (citing *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

B. ANALYSIS

1. First Amendment Claim

VDARE's First Amendment claim requires it to establish that the violative conduct was committed by a state actor. The parties vehemently dispute that the conduct in the instant case was committed by a state actor. Defendants contend that the conduct in question is Cheyenne Resort's cancellation of the Conference. (Doc. # 24 at 5–7; Doc. # 39 at 3–4.) VDARE argues that Defendants' Statement amounted to unconstitutional conduct. (Doc. # 32 at 3–6; Doc. # 36 at 5–12.) Magistrate Judge Tafoya focused on the Cheyenne Resort's cancellation of the Conference and whether such cancellation could be "attributed" to Defendants. (Doc. # 35 at 8.) Determining that VDARE failed to plead sufficient factual allegations showing that the cancellation of the Conference could be attributed to Defendants under the nexus test, the Magistrate Judge recommended that

the Court dismiss Plaintiff's First Amendment claim. (*Id.* at 8.) However, applying *de novo* review, the Court finds that VDARE fails to adequately allege that either Cheyenne Resort's cancellation or Defendants' Statement amounts to unconstitutional state action for purposes of stating a plausible First Amendment claim.

a. State Action Claim Predicated Upon Cheyenne Resort's Cancellation

To begin, Cheyenne Resort is a private party. If Cheyenne Resort's cancellation is the conduct in question, VDARE must plead factual allegations showing that Cheyenne Resort's cancellation constituted state action. *Brill*, 286 F. Supp. 3d at 1216 (quoting *Lugar*, 457 U.S. at 937). This is so because the Free Speech Clause "does not prohibit *private* abridgement of speech." *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1928. "In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action." *Nat'l Collegiate Athletic Ass'n*, 488 U.S. at 179. Indeed, the "Court 'ask[s] whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.'" *Jackson v. Curry Cty.*, 343 F. Supp. 3d 1103, 1110 (D.N.M. 2018) (quoting *Nat'l Collegiate Athletic Ass'n*, 488 U.S. at 179). Both parties agree that the nexus test applies,[2] and as such, a plaintiff must demonstrate that "there is a sufficiently close

[2] The Court notes that VDARE incorrectly states that "[t]he nexus test found in the Magistrate Judge's Recommendation is meant to ensure that there is a 'a real nexus between the employee's use or misuse of their authority as a public employee, and the violation allegedly committed by the defendant.'" (Doc. # 36 at 6 (quoting *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1156 (10th Cir. 2016)).) *Schaffer* addresses an entirely different nexus analysis that does not concern private entities. 814 F.3d at 1156 (addressing whether public parking officer's provision of witness statements while on duty amounted to statements made under color of the

nexus" between Defendants and the challenged conduct such that the conduct "may be fairly treated as that of the State itself." *Gallagher*, 49 F.3d at 1448 (quoting *Jackson*, 419 U.S. at 351).[3] In particular, under the nexus test, "a state normally can be held responsible for a private decision 'only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.'" *Gallagher*, 49 F.3d at 1448 (quoting *Blum*, 457 U.S. at 991).

VDARE's Amended Complaint is devoid of any factual allegations that show Cheyenne Resort's cancellation constituted state action. Although VDARE alleges that Defendants knew or should have known that the Statement would cause Cheyenne Resort to cancel the Conference in abridgement of VDARE's First Amendment rights (Doc. # 13 at 6, ¶ 17; 7, ¶ 22; 8–9, ¶¶ 27–29), such allegations are totally conclusory and do nothing to tether Cheyenne Resort's conduct to state action. Furthermore, VDARE pleads that the timing of the Defendants' Statement and Cheyenne Resort's cancellation of the Conference (Doc. # 32 at 4; Doc. # 13 at 4–5, ¶¶ 11–13; Doc. # 36 at 10–11) is sufficient to show that Defendants' Statement caused Cheyenne Resort to cancel the Conference. However, this allegation too is conclusory and fails to support the conclusion that Cheyenne Resort's cancellation of the Conference amounted to state action, i.e., that Defendants "exercised coercive power" or "provided such

law). Magistrate Judge Tafoya applied the nexus test for determining whether a private actor's conduct can amount to state action. (Doc. # 35 at 5–7.) Thus, the Court rejects VDARE's nonsensical construction of the Recommendation based on *Schaffer*.

significant encouragement" that Cheyenne Resort's choice to cancel the Conference "must in law be deemed to be that of" Defendants. *Blum*, 457 U.S. at 1004. In short, Plaintiff fails to state a First Amendment claim based on Cheyenne Resort's conduct.

b. First Amendment Claim Based on Defendants' Statement

The Court next turns its attention to VDARE's main contention on the First Amendment issue—that the Magistrate Judge failed to evaluate whether VDARE adequately pleaded that Defendants' Statement violated VDARE's First Amendment rights, and, instead, placed too much focus on Cheyenne Resort's reaction to Defendants' Statement. (Doc. # 36 at 2, 5–12.) VDARE asserts that, because Mayor Suthers "expressly" issued the Statement in his official capacity as Mayor of Colorado Springs, Defendants' conduct was made under color of law under the second element of its Section 1983 claim. (Doc. # 36 at 6.) Thus, VDARE avers that this Court should analyze the first element of its Section 1983 claim and assess whether Defendants' Statement deprived VDARE of its First Amendment rights. (*Id.* at 2, 6–7.) Because neither Defendants nor the Magistrate Judge addressed this point, the Court will do so.

In its opposition to Defendants' Motion to Dismiss and its Objection to the Recommendation, VDARE argues that Defendants' Statement constituted an unconstitutional threat to Cheyenne Resort and "a continuing threat to any other private venue that would provide space for Plaintiff to hold a conference or gathering." (Doc. # 32 at 6 (citing Doc. # 13, ¶¶ 29, 39, 49); Doc. # 36 at 10–12.) Furthermore, VDARE argues that Defendants' "announcement that Colorado Springs would not provide police protection or other city services necessary to protect Plaintiff's conference from

disruption and violence made it 'impossible' for [Cheyenne Resort] to comply with its contract with Plaintiff." (Doc. # 36 at 12 (citing Doc. # 13 at ¶ 46).) As such, VDARE posits that, under Supreme Court and Tenth Circuit precedent, Defendants' Statement infringed upon VDARE's First Amendment rights. (*Id.* at 7–11.) The Court disagrees.

Defendants' conduct, as alleged, does not establish a plausible First Amendment claim. As a preliminary matter, the Statement itself is an exercise of permissible government speech. *Summum*, 555 U.S. at 467–68; *Johanns,* 544 U.S. 55 at 553; *Southworth,* 529 U.S. at 229; *Rosenberger*, 515 U.S. at 833; *Finley,* 524 U.S. at 598. Defendants are entitled to speak for themselves, express their own views, including disfavoring certain points of view. *Summum*, 555 U.S. at 467; *Finley*, 524 U.S. at 598. In the Statement, Defendants merely expressed themselves and their views on the need for private local businesses to pay attention to the types of events they accept and groups that they invite to their City. (Doc. # 13 at 4, ¶ 12.) Defendants also suggested that Colorado Springs would not provide any support or resources for VDARE's Conference, which was Colorado Springs' disfavoring of VDARE's point of view. (*Id.*); *see Finley,* 524 U.S. at 598. In the face of this permissible government speech, VDARE fails to cite to any Supreme Court or Tenth Circuit case, and this Court has not found one, providing that, as a matter of law, a city's public communication that it would not provide local support or resources to a private entity's private event on private property constitutes a violation of that private entity's First Amendment speech or association rights. Accordingly, Supreme Court precedent on government speech evinces that

Defendants' Statement is permissible and does not constitute an abridgement of VDARE's First Amendment rights.[4]

VDARE also argues that Defendants' Statement constitutes a First Amendment violation because "[i]t is well settled law that it is a violation for state actors to withhold generally available public services, like police protection, to private citizens based on their political views." (Doc. # 36 at 9; Doc. # 32 at 7–8.) However, the cases which VDARE cites do not support such a broad proposition.

VDARE describes *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) as the "governing U.S. Supreme Court precedent in this case[.]" (Doc. # 32 at 7.) In *Bantam Books*, Rhode Island law granted a commission ("Commission") with the power to refer distributors and publishers for criminal prosecution for the sale or distribution of publications unapproved by the Commission and to notify publishers of such power through extrajudicial procedures, *id.* at 61–63; and the publishers obliged for fear of being prosecuted, *id*. at 64. The Supreme Court held that the Commission's system was a "scheme of state censorship effectuated by extralegal sanctions[,]" *id.* at 72, that amounted to unconstitutional state action in violation publishers' First Amendment rights, including the prior restraint of protectable publications, which bears a "heavy presumption against" such a system's "validity." *Id.* at 70. Especially egregious in *Bantam Books, Inc.* were the notices that the Commission sent to distributors to which the Supreme Court likened to "threat[s] of invoking legal sanctions and other means of

[4] Of course, Defendants are accountable for their speech through the electoral system in which VDARE or its supporters in the Colorado Springs community are welcome to participate.

coercion, persuasion, and intimidation[.]" *Id.* at 67, 67 n. 7–8. In the instant case, Defendants issued a public statement that both acknowledged that Colorado Springs had no authority to restrict freedom of speech or direct Cheyenne Resort as to which events they may host and expressed that Colorado Springs would not provide any support or resources for VDARE's Conference. (Doc. # 13 at 4, ¶ 12.) *Bantam Books, Inc.* is clearly distinguishable from the instant case because Defendants' Statement in this case resembles nowhere near the same or similar level of coercive threats and informal censorship at issue in *Bantam Books, Inc*. Therefore, the Court finds that VDARE's reliance on *Bantam Books, Inc.* is misplaced.

VDARE's dependence on *Forsyth County, Ga. v. Nationalist Movement* fares no better. 505 U.S. 123 (1992); (Doc. # 36 at 9, 15–16; Doc. # 32 at 15–16.) VDARE argues that the *Forsyth County* decision stands for the proposition that "[i]f a municipality cannot impose even a small fee on an event based on a good-faith estimate of the police protection it will require, a municipality clearly violates the First Amendment when it decides to withhold police protection *entirely* from an event based *expressly* on disapproval of the event's message." (Doc. # 32 at 16 (emphasis in original).) This is a disingenuous stretch. *Forsyth County* involved a facial challenge to an ordinance that required public officials to review the content of a private party's speech and anticipate how listeners would react to such speech in order to assess the value of a permit fee to impose upon the private party seeking to exercise such speech on public property. In stark contrast, the instant case involves Colorado Springs' decision to exercise permissible government speech expressing that it would not devote

any support or resources to Cheyenne Resort, a private party hosting a private organization's event on private property. The *Forsyth County* Court time and again stressed the importance of First Amendment interests in the context of governmental prior restraint and regulation of speech in the "archetype of a traditional public forum." 505 U.S. at 130. No such interests, public forums, or permit schemes are presented here. In contrast to the licensing authority in *Forsyth County*, Colorado Springs acknowledged that it had no authority to restrict freedom of speech at private facilities such as those owned by Cheyenne Resort. (Doc. # 13 at 4, ¶ 12.) Accordingly, the Court gleans nothing from *Forsyth County* that supports VDARE's assertion that it pleaded a plausible First Amendment claim.

The Court also swiftly disposes of any value that VDARE ascribes to the Tenth Circuit's decision in *National Commodity & Barter Association v. Archer*, 31 F.3d 1521 (10th Cir. 1994). *National Commodity and Barter* involved federal IRS and United States Department of Justice officers and employees who, pursuant to a search warrant, raided a nonprofit association's offices and some association members' homes and seized "membership lists and other records, books, contributions, stationery, correspondence, brochures, and legal files belonging to the" association. *Id*. at 1525–26. Several of the agents and officers then used the membership lists to act as undercover agents in order to infiltrate the association whose goal was to educate the public on the principle that federal taxes are fundamentally unconstitutional. *Id.* at 1525–27. In determining that the association stated a plausible First Amendment claim based on such searches and use of membership lists, the Tenth Circuit relied on precedent

addressing specific First Amendment challenges to government regulations and enforcement of subpoenas to obtain membership records or lists that would blunt association members' free speech and association rights, including a resulting reluctance of others to associate with such associations for fear of reprisal. *Id.* at 1527–31. Not only is *National Commodity and Barter* not pertinent to the instant case, but also, it in no way supports the proposition that "[i]t is well settled law that it is a violation for state actors to withhold generally available public services, like police protection, to private citizens based on their political views." (Doc. # 36 at 9.)

What is apparent from all three of these cases is that, for unconstitutional state action to exist, state law must direct and/or state agencies and officials must commit conduct that directly violates a party's First Amendment rights. As applied to the instant case, the Court concludes that as a matter of law, Defendants' public statement was permissible government speech which in no way directed Cheyenne Resort to take any action. As such, the Statement did not amount to unconstitutional state action.

VDARE's final objection as to the First Amendment claim is that the Magistrate Judge failed to draw all reasonable inferences from its factual allegations, including the need to assume the "foreseeable and naturally flowing result of the Mayor's state action under the color of the law[.]" (Doc. # 36 at 7.) VDARE argues that, had she done so, she would have concluded that the Amended Complaint sets forth a plausible First Amendment Claim. (*Id.*) However, VDARE's conclusory and speculative allegations in its Amended Complaint leave a void connecting Defendants' Statement to Cheyenne Resort's cancellation of the Conference:

- Given the nature of VDARE's work, and the controversy that it sometimes generates, Defendants either knew or should have known that VDARE's planned Conference might give rise to protests or unrest by those who may not agree with VDARE's purpose, viewpoints or statements." (Doc. # 13 at 6, ¶ 17.)

- Defendants' promise that the City would not provide "any support or resources" to the Conference, given the obvious and foreseeable need for municipal police and fire services, had the effect of depriving VDARE of its First Amendment rights, chilling its speech on matters of public concern, and depriving VDARE and potential attendees of the Conference from communicating on important national issues such as immigration control and reform." (*Id.*)

- Defendants' announcement that they would not provide any municipal resources or support of any kind, including basic police, fire, ambulance, parking and security services, meant that participants in the Conference, the Resort's patrons and employees, and innocent bystanders would potentially be subjected to serious injury or death in the event that they were threatened or attacked by protestors. In addition, the Resort was powerless to stop protestors from destroying its property, harassing or injuring its patrons, or disrupting its business operations. Defendants knew that their conduct violated Plaintiff's First Amendment rights and placed the rights and safety of conference-goers and the Resort's patrons and employees at serious risk. They intentionally, recklessly and heedlessly disregarded this risk. (Doc. # 13 at 7–8, ¶ 22.)

- This statement effectively made performance of the contract impossible. Defendants' announcement meant that the Resort would be placing its patrons and employees at risk of serious injury or even death if it honored the terms of its contract with Plaintiff. The Resort would be powerless to stop protestors from destroying its property, harassing or injuring its patrons, or disrupting its business operations in the event it honored its agreement to host the Conference. It would be placing itself at a substantial risk of tort or potentially even criminal liability if it proceeded to host the Conference while knowing that basic city services would not be provided in the vent that they were needed. (Doc. # 13 at 16, ¶ 46.)

- Defendants' actions have made it impossible for VDARE to conduct future conferences, discussions and events in Colorado Springs, as Defendants have made clear their position that VDARE, its sponsors and other associated individuals enjoy a disfavored status under the law. (Doc. # 13 at 9, ¶ 29.)

These allegations attempt to raise a causal relationship between Defendants' Statement and Cheyenne Resort's cancellation of VDARE's Conference. However, because these allegations are conclusory and speculative, this Court cannot rely upon them in determining whether VDARE has stated a plausible First Amendment claim. *S. Disposal, Inc.*, 161 F.3d at 1262; *Iqbal*, 556 U.S. at 678. For example, VDARE alleges that Defendants' Statement made it impossible for Cheyenne Resort to perform its contract with VDARE. (Doc. # 13 at 16, ¶ 46.) This is a conclusion; and VDARE never sets forth factual allegations as to how the Statement made it impossible. There are no allegations as to why Cheyenne Resort cancelled the Conference—only speculation as to why it did so, based on hypothetical events that might have occurred, as well as protests that might have turned violent. (*Id.*) In the absence of factual allegations underlying these speculations, these conclusions are insufficient to support a plausible claim for relief, and as a result, the Magistrate Judge was correct to ignore them.

Moreover, VDARE asserts the following unsupported legal conclusions in its Amended Complaint:

- "Defendants intended to deprive VDARE of its rights under the First Amendment to freedom of speech, assembly and association . . . By refusing to provide basic safeguards for the Conference's sponsors and participants, Defendants deprived the Conference's sponsors and participants of their rights to peaceably assemble, and debate issues of importance to themselves, to their community, and to the country as a whole." (Doc. # 13 at 6, ¶ 17.)
- Defendants knew that their conduct violated Plaintiff's First Amendment rights and placed the rights and safety of conference-goers and the Resort's patrons and employees at serious risk. (*Id.* at 7, ¶ 22.)
- This case is on all-four with *Bantam Books*. (Doc. # 13 at 13, ¶ 34.)

- Thus, Defendants' statement created exactly the sort of "informal blacklist" of certain types of speech that was prohibited by the Supreme Court over 54 years ago in *Bantam Books*. (Doc. # 13 at 13, ¶ 34.)

For the reasons set forth *supra* at pp. 18–20, these legal conclusions too are unworthy of the presumption of truth for purposes of supporting a plausible First Amendment claim. *Iqbal*, 556 U.S. at 679–81.

Thus, VDARE turns to assumptions about the effects of Defendants' Statement to demonstrate that it has stated a plausible First Amendment Claim. Although VDARE requests the Court to draw a proper inference from its factual allegations, VDARE is actually inviting this Court to assume that Defendants knew or should have known that Cheyenne Resort would cancel the Conference based on Defendants' public statement. VDARE further requests that this Court assume that Defendants knew or should have known that the Statement violated Plaintiff's First Amendment rights. (Doc. # 36 at 7, 11.) Yet, there is a difference between an inference and an assumption. There are no factual allegations upon which this Court can draw reasonable inferences in favor of VDARE without making assumptions or engaging in speculation. Instead, these "naked assertions" are only conclusions and speculations "devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678. As such, they are neither entitled to the presumption of truth nor show that Plaintiff has stated a plausible First Amendment claim. *Twombly*, 550 U.S. at 555.In accordance with unequivocal Supreme Court and Tenth Circuit precedent, the Court declines VDARE's invitation. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983) (explaining that a court may not assume that a plaintiff can prove facts that have not

been alleged, or that a defendant has violated laws in ways that a plaintiff has not alleged); *see also Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997) (a court may not "supply additional factual allegations to round out a plaintiff's complaint"). Indeed, "[f]actual allegations must be enough to raise a right to relief above the speculative level[.]" *Twombly*, 550 U.S. at 555. Accordingly, Plaintiff's First Amendment claim is dismissed.

Because VDARE's First Amendment claim fails, the Court agrees with the Magistrate Judge that Mayor Suthers is entitled to qualified immunity in his individual capacity as to VDARE's First Amendment claim. (Doc. # 35 at 10–11); *see Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) ("Qualified immunity attaches when the official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."); *Hesse v. Town of Jackson, Wyo.*, 541 F.3d 1240, 1244 (10th Cir. 2008) (explaining that where no constitutional right has been violated "no further inquiry is necessary and the defendant is entitled to qualified immunity").

2. Retaliation Claim

The parties and the Magistrate Judge agree that, in order to plead a plausible retaliation claim, a plaintiff must set forth factual allegations sufficient to establish three elements: (1) the plaintiff was engaged in constitutionally protected activity; (2) the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) that the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of

constitutionally protected activity. *Leverington v. City of Colo. Springs*, 643 F.3d 719, 729 (10th Cir. 2011); *McBeth v.* Himes, 598 F.3d 708, 717 (10th Cir. 2010); *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000). The Magistrate Judge specifically concluded that VDARE failed to adequately plead the third element because VDARE "fails to allege any facts in support of" the conclusory allegation that Defendants' Statement was due to VDARE's controversial viewpoints and VDARE relied solely on temporal proximity to infer intent. (Doc. # 35 at 10 (quoting (Doc. # 13 at 3, ¶ 13).)

VDARE objects to the Magistrate Judge's decision as "plainly wrong" and argues that Defendants' Statement "was explicitly targeted at VDARE, and it was made in the context of the then-planned event of VDARE at [Cheyenne] Resort." (Doc. # 36 at 12–13.) VDARE cites paragraphs twelve through thirteen of its Amended Complaint to support its contention that the "Mayor's stated motivation was to oppose 'hate speech,' which it associated with VDARE, showing that the Mayor was opposed to VDARE's event in Colorado Springs because of VDARE's perceived speech and political positions." (*Id.* at 13.) VDARE also posits that, subsequent to Cheyenne Resort's cancellation of the Conference, Mayor Suthers' statement expressing "satisfaction" that the Conference had been cancelled confirms Defendants' retaliatory motive under the third element. (*Id.* (citing Doc. # 13 at ¶ 14.) Furthermore, VDARE suggests that these facts "are clear evidence of Defendants' motivation to oppose Plaintiff's protected speech" and that "Defendants would not have made a statement opposing VDARE's event and alleging it was "hate speech" if they did not believe that VDARE was

associated with "hate speech, and if they were not opposed to such constitutionally-protected speech." (*Id.*)

The Court ultimately agrees with Magistrate Judge Tafoya's conclusion and finds that VDARE's reliance on speculations and conclusory allegations is futile in pleading a plausible retaliation claim. However, the Court finds that VDARE has failed to allege the second element of its retaliation claim, and as a result, it need not address the first or third elements of the claim. Indeed, this Court has already determined that Defendants' Statement amounted to constitutionally permissible government speech and did not support any violation of VDARE's First Amendment rights. *See, e.g.*, *Summum*, 555 U.S. at 467; *Johanns*, 544 U.S. at 553; *Rosenberger*, 515 U.S. at 833; *Finley*, 524 U.S. at 598; *see also supra* pp. 15–26. Moreover, the Court has also shown that VDARE's conclusory and speculative allegations are insufficient to show a causal connection between Defendants' Statement and Cheyenne Resort's cancellation of the Conference. *See supra* pp. 22–26. These conclusions dispel VDARE's ability to plead that Defendants' Statement amounted to an adverse action and "caused [VDARE] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity[.]" *Leverington*, 643 F.3d at 729.

As a result, VDARE's deficient allegations are insufficient to establish the second element of its retaliation claim. Therefore, VDARE's retaliation claim is also dismissed for failure to state a claim.

3. Equal Protection Claim

The Court notes that neither party objected to the Magistrate Judge's recommendation to dismiss Plaintiff's Equal Protection Clause ("EPC") claim. When neither party objects to a Magistrate Judge's Recommendation, the Court "may review a magistrate [judge's] report under any standard it deems appropriate." *Summers*, 927 F.2d at 1167. Although VDARE did not allege an EPC claim under a separate heading, Magistrate Judge Tafoya and Defendants construed Paragraph 19 of the Amended Complaint as a possible attempt by VDARE to allege an EPC claim. (Doc. # 35 at 8–9.) Paragraph 19 alleges:

> The actions of Defendants as described herein, while acting under color of state law, intentionally deprived Plaintiff of the securities, rights, privileges, liberties, and immunities secured by the Constitution of the United States of America, including the rights to freedom of speech and freedom of association as guaranteed by the First Amendment to the Constitution of the United States of America, **equal protection of the laws** as guaranteed by the Fourteenth Amendment of the Constitution of the United States of America, and 42 U.S.C. § 1983, in that Defendants unlawfully threatened to withhold city services based upon Plaintiff's speech and associations.

(Doc. # 13 at 7, ¶ 19 (emphasis added).) Because the Amended Complaint did not contain "any facts to support [VDARE's] contention that it was denied equal protection rights" or the elements of an EPC claim under Tenth Circuit law, Magistrate Judge Tafoya recommended that this claim be dismissed. VDARE neither objected to nor responded to this portion of the Recommendation.

The Court has reviewed all the relevant pleadings and applicable legal authority concerning the Recommendation on VDARE's first claim to the extent it attempts to plead an EPC claim. Based on this review, the Court concludes that Magistrate Judge

Tafoya's analysis and recommendation is correct and that "there is no clear error on the face of the record." Fed. R. Civ. P. 72(a). The Court therefore adopts the Recommendation with respect to VDARE's EPC claim.

4. Tortious Interference Claim

Finally, Magistrate Judge Tafoya recommends that this Court decline to exercise supplemental jurisdiction over VDARE's state common law claim for tortious interference. (Doc. # 35 at 11–13.) Because VDARE's only objection to this portion of the recommendation is based on VDARE's assertion that it pleaded plausible federal claims (Doc. # 36 at 16), the Court agrees with the Magistrate Judge.

28 U.S.C. § 1367(c)(3) provides that a district court has the discretion to decline to exercise supplemental jurisdiction over a state law claim if "the district court has dismissed all claims over which it has original jurisdiction." *See also Smith v. City of Enid ex rel. Enid City* Comm'n, 149 F.3d 1151, 1156 (10th Cir. 1998) ("When all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims."). When a state law claim is no longer supplemental to any federal question claim, "the most common response to a pretrial disposition of federal claims has been to dismiss the state law claim or claims without prejudice[.]" *Ball v.* Renner, 54 F.3d 664, 669 (10th Cir. 1995); *see also Brooks v. Gaenzle*, 614 F.3d 1213, 1230 (10th Cir. 2010) (reversing district court's grant of summary judgment on state law tort claim and remanding with instructions to dismiss it without prejudice because Tenth Circuit observed that state law tort claim was "best left for a state court's determination"). This preferred practice derives from the "seminal

teaching of *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), reconfirmed in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988) and repeated in a host of cases such as *Sawyer v. County of Creek*, 908 F.2d 663 (10th Cir. 1990)[, *overruled on other grounds in Gray v. Univ. of Colo. Hosp. Auth.*, 672 F.3d 909 (10th Cir. 2012)]." *Id.* The Tenth Circuit has recognized that there are compelling reasons "for a district court's deferral to a state court rather than retaining and disposing of state law claims itself[,]" including factors such as "economy, fairness, convenience and comity." *Id.* "Notions of comity and federalism demand that a state court try its own lawsuits, absent compelling reasons to the contrary." *Id.* (quoting *Thatcher Enters. v. Cache Cty. Corp.*, 902 F.2d 1472, 1478 (10th Cir. 1990)).

After dismissing VDARE's First Amendment and retaliation claims, there are no remaining federal question claims in this case, and VDARE has never sought to establish diversity of citizenship jurisdiction with respect to its state-law claim. As such, "[u]nder those circumstances, 28 U.S.C. § 1367(c)(3) expressly permits a district court to decline to exercise supplemental jurisdiction over any remaining state-law claims[.]" *Gaston v. Ploeger*, 297 F. App'x 738, 746 (10th Cir. 2008). Thus, this Court follows the Tenth Circuit's preference and finds that notions of comity and federalism justify "state rather than federal court resolution of the" state law claim for tortious interference.[5] *Ball*,

[5] Moreover, Colorado law recognizes "if a plaintiff asserts all of his or her claims, including state law claims, in federal court, and the federal court declines to exercise supplemental jurisdiction [over the state claims], the plaintiff may refile those claims in state court." *Brooks*, 614 F.3d at 1230 (quoting *Dalal v. Allliant Techsystems, Inc.*, 934 P.2d 830, 834 (Colo. App. 1996) (explaining that 28 U.S.C. § 1367(d) states the period of limitation for a state claim is tolled while claim is pending in federal court and for thirty days after it is dismissed unless state law provides for a longer tolling period)).

54 F.3d at 669. Accordingly, pursuant to 28 U.S.C. § 1367(c)(3), this Court declines to exercise supplemental jurisdiction over VDARE's remaining state law tortious interference claim and dismisses it without prejudice.[6]

IV. CONCLUSION

Based on the foregoing reasons, the Court ORDERS as follows:

1. VDARE's Objection (Doc. # 36) to the Recommendation is OVERRULED;

2. The Recommendation (Doc. # 35) of Magistrate Judge Kathleen M. Tafoya is ADOPTED as an ORDER of this Court;

3. Defendants Mayor John Suthers and the City of Colorado Springs' Motion to Dismiss First Amended Complaint (Doc. # 24) is GRANTED IN PART;

4. VDARE's First Amendment, Retaliation, and Equal Protection Clause Claims are DISMISSED WITH PREJUDICE;[7]

5. VDARE's tortious interference claim is DISMISSED WITHOUT PREJUDICE;

[6] VDARE is welcome to pursue its claim in a Colorado state court where the state court has an interest in trying its own lawsuit. *Brooks*, 614 F.3d at 1230.

[7] The Court notes that VDARE has already amended its complaint once, and as such, it would be futile to allow further amendment to correct the multitude of legal and factual deficiencies of VDARE's Amended Complaint. *See Guy v. Lampert*, 748 F. App'x 178, 181 (10th Cir. 2018) (quoting *Gee v. Pacheco*, 627 F.3d 1178, 1195 (10th Cir. 2010)); *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1126 (10th Cir. 1997); *see also Weise v. Casper*, 507 F.3d 1260, 1265 (10th Cir. 2007) (recognizing that "a district court cannot avoid ruling on the merits of a qualified immunity defense when it can resolve the purely legal question of whether a defendant's conduct, as alleged by plaintiff, violates clearly established law"); *Lybrook v. Members of the Farmington Mun. Schs. Bd. of Educ.*, 232 F.3d 1334, 1341 (10th Cir. 2000) (affirming district court order granting motion to dismiss with prejudice on qualified immunity grounds). Thus, the dismissal of VDARE's First Amendment, retaliation, and Equal Protection Clause claims is with prejudice.

6. VDARE's Unopposed Motion for Enlargement of Time to File Reply in Support of Plaintiff's Objection to Magistrate Recommendations (Doc. # 40) is DENIED AS MOOT; and

7. VDARE's *Post Factum* Motion to Exceed Page Limitation (Doc. # 41) is DENIED AS MOOT.

DATED: March 27, 2020

BY THE COURT:

Christine M. Arguello

CHRISTINE M. ARGUELLO
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-03305-CMA-KMT

VDARE FOUNDATION,

Plaintiff,

v.

CITY OF COLORADO SPRINGS, and
JOHN SUTHERS,

Defendants.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order Adopting the Recommendation of United States Magistrate Judge Kathleen M. Tafoya (Doc. # 42), entered by Judge Christine M. Arguello on March 27, 2020, it is

ORDERED that VDARE's Objection (Doc. # 36) to the Recommendation is OVERRULED. It is

FURTHER ORDERED that The Recommendation of Magistrate Judge Kathleen M. Tafoya (Doc. # 35) is ADOPTED as an ORDER of this Court. It is

FURTHER ORDERED that Defendants Mayor John Suthers and the City of Colorado Springs' Motion to Dismiss First Amended Complaint (Doc. # 24) is GRANTED IN PART. It is

FURTHER ORDERED that VDARE's First Amendment, Retaliation, and Equal Protection Clause Claims are DISMISSED WITH PREJUDICE. It is

FURTHER ORDERED that VDARE's tortious interference claim is DISMISSED WITHOUT PREJUDICE. It is

FURTHER ORDERED that VDARE's Unopposed Motion for Enlargement of Time to File Reply in Support of Plaintiff's Objection to Magistrate Recommendations (Doc. # 40) is DENIED AS MOOT. It is

FURTHER ORDERED that VDARE's *Post Factum* Motion to Exceed Page Limitation (Doc. # 41) is DENIED AS MOOT. It is

FURTHER ORDER that judgment is entered in favor of Defendants City of Colorado Springs and John Suthers and against Plaintiff VDARE Foundation.

Dated: March 30, 2020.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/ S. West
S. West, Deputy Clerk