No. 21-

IN THE

Supreme Court of the United States

VDARE FOUNDATION,

Petitioner,

v.

CITY OF COLORADO SPRINGS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a complaint based on a local government's public announcement that the plaintiff's speech may be illegal "hate speech" and that, therefore, the government would withhold "any" municipal services to the private facility hosting the speech assembly gives rise to a plausible claim for relief under 42 U.S.C. § 1983 and for First Amendment Retaliation.

PARTIES TO THE PROCEEDING

Petitioner is VDare Foundation ("***VDARE***"). Respondent is the City of Colorado Springs, a Colorado home rule municipality ("***the City***").

RULE 29.6 STATEMENT

Petitioner is VDare Foundation is a non-profit educational organization that is not owned by any corporate parents or any public companies.

STATEMENT OF RELATED CASES

The following cases are the proceedings below and judgments entered:

a. *VDare Foundation v. City of Colorado Spring and John Suthers*, Civil Action No. 18-cv-03305-CMA-KMT, United States District Court, District of Colorado. Judgement entered on March 27, 2020.

b. *VDare Foundation v. City of Colorado Spring and John Suthers,* Case No. 20-1162, United States Court of Appeals for the Tenth Circuit. Judgment entered August 23, 2021, rehearing denied on September 20, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner VDARE respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit ("***COA***").

OPINIONS BELOW

The opinion of the COA[1] (App. A at 1a-50a) is published at 11 F.4th 1151 (10th Cir. 2021) ("***COA Opinion***"). The opinion of the United States District Court for the District of Colorado ("***District Court***") is published at *VDare Found. v. City of Colorado Springs,* 449 F. Supp. 3d 1032 (D. Colo. 2020), ("***District Court Opinion***", App. B at 51a-88a). The District Court Opinion adopted the report and recommendation of the magistrate judge ("***Magistrate***"), which is published at *VDare Found. v. City of Colorado Springs*, No. 18-CV-03305-CMA-KMT, 2020 WL 2309613 (D. Colo. Jan. 29, 2020) ("***Magistrate Recommendation***", App. C at 89a-106a).

JURISDICTION

The judgment of the COA was entered on August 23, 2021. *See generally* App. A. Petitioner moved for rehearing *en banc* and that was denied by the COA on September 20, 2021. App. D at 107a-108a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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1. Specific discussions of all Opinions below shall be cited to where they are found in the Appendix ("***App.***") followed by a page number suffixed with an "a" (*e.g.*, App. at __a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble".

STATEMENT

I. Overview

This case presents the issue of to what extent a state actor can express a viewpoint against speech/association it disfavors while not violating the First Amendment rights of the disfavored speakers. This Court has previously held that state actors who use their platforms in a coercive or threatening fashion against disfavored speech/association violate the First Amendment and as discussed below, this is exactly what happened to VDARE.

But the first question in this case is really not, as the COA framed it, "[w]hen the government speaks, what can it say?". App. at 1a. The initial question is rather, when the government speaks, how do we construe it? Because here, in a divided COA, two judges construed the City's speech as harmless, protected speech, that had no causal relationship to the cancellation of VDARE's constitutionally protected event. The majority of the COA engaged in an unnatural reading of the City's speech, reading each sentence in isolation, speculating about the significance of factual occurrences outside the pleadings, and drawing every inference in favor of government innocence.

However, the dissenting judge concluded that the most reasonable—perhaps the only reasonable—construction of the City's speech was that it was intended to convey a message that no police or fire protection would be provided for VDARE's constitutionally protected event in the City. This construction was shared by those who actually heard/read the speech in real time, including the police themselves and local media. Even the City—through the words of its mayor—seemed to take credit for having caused the cancellation.

The COA Opinion raises a dangerous threat to the First Amendment and worse, it does so by way of an improper expansion of the government speech doctrine–"a doctrine that is susceptible to dangerous misuse" and requires "great caution" before expanding its application.[2] If it is allowed to stand, then the Tenth Circuit's Opinion will serve a blueprint for how state actors can make statements that are understood by the public as veiled threats against speech and assembly, while being just ambivalent enough to allow a sophisticated judiciary to "explain away" the statements as benign. The COA's rationale would also turn the prohibition against the state acceding to the "heckler's veto" completely on its head. While that doctrine prevents the state from forcing a disfavored speaker to internalize the security costs of violent mobs who oppose their free speech, the state could simply "pull the plug" on government services—such as police and fire—and thereby coercively dissuade any private parties from accommodating the objectionable speech and assembly.

2. *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017).

This Court needs to send a clear message to state actors that while the First Amendment allows them to express their own ideas and opinions, it does not allow them to do so in a way that causes the ordinary listener/reader to perceive it as threatening, coercive, or retaliatory against protected speech and association. So, when answering the question of "what can the government say?", the answer is that the government cannot make statements that cause the ordinary person on the street to believe the government will potentially use its police power to prosecute the speech and association but withhold its police power to protect the speech and association. In sum, while the government may engage in "virtue signaling", it may not do so in a way that creates state-sponsored "cancel culture".

II. Factual Background

VDARE is a non-profit educational organization. *See* VDARE's First Amended Complaint filed March 22, 2019 [Doc. 13] ("***Complaint***") at ¶ 2. As is stated on the "about" page of its website (https://vdare.com/about), VDARE's mission is education on two main issues: first, the unsustainability of current U.S. immigration policy and second, whether the U.S. can survive as a nation-state. *Id.* VDARE does this through VDARE.com, VDARE Books, and through public speaking, conferences, debates, and media appearances. *Id.*

VDARE's founder, Peter Brimelow ("***Mr. Brimelow***"), is a well-known magazine editor, political commentator, columnist, and author. *Id.* at ¶ 3. During the course of a long career that spans five decades, he has served as an editor and writer at the *Wall Street Journal*, *Financial*

Post, *Macleans*, *Barrons*, *Fortune*, *Forbes*, *National Review*, and *MarketWatch*. *Id.* He is a recipient of the Gerald Loeb Award for Distinguished Business and Financial Journalism and was a media fellow at the Hoover Institution. *Id.* He is the author of four well-regarded books, including *Alien Nation: Common Sense About America's Immigration Disaster* (1995), a national bestseller in the U.S., and *The Patriot Game: National Dreams and Political Realities* (1986), a book on Canadian politics that is credited with spurring the creation of the Reform Party of Canada in 1987 and exercising a profound influence on future Prime Minister Stephen Harper; *The Wall Street Gurus: How You Can Profit from Investment Newsletters*; and *The Worm in the Apple: How the Teacher Unions Are Destroying American Education*. *Id.*

Since 1999, VDARE has published data, analysis, and editorial commentary from a wide variety of writers of a myriad of races, religions, nationalities, and political affiliations who oppose current U.S. immigration policy and argue for immigration control and reform. *Id.* at ¶ 4. In doing so, VDARE seeks to influence public debate and discussion on the issues of immigration and the future of the United States as a viable nation-state. *Id.* It has never advocated violence or any form of illegality. *Id.* It counts foreign nationals, immigrants, and members of racial and ethnic minorities among its strongest supporters, donors, and contributors. *Id.* It has published on the negative effect of uncontrolled immigration on racial minorities, including recently arrived immigrants. *Id.*

On or about March 31, 2017, VDARE reserved the Cheyenne Mountain Resort in Colorado Springs, Colorado (the "***Resort***") for a conference event featuring guest

speakers and activities of interest and learning on subjects related to its mission (the "***Conference***"). *Id.* at ¶ 11. The 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.*

On August 14, 2017, the City's mayor, John Suthers ("***Mayor Suthers***") issued a public announcement (the "***Announcement***") on behalf of the City referencing the VDARE's then-forthcoming conference:

> 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 ¶ 12.

The public perceived the Announcement as a pronouncement that the City would not provide any police or fire protection to the Resort for the Conference because of the alleged—and potentially illegal—»hate speech" that would purportedly occur at the Conference. *Id.* a ¶ 13. This conclusion was underscored by the fact that local news reported in a story entitled "Colorado Springs Mayor Won't Commit City Assistance" that Sheriff's Office of El Paso County—the county wherein the City is located—announced that its deputies would not be providing police services "either" unless the City requested it. *Id.*[3]

The very next day, on August 15, 2017, the Resort issued a statement announcing that it would not host the Conference and cancelled its contract with VDARE. *Id.* at ¶ 14. Up until this time, the Resort had been actively communicating and coordinating with VDARE about logistics and safety in connection with the Conference. *Id.* In a subsequent published interview, Mayor Suthers publicly expressed satisfaction that the Conference had been cancelled. *Id.*

The City targeted the Conference for denial of city services it would otherwise have provided, including police protection, because of its disfavored speech. *Id.* at ¶ 14. Given the nature of VDARE's work, and the controversy that it sometimes generates, the City either knew or should have known that VDARE's planned Conference might give rise to protests or unrest by those who may not

3. Referencing story found at https://www.thedenverchannel.com/news/politics/colorado-springs-mayor-wont-commit-city-assistance-to-upcoming-white-nationalist-conference (last visited Dec. 13, 2021).

agree with VDARE's purpose, viewpoints, or statements. *Id.* at ¶ 17.

The City's pronouncement that it 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. *Id.* This was underscored by the fact that in an interview published on August 17, 2018, Mayor Suthers expressed satisfaction that the Resort had cancelled its contract to host the Conference. *Id.* at ¶ 43. In fact, the interview he suggested that he was "fairly confident" that it was his Announcement on behalf of the City that made the Resort "aware of the nature of VDARE" (i.e., potentially illegal "hate speech" that would not be supported by any City police or fire services), which it had not been aware of prior to the Announcement, leading to its cancellation of the Conference. *Id.*

III. Procedural Posture

VDARE subsequently filed suit against the City and Mayor Suthers for violations of 42 U.S.C. § 1983, First Amendment Retaliation, and for intentional interference with contract under Colorado law. App. at 4a-6a. On January 29, 2020, the Magistrate granted the City and Mayor Suthers' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), recommending to the District Court that VDARE had failed to plausibly plead claims for relief under 42 U.S.C. § 1983 and for First Amendment Retaliation against the City and Mayor Suthers. *See generally* App. C. The Magistrate further recommended declining to exercise supplemental jurisdiction under the remaining state law claim for tortious interference. *Id.*

VDARE then appealed the Magistrate Recommendation to the District Court. App. B. On March 27, 2020, the District Court adopted the Magistrate Recommendations. *Id.* VDARE then appealed to the COA, wherein the COA affirmed by a majority Opinion on August 23, 2021. *See* App. A. Judge Harris Hartz ("***Judge Hartz***") dissented from the majority, stating that he would have held VDARE plausibly stated claims for relief against the City.[4] App. A at 46a-50a. VDARE then sought *en banc* reconsideration, but this was denied on September 20, 2021. App. D.

REASONS FOR GRANTING THE WRIT

Imagine if the mayor of a hypothetical American city called "Blackacre Springs" in the hypothetical American state of "Ames" issued the following announcement regarding an event at a private facility booked four months earlier that involved constitutionally protected speech and association by the well-known "Black Lives Matter" organization:

> The City of Blackacre 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

4. Judge Hartz, however, concurred with the majority on the question of qualified immunity for Mayor Suthers. Although VDARE does not agree with the COA's conclusions on this issue, it has elected not to seek review of the qualified immunity portion of the COA Opinion to focus on First Amendment issues and, thus, Mayor Suthers is not listed as a Respondent in this Petition.

> our great city.
>
> The City of Blackacre 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 Ames 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 day following this hypothetical announcement, the Resort cancels the conference without stating an official reason. But the mayor of Blackacre Springs subsequently expresses satisfaction with the cancellation and states he is "confident" that the Resort "didn't know the nature of Black Lives Matter" when it booked the event.

Under this scenario it is impossible—truly *impossible*—to imagine any court finding a First Amendment claim based on this fact set would fail the "judicial experience and common sense" plausibility test of *Iqbal*. Yet, the COA Opinion has provided a template for any city in America to chill First Amendment expression while avoiding accountability. The absurdity of the COA Opinion is manifestly apparent by the fact that the dissent—Judge Hartz—understood the City's Announcement exactly as VDARE alleges and as it was, in fact, understood by the local police and media. If a federal appellate judge, the police, and local media all read the City's Announcement as supporting VDARE's First Amendment claim, then how can that construction possibly be "implausible"?

The Court cannot allow Rule 12(b)(6) plausibility standards to become "trial by judicial panel" where the subjective views of a panel majority determine what should be an objective standard. The Court should grant this Petition and ensure the First Amendment is protected for all Americans from the type of unconstitutional chilling of free speech and association committed by the City against VDARE.

I. The Ordinary Reasonable Reader Would Understand The City's Announcement As A Coercive Threat Against VDARE And The Resort.

As Judge Hartz recognized, the "first step" in determining the plausibility of VDARE's federal question claims[5] under *Ashcroft v. Iqbal* is to determine the "common sense" meaning of the Announcement. 556 U.S. 662, 679 (2009). And fortunately, there is a venerable body of case law that this Court can look to assess the plain and ordinary meaning of publications such as the Announcement.[6] Applying these principles—which the

5. Because VDARE's tortious interference claim was dismissed because the District Court and COA declined to exercise supplemental jurisdiction over that state law claim considering the dismissal of the federal question claims, the question of whether the COA erred in affirming dismissal of that claim will not be separately argued in this Petition. VDARE agrees that, absent the federal question claims, the lower courts properly dismissed the supplemental state law claim. However, assuming the Court grants this Petition and reverses the COA on dismissal of any of the federal question claims, VDARE prays for reinstatement of the tortious interference claim as well.

6. Although VDARE has located no case applying tort law in the context of construing the meaning of government speech,

COA clearly did not—this Court should adopt Judge Hartz's construction of the Announcement, which gives rise to an unconstitutional threat.

A. Determining meaning of publications under well-established tort law.

In considering the meaning of a statement in tort law, such as defamation, courts construe the publication "as a whole . . . in (its) plain, natural, and ordinary meaning, . . . as other people would understand (it), according to the sense in which (it) appear(s) to have been published.[.]" *Southard v. Forbes, Inc.*, 588 F.2d 140, 143 (5th Cir. 1979) (applying Georgia law and quoting *Garland v. State*, 84 S.E.2d 9, 11 (1954)); *accord Golden Bear Distrib. Sys. of Texas, Inc. v. Chase Revel, Inc.,* 708 F.2d 944, 948 (5th Cir. 1983) (applying Texas law).[7]

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this Court has previously borrowed from tort law in determining how an ordinary person would construe statements in the context of securities law. *See Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 192 (2015) ("But we may still look to the common law for its insights into how a reasonable person understands statements…"). There is no principled reason why the Court cannot also look the common law to determine how a reasonable person understands government speech.

7. The general principles of construing statements under tort law discussed herein are widely recognized by multiple secondary authorities. *See, e.g.,* F. Harper, et al., Harper, James, and Gray on Torts § 5.4 (3rd ed. 2006); W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 111, at 780-83, and § 113, at 808-10 (5th ed. 1984); Restatement (Second) of Torts § 563 cmt. b, § 564, and § 614 & cmt. b (1977); Rodney A. Smolla, 1 Law of Defamation § 4:17 (2d ed. 2011).

Courts should refrain from a "hair-splitting analysis" of what is said in a statement to find an innocent meaning that would not be found by the common sense "person on the street" and not the careful or "literal" reader. *See Forsher v. Bugliosi*, 608 P.2d 716, 722 (Cal. 1980); *Golden Bear,* 708 F.2d at 948; *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 119 (Tex. 2000); *see also* 1 Law of Defamation § 4:5.50 *and* note 7 *supra*.

As Prof. Smolla has noted, one example of the type of "careful", "literal", and "hair splitting" reading that the ordinary reasonable reader would not engage in is where a court "[n]arrowly and technically pars[es] material line-by-line", as this is not a "common sense" way to determine the meaning of a statement. 1 Law of Defamation § 4:17. Ordinary readers determine meaning through the entire context, juxtaposition, and innuendo of statements. *See id.*

B. The COA Opinion disregards common sense in construing the Announcement.

Inexplicably, the COA applied the antithesis of every known cannon of construction and common sense in construing the meaning of the Announcement. In fact, the COA appears to have applied no guiding principles whatsoever in construing the Announcement other than performing a hair-splitting analysis to find an innocent meaning. While it criticizes VDARE for relying on its "subjective interpretation" of the Announcement, it does no more than provide its own subjective interpretation that contravenes the objective reality of how ordinary people understood the Announcement. In doing so, the COA reached an absurd conclusion regarding the meaning the Announcement, essentially ensuring that its

construction would draw every inference in favor of the City's construction and opposed to VDARE's, which led to the Rule 12(b)(6) dismissal.

First, the COA emphasizes the fact that VDARE is not specifically referenced in the Announcement. App. 22a; 36a. So what? This is legally insignificant because the uncontroverted pleadings aver that multiple third parties understood the Announcement to be of and concerning VDARE and the subject matter of the Conference. Just as publications may convey meanings by implications, so may they identify their subjects by implication. *Cf., e.g.,* 54 A.L.R. 4th 746 (collecting cases where defamation plaintiffs maintained actions despite not being expressly named where third persons understood the alleged defamatory publication as of and concerning them). The "people on the street" (Mayor Suthers, local media, and local police) all understood what "event" and what "group" was being referred to by the Announcement. The COA placing significance on the fact that VDARE was not specifically named is an erroneous "careful" and "literal" reading of the Announcement.

Second, the COA reads every sentence of the Announcement in isolation, devoid of context, and reaches implausible conclusions as a result. *See generally* App. A at § 1.A.4. In fact, nowhere in the COA Opinion does it attempt to resolve the overall "gists" or "impressions" the Announcement created in the mind of the ordinary reader. *See generally id.* This is exactly the type of reading that courts should not do when attempting to ascertain the meaning to the "ordinary reasonable reader". *See, e.g.,* 1 Law of Defamation § 4:17. As a result, the COA's construction arrives at completely non-sensical conclusions to find innocent meaning.

For example, the COA—during its improper hair-splitting exegesis of the Announcement—claims that the Announcement's second "sentence doesn't name VDARE or express any 'distaste' for VDARE's speech". App. at 22a. While it is true that the second sentence of Announcement does not mention VDARE or its speech expressly, any ordinary reader would read that sentence in the context of: (1) the City singling out the Resort in the prior sentence; (2) the next sentence discussing "this" event in the singular and referencing "hate speech"; and (4) the final sentence discussing the City's "enforcement" of Colorado law against transgressions of "fear, intimidation, and harassment". What other "event" at the Resort that involved alleged "hate speech" was the Announcement referring to if not to VDARE's conference? The COA's sentence-by-sentence literal reading of the Announcement is a ridiculous construction that no ordinary citizen would have undertaken.

In short, the COA majority committed clear error when it failed to read the government Announcement in the same way it would for a tort plaintiff. The COA should have read the Announcement in its entire context and determined the impression the Announcement would have on the ordinary listener – not as trained lawyers who can find innocence in sentence-by-sentence analysis. Had it done so, it would have arrived at the same conclusions as Judge Hartz, the local media, local police, and even Mayor Suthers himself who later expressed satisfaction at the effects of the Announcement.

C. Applying appropriate legal principles, the Announcement must be construed as a coercive threat.

Judge Hartz correctly observed that the only real reasonable construction of the third sentence of the Announcement is a clear threat to refuse "any" City services to the Resort and Conference. App. 46a-47a. This is not VDARE's "subjective interpretation" of the statement in the third sentence of the Announcement – it is the undeniable objective reality. Both the plain language of the Announcement and the fact that local media and police understood the statement to mean there would be no City services provided to the Conference belie the COA's implausible construction.

Further, as Judge Hartz noted, the Announcement has the additional aggravating effect of inviting violence since counter-ideologues will know in advance that their adversaries will have no police or fire protection. *Id.* As he further noted, and as is the only "common sense" interpretation of these statements, if the City was not referring to police and fire services being withheld from the Conference, what other services could they possibly be referring to? *Id.* at 48a-49a. Public education services? Food stamps? The COA Opinion on this point is completely insupportable.

But while Judge Hartz focused primarily on this third sentence of the Announcement—which is more than sufficient to give rise to a First Amendment claim when read in the entire context of the Announcement—the remainder of the Announcement is equally offensive to the First Amendment. The most reasonable and plausible

construction of the Announcement—and certainly its gist and implications—are that "while we cannot tell you what to do, if your hotel is the victim of violent crime or arson as a result of choosing to host the Conference—a hate speech conference that may violate Colorado law—you are on your own." The City made it known that the Resort would lose the protection of its police power but might be subject to its police power due to its "steadfast commitment" to enforce an amorphous set of laws that may be violated by VDARE's Conference.[8]

As discussed below, the Court need only agree with VDARE's construction and import of the third sentence for a plausible First Amendment-based claim for relief to lie. Finally, if a publication is ambiguous as to meaning (i.e., it could be reasonably construed as innocent or reasonably construed as tortious), then a factfinder should determine the question. *See, e.g., Golden Bear,* 708 F.2d at 948-49. Thus, if the Announcement is *capable* of meaning to the ordinary reader what VDARE alleges, the Court should deem VDARE's First Amendment claims as plausible, even if the Court finds that the Announcement does not *require* the conclusion VDARE suggests.

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8. The COA Opinion also implausibly construed the fourth sentence of the Announcement as simply a "statement of Colorado law". App. at 22a-23a. This is yet another example of the COA's unrealistic reading of the Announcement. The COA implausibly pretends this sentence is just a general public service advisory completely detached from the context of the Announcement referred to "this event" at the Cheyenne Resort, referring to it as "hate speech". Moreover, it is not even clear *what* law this statement is referring to and it is not clear that there even is such a law that protects people from "fear".

II. Based On A Proper Construction Of The Announcement, VDARE Plausibly Pleaded Federal Question Claims.

With a proper construction of the Announcement in mind, the Court can then easily determine that VDARE's federal question claims are plausibly pleaded.

A. VDARE plausibly pleaded a claim for relief under 42 U.S.C. § 1983.

VDARE's first claim is that the City, acting under color of law, intentionally deprived VDARE of its First Amendment rights to freedom of speech and freedom of association. App. at 9a. VDARE's Complaint alleged that, the City's "announcement that they would not provide any municipal resources or support of any kind, including basic police, fire, ambulance, parking and security services" deprived it of its First Amendment rights, which in turn caused VDARE to lose revenue from the planned Conference and resulted in negative publicity." *Id.* VDARE also claims that the City's refusal to "provide any support or resources" has "made it impossible for VDARE to conduct future conferences, discussions and events in Colorado Springs," because the City has made clear that VDARE "enjoy[s] a disfavored status under the law." *Id.*

The COA agreed with the District Court and the City that VDARE failed to plausibly plead that the Resort's cancellation was "state action" because the City had not coerced or significantly encouraged the cancellation. App. at 10a. The COA further agreed with the District Court that the Announcement was protected government speech and was not threatening. However, as discussed above,

the COA only reached these conclusions because of its implausible construction of the Announcement.

Under Tenth Circuit law, VDARE plausibly pleaded a claim for relief under Section 1983 if it plausibly pleaded: "(1) deprivation of a federally protected right by (2) an actor acting under color of state law." *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1155 (10th Cir. 2016) (citation omitted). Because the second element requires an actor to act "under color of state law," usually "the only proper defendants in a Section 1983 claim are those who represent the state in some capacity, whether they act in accordance with their authority or misuse it." *Gallagher v. "Neil Young Freedom Concert,"*, 49 F.3d 1442, 1447 (10th Cir. 1995) (internal marks, brackets, and citations omitted). Therefore, to succeed on a § 1983 claim based on the Resort's cancellation,[9] VDARE must have plausibly alleged that the Resort's decision to cancel the Conference amounts to state action. *See id.*

This Court has held that state action can lie in the conduct of private parties "where 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." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). Under this "nexus test" a state normally can be held responsible for a private decision "when it has exercised coercive power or has provided such significant encouragement,

9. As discussed *infra*, VDARE contends that even aside from the cancellation, the Announcement and its thinly veiled threats are deprivations of VDARE's First Amendment rights *per se* and not, as the COA concluded, protected government speech.

either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

VDARE pleaded and argued that the threatening Announcement was a deprivation of First Amendment rights and, in addition, the Resort's cancellation amounted to state action through the nexus test. The COA held that VDARE failed to plausibly plead facts that satisfy this nexus test. App. at 12a. However, if this Court reads the Announcement in proper context, the Announcement, as Judge Hartz recognized, unequivocally contains a coercive threat and encouragement against the Resort. At minimum, it is a threat to deprive the Resort of police or fire protection in the event of violent agitators who oppose VDARE's right to speech and assembly. At worst, however, the Announcement threatened potential criminal prosecution for those involved in VDARE's "hate speech" based on it reference to amorphously alleged "Colorado laws" protecting persons from "intimidation and fear".

As such, VDARE's Complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To meet this standard, VDARE needed only to plead factual content that allows this Court "to draw the reasonable inference that [the City] is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). VDARE has alleged sufficient facts to "nudge [its] claims ... across the line from conceivable to plausible." *Id.* at 680 (internal quotation marks omitted) (quoting *Twombly*, 550 U.S. at 570).

The allegations in VDARE's Complaint in this case is on point with this Court's holding 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 by a book publisher, 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. In rejecting this argument, the Court observed:

> 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.
>
> […]

> It is true . . . that [the 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 [the publisher'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.

In *Bantam Books*, the Court exercised "judicial experience and common sense" (*see Iqbal*, 556 U.S. at 679) to understand that the "person on the street" does not take lightly to "thinly veiled threats" of the government. Yet here, the thinly veiled threat made by the City was more ominous than anything in *Bantam Books*. In *Bantam Books*, the publishers faced potential minimal "informal sanctions" where here the public—and specifically the Resort—feared prosecution under some vague recitation of alleged Colorado laws as well as the deprivation of police protection should they attend the Conference. The Resort's decision to cancel was, in reality, a decision made by the City due to the coercive threats and encouragement. VDARE's allegations in its Complaint has plausibly satisfied the nexus test. *See also Chernin v. Lyng*, 874 F.2d 501, 507-08 (8th Cir. 1989) (finding plausible state action based on allegations that USDA refused to provide services to plaintiff's employer unless plaintiff was fired).

And the "government speech" doctrine does not, as the COA determined, protect the City here. First, as repeatedly stated herein, the COA misconstrued the

meaning the Announcement into something innocent, when it was clearly not. As Judge Hartz observed in his dissent, government speech does not—just as it did not in *Bantam Books*—include the right to make coercive threats that intrude on First Amendment rights. App. at 47a. As Judge Hartz further observed, this Court's holding in *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015) allows the government to state its position on social matters, but it does not allow the government to use its platform to compel private persons to convey the government's speech. *Id.* at 208. Axiomatically, therefore, the government cannot use its speech in a way that threatens to stifle, dissuade, punish, or deter constitutionally protected speech because the government disfavors the viewpoint. *Cf., 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.").

And while the City's threats are a, *per se,* deprivation of VDARE's constitutional rights by threatening adverse action, there is little question that these threats were also the cause in fact of the cancellation of the Conference. As Judge Hartz again noted, it is more than plausible that a hotel operator would be strongly dissuaded from doing business with a customer who would cause the hotel to lose municipal police and fire protection. App. 48a-49a. The COA's conclusion that this would not have been a "significantly encouraging" factor in the cancellation defies common sense and reality.

But COA also erred by relying on extraneous facts to reach this conclusion that VDARE had inadequately alleged causation. The COA repeatedly referred to the violence that occurred in Charlottesville, Virginia as an alternative explanation for the cancellation. App. 25a. The COA claimed that VDARE had some affirmative duty to negate this possibility to plausibly state a claim for relief that relied on the cancellation. *Id.*

But there are multiple problems with the COA's criticism of VDARE's pleading on causation. Nowhere in the Complaint is there even a single reference to Charlottesville or the violence that ensued there in 2017. *See generally* Complaint. The COA improperly imported the events of Charlottesville into what should have only been an analysis on the four corners of the Complaint. *See, e.g., Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996).[10] But even were it appropriate for the Court to consider the Charlottesville violence in conjunction with the issues pleaded by VDARE, there is no evidence—and certainly none in the record—that VDARE was in any way connected with what happened in Charlottesville. It was thus completely inappropriate for the COA to: (1) introduce the extraneous Charlottesville facts into the "plausibility" analysis; (2) surmise that the VDARE was connected to Charlottesville; and (3) speculate that the Resort may have cancelled due to Charlottesville and not because of the threats contained in the Announcement.

10. Neither the Magistrate or District Court ever converted the Rule 12(b)(6) motion into a motion for summary judgment by providing the proper notice and opportunity to respond. *See* Fed. R. Civ. P. 12(d).

VDARE did not have a duty to affirmatively plead the negations of other potential causes. The Resort could have also cancelled for logistical, weather, of financial reasons as well. Was VDARE Required to affirmatively plead the negations of all of these specific possibilities? The COA essentially transformed VDARE's plausibility pleading standard into a *Daubertesque* standard requiring a pleading that negates all alternative causes of a plaintiff's injury. *Cf, e.g., Lauzon v. Senco Prods., Inc.,* 270 F.3d 681, 694 (8th Cir. 2001) (stating an expert must "be able to explain why other conceivable causes are excludable").

And as Judge Hartz observed, to the extent Charlottesville played any role whatsoever in the Resort's decision, it punctuated the power of the coercive threat of denying police and fire protection made in the Announcement. App. 49a-50a. Further, he recognizes that the COA's criticism of VDARE's failure to include an excuse given by the Resort in the Complaint as a pleading deficiency is totally inappropriate.[11] *Id.* VDARE was not required to engage in informal pre-suit discovery in order to file its suit.

But, in any event, VDARE's allegations plausibly establish causation. VDARE alleged not just the

11. Since the COA chose to consider evidence extraneous to the Complaint (inappropriately), it could have also taken notice of the fact that the Cheyenne Resort refused to comment to local media when asked about the cancellation of the VDARE Conference. *See* https://www.koaa.com/news/news5-investigates/2017/08/16/cheyenne-mountain-resort-cancels-white-nationalist-conference/ (last visited Dec. 16, 2021). There is no evidence in the record that the Resort gave any excuse or was willing to talk to VDARE about its reasons for cancellation.

temporal connection between the cancellation and the Announcement, but also Mayor Suther's admission that he was "confident" the Resort was not aware of the "nature" of VDARE until his Announcement. Clearly, therefore, the City has admitted that its announcement played a causal role in the cancellation. In addition, it must be plausibly inferred that where the local police and media understood the Announcement to mean police and fire services would not be provided if VDARE was hosted, that the Resort cancelled immediately after the Announcement was issued. Finally, VDARE alleged the Resort was in constant communication regarding logistics and safety up until the Announcement.

"The plausibility standard is not akin to a 'probability requirement[.]'" *Iqbal*, 556 U.S. 662, 678 (quoting *Twombly,* 550 U.S. at 556). "[I]t asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. (citing *Twombly*, 550 U.S. at 556). Here, VDARE has plausibly alleged facts that, if proven, will demonstrate more than a possibility that the City acted unlawfully, but instead coercively threatened—successfully—to have VDARE's speech assembly cancelled, thereby giving rise to liability under § 1983.

"Speech cannot ... be punished or banned, simply because it might offend" those who hear it. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992). And the City was not permitted to respond to threats of violence against VDARE's speech by leaving VDARE and its third-party host to fend for themselves. "The police must preserve order when unpopular speech disrupts it […] The police must permit the speech and control the crowd; there is no heckler's veto." *Hedges v.*

Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1299 (7th Cir.1993). The City not only allowed a heckler's veto against the Conference – *it invited hecklers to engage in a violent veto without the presence of police power.*

VDARE has stated a plausible § 1983 claim and this Court should reverse the COA.

B. For the same reasons, VDARE plausibly pleaded a First Amendment retaliation claim.

Similarly, based on a proper construction of the Announcement, VDARE has plausibly pleaded a claim for relief for First Amendment retaliation. To have plausibly pleaded this claim under the law of the Tenth Circuit, VDARE was required to plausibly allege (1) that it was engaged in constitutionally protected activity, (2) the defendant's actions caused it to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that protected activity, and (3) the defendant's actions were substantially motivated as a response to [its] protected conduct. *McBeth v. Himes*, 598 F.3d 708, 717 (10th Cir. 2010) (citations omitted).

The COA only concluded VDARE did not plausibly plead the second element (chilling an ordinary person from engaging in protected activity) of this claim based on its implausible reading of the Announcement.[12] *See, e.g.,* App. A at 39a-41a ("[T]he court cannot just adopt VDARE's

12. There is no question that VDARE plausibly pleaded that it was engaging in protected activity (the Conference) and that the City's announcement—as well as the Resort's cancellation—were substantially motivated as a response to VDARE's exercise of its rights to free speech and assembly.

subjective interpretation of the Statement."). Of course, given that the COA's unrealistic interpretation of the Announcement as nothing more than friendly statements of government policy and public service advisories about the government's steadfast commitment to enforce "laws" that forbid hurting someone's feelings—none of which specifically mentioned VDARE—it should come as no surprise that the COA held these warm government admonitions did not give rise to a plausible claim for chilling VDARE's exercise of free speech and assembly.

But for the same reasons as discussed above, the COA's hair-splitting and careful search for innocent meaning in the Announcement is inappropriate and cannot stand the scrutiny of common sense. More importantly, however, the COA did not have to rely on VDARE's "subjective interpretation"—and then replace it with its own, most implausible, subjective interpretation—but rather could have simply taken cognizance of how people interpreted the speech in real time, such as local media, and the police, as well as Mayor Suther's "confident" acknowledgement that the Announcement, at minimum, alerted the Resort to the "true nature" of VDARE the day before the cancellation.

The COA construction of the Announcement is the fulcrum on which the entire Opinion rests. Once its implausible construction of the Announcement is cured, the rest of the Opinion unravels. It is entirely based on its unreasonable reading. For these reasons, as discussed in greater detail above, all the COA conclusions on whether VDARE plausibly alleged the "chilling" element of its retaliation claim (including plausibly alleging the reason the Resort cancelled) were warped by its improper construction. If the COA had read the Announcement

through the lens of the common person on the street, rather than in the light most favorable to finding innocent government speech, then, as Judge Hartz observed, then VDARE's claims are easily go from merely possible to "beyond debate" as plausible. App. A at 50a. Reading the Announcement properly, VDARE's claims are not just "nudged" over the plausibility line but run untouched into the plausibility "end zone".

VDARE has stated a plausible First Amendment retaliation claim and this Court should reverse the COA.

C. The Critical Constitutional Importance.

The First Amendment is the keystone constitutional right of which all other liberties are derivative of. VDARE's First Amendment rights were clearly violated when the City threatened to use police power to punish the speech assembly and withdraw police power from protecting it. Although VDARE's speech assembly has been maligned as extremist "hate speech", the truth is that immigration reform is a highly important issue to a large percentage of Americans on both sides of the political aisle.[13] However, regardless of how "controversial" VDARE's positions are alleged to be and regardless of whether it elicits violent reactions from ideologically opposed mobs, this has no First Amendment significance, save that actually weighs in VDARE's favor: "[I]f it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *FCC v. Pacifica Foundation*, 438 U. S. 726, 745-746 (1978).

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13. *See, e.g.*, https://thehill.com/latino/577408-democratic-poll-66-percent-of-voters-would-be-upset-without-immigration-reform (last visited Dec. 14, 2021).

This should have been an easy decision for the Magistrate, District Court, and COA. The lower courts, however, read the Announcement in a way that seized absurdity from the jaws of plausibility in favor of finding government innocence. If the Announcement were a passage in the reading comprehension section of a standardized test and asked for the "main ideas", VDARE, the Resort, and the local media and police all got the question correct. VDARE had to live with the consequences of how the common and ordinary citizens of Colorado Springs—including those at the Resort, local police, and media—understood the "main ideas" of the Announcement. In bringing this action to vindicate its First Amendment rights, however, VDARE was told by jurists that the Announcement did not really mean what the ordinary readers perceived it to mean.

VDARE's predicament is not unique. So-called "cancel culture" has increasingly made exercising the rights to free speech and association more and more difficult as private sectors "deplatform" disfavored speech. Governments cannot be allowed to join in this phenomenon and must take great care not to spook an already skittish private sector into cancelling disfavored speech due to veiled threats like those in the Announcement. This Court need not decide this case on any exotic or novel propositions, but only a single proposition that must be underscored and reemphasized – state actors cannot engage in government speech that chills the free exercise of private speech and assembly. America—including its lower courts—needs to be reminded in no uncertain terms that the Amendment means what it says—that freedom of speech may not be abridged by the state; that the freedom applies to unpopular and controversial speech as well as

to mainstream expressions; and that it is not a defense for a municipality that threatens sanctions for those hosting disagreeable speech to simultaneously claim—in Orwellian "doublethink" fashion—that it is honoring the First Amendment.

By applying Rule 12(b)(6) in a way that creates a *de facto* expansion of the government speech doctrine, the Tenth Circuit has a set a dangerous precedent for the government to chill free speech and assembly. The Court should grant plenary review and reverse this egregious error of law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 20, 2021

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED AUGUST 23, 2021

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 20-1162

VDARE FOUNDATION,

Plaintiff-Appellant,

v.

CITY OF COLORADO SPRINGS; JOHN SUTHERS,

Defendants-Appellees.

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:18-CV-03305-CMA-KMT)

August 23, 2021, Filed

Before TYMKOVICH, Chief Judge, HARTZ, and PHILLIPS, Circuit Judges. HARTZ, J., Circuit Judge, dissenting.

PHILLIPS, Circuit Judge.

When the government speaks, what can it say? VDARE Foundation, Inc. alleges that the City of Colorado

Springs improperly spoke through a public statement issued by its Mayor and, in so doing, violated VDARE's First Amendment rights. The public statement, which was issued two days after the Charlottesville protests, denounced "hate speech" and relayed that the City wouldn't be providing municipal resources for VDARE's upcoming private conference in the City. The day after the Mayor issued the statement, a private resort in the City cancelled its contract to host VDARE's upcoming conference. VDARE alleges, under 42 U.S.C. § 1983, that the City's statement left the resort with no choice but to cancel the conference and thus (1) violated VDARE's rights to freedom of speech and freedom of association, (2) constituted First Amendment retaliation, and (3) tortiously interfered with VDARE's contract with the resort. The district court dismissed VDARE's federal claims for failing to state a claim. After that, it declined to exercise supplemental jurisdiction over the state tort claim. VDARE appeals. We affirm.

BACKGROUND

I. Factual Background[1]

VDARE describes itself as a nonprofit organization that educates the public on two main issues: (1) the unsustainability of current U.S. immigration policy, and (2) the United States' ability to survive as a nation-state.

1. These facts are largely derived from VDARE's First Amended Complaint. At this posture, they are accepted as true and viewed in the light most favorable to VDARE. *See Mayfield v. Bethards*, 826 F.3d 1252, 1255 (10th Cir. 2016).

VDARE carries out its mission through its website, books, public-speaking engagements, conferences, debates, and media appearances. It alleges that though it seeks to "influence public debate and discussion on the issues of immigration and the future of the United States as a viable nation-state," it has "never advocated violence or any form of illegality." Appellant's App. at 7.

Around March 2017, VDARE reserved the Cheyenne Mountain Resort (the "Resort") in Colorado Springs for a future conference (the "Conference") featuring guest speakers and activities related to its mission. VDARE alleges that the Resort knew of VDARE's mission as well as the potential for media attention and possible protests that could arise from the Conference.

Over four months after VDARE booked the Conference, on August 12, 2017, violence erupted in Charlottesville, Virginia following a controversial political rally. The rally, protests, and ensuing violence drew national media attention. Two days later, on August 14, 2017, Mayor John Suthers, speaking on behalf of the City of Colorado Springs (the "City") (collectively, "Defendants"), 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 8 (the "Statement").

The next day, August 15, 2017, the Resort issued a statement announcing that it would no longer be hosting the Conference and cancelled its contract with VDARE. In its Amended Complaint, VDARE doesn't allege that the City had any direct involvement with the Resort's decision to cancel the Conference. Nor does it allege what, if any, reasons the Resort provided when it informed VDARE that it was cancelling the Conference. Rather, VDARE alleges that before the City's Statement, the Resort had been actively communicating and coordinating with VDARE about logistics and safety in connection with the Conference. Further, it alleges that sometime after the Resort cancelled the Conference, Mayor Suthers "publicly expressed satisfaction that the Conference had been cancelled." *Id.* at 9.

II. Procedural Background

In its Amended Complaint, VDARE asserts three claims against Defendants. First, under 42 U.S.C.

§ 1983, VDARE alleges that Defendants violated its rights to freedom of speech and freedom of association as guaranteed by the First Amendment and that they violated VDARE's equal protection rights as guaranteed by the Fourteenth Amendment.

Specifically, VDARE alleges that the City's "announcement that [it] 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." *Id.* at 11. VDARE further alleges that the City "targeted" it under the City's "Hate Speech Policy," which was "not content-neutral either facially or in its application" and "targeted events, groups, and individuals for disfavored treatment based on the content of their speech." *Id.* From this, VDARE claims that it was "deprived of its ability to lawfully and peaceably assemble with its invited guest speakers, readers, supporters, and other interested persons." *Id.*

Second, VDARE alleges that Defendants retaliated against it in violation of the First Amendment by characterizing its "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.'" *Id.* at 17-18. Here, VDARE again emphasizes the part of the City's Statement stating that the City would not "provide any support or resources

to this event." *Id.* at 18. VDARE alleges that the City's decision "would chill a person of ordinary firmness from continuing to engage in this type of . . . activity." *Id.* And due to the City's "expressed disapproval" of VDARE's speech, VDARE claims that it hasn't attempted to arrange another conference in Colorado Springs. *Id.*

Third, VDARE alleges that Defendants intentionally interfered with its contract by "effectively ma[king] performance of the contract impossible." *Id.* at 19-20. On this point, VDARE claims that Defendants "were specifically aware of the Resort's contract with [VDARE]" and that Mayor Suthers later "expressed satisfaction that the Resort had cancelled its contract to host [the] Immigration Reform Conference." *Id.* at 19.

Based on these claims, VDARE seeks (1) compensatory, punitive, and "presumed" damages; (2) a declaration that "Defendants' conduct violated Plaintiff's First Amendment rights and intentionally interfered with their contract with the Resort"; and (3) an injunction "forbidding Defendants from denying municipal services to entities or events based on their controversial viewpoints and affiliations." *Id.* at 22.

Defendants moved to dismiss VDARE's Amended Complaint for failure to state a claim. The district judge referred this motion to a magistrate judge. The magistrate judge issued a report and recommendation (the "Recommendation"), suggesting the district court dismiss all federal claims and decline to exercise supplemental jurisdiction over the state claim. Despite VDARE's

objections to the Recommendation, the district judge adopted the Recommendation, further addressing an argument on "government speech" that VDARE insisted the magistrate judge had missed. Three days later, the district judge entered a final judgment, from which VDARE has timely appealed. We exercise jurisdiction under 12 U.S.C. § 1291.

III. Standard of Review

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint 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 omitted).

"We review de novo the [district court's] grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim." *Gee v. Pacheco*, 627 F.3d 1178, 1183 (10th Cir. 2010) (citation omitted). "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, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A claim "has facial plausibility" if the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

A plaintiff must allege sufficient facts to "nudge[] [his] claims . . . across the line from conceivable to plausible." *Id.* at 680 (second alteration in original) (internal quotation marks omitted) (quoting *Twombly*, 550 U.S. at 570).

"The plausibility standard is not akin to a 'probability requirement[.]'" *Id.* (quoting *Twombly*, 550 U.S. at 556). "[I]t asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556). "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.* (internal quotation marks omitted) (quoting *Twombly*, 550 U.S. at 557).

Under the Rule 12(b)(6) analysis, we "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679. "When there are well-pleaded factual allegations" remaining, we "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* While "[t]he 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) (citation omitted), the court need not accept "conclusory allegations without supporting factual averments," *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citations omitted).

DISCUSSION

VDARE raises two First Amendment claims and one state tort claim. Its first claim alleges a violation of its

rights to freedom of speech and freedom of association. As we will discuss next, to successfully plead this claim through § 1983, VDARE must plead that any allegedly unconstitutional conduct that injured VDARE was state action. VDARE's second claim is for First Amendment retaliation—a claim that hinges on satisfying several rigorous elements. We will address each of these two claims in turn and then address supplemental jurisdiction last.

I. Freedom of Speech and Freedom of Association Claim

VDARE's first claim is that Defendants, acting under color of law, intentionally deprived VDARE of its First Amendment rights to freedom of speech and freedom of association. According to VDARE, "Defendants' announcement that they would not provide any municipal resources or support of any kind, including basic police, fire, ambulance, parking and security services" deprived it of its First Amendment rights, which in turn caused VDARE to lose revenue from the planned Conference and resulted in negative publicity. Appellant's App. at 11, 13. VDARE also claims that the City's refusal to "provide any support or resources" has "made it impossible for VDARE to conduct future conferences, discussions and events in Colorado Springs," because Defendants have made clear that VDARE "enjoy[s] a disfavored status under the law." *Id.* at 13.

In addressing this claim, the Recommendation limited its analysis to whether the Resort's cancelling of the

Conference could be considered state action. After noting that most rights in the Constitution are protected against infringement only by governments, the Recommendation concluded that VDARE hadn't alleged a sufficient nexus between the Resort's cancellation and the City's Statement for the Resort's conduct to be deemed state action. So it recommended that the district court dismiss the claim.

In its objections to the Recommendation, VDARE argued that the Recommendation had failed to consider whether the City's Statement itself, if taken as a "threat" or a "warn[ing]" to "local businesses" not to contract with VDARE, could support the claim. *Id.* at 61. Otherwise stated, VDARE argued that the Recommendation focused only on whether the *Resort's* cancelling the Conference could be deemed a constitutional violation as opposed to the *City's* issuing the Statement advising that it wouldn't provide any support or resources for the Conference. *Id.* at 53.

In response, the district court separately assessed (1) the Resort's cancellation and (2) the City's Statement. First, it ruled that the Resort's cancellation was not plausibly pleaded as state action, because it contained no factual allegations that the City had coerced or significantly encouraged the Resort's decision. Second, it concluded that the City's Statement itself was permissible government speech under the "government-speech" doctrine and that the City was merely 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." *Id.* at 90-91.

VDARE contends that the district court erred in two ways. First, it asserts that the district court failed to apply the correct formulation of the "nexus test" in determining whether VDARE had plausibly alleged state action. Second, it claims that the district court wrongly "separat[ed] the Cheyenne Resort's cancellation and the Defendants' statements into an artificial dichotomy" and didn't sufficiently consider the importance of context. Appellant's Opening Br. at 12.

Defendants respond that (1) the district court correctly determined that VDARE hadn't plausibly alleged that the Resort's decision to cancel the Conference was state action, and (2) the City's Statement was "permissible government speech which in no way directed Cheyenne Resort to take any action." Appellees' Answer Br. at 3. For the following reasons, we agree with Defendants.

A. § 1983 and State Action

A claim pleaded under § 1983 requires "(1) deprivation of a federally protected right by (2) an actor acting under color of state law." *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1155 (10th Cir. 2016) (citation omitted). Because the second element requires an actor to act "under color of state law," "the only proper defendants in a Section 1983 claim are those who represent the state in some capacity, whether they act in accordance with their authority or misuse it." *Gallagher v. "Neil Young Freedom Concert,"*, 49 F.3d 1442, 1447 (10th Cir. 1995) (internal marks, brackets, and citations omitted). Therefore, to succeed on a § 1983 claim based on the Resort's cancellation, VDARE

must plausibly allege that the Resort's decision to cancel the Conference amounts to state action. *See id.*

We have previously considered four tests delineated by the Supreme Court to determine whether private parties should be deemed state actors when conducting a state action analysis: (1) the nexus test, (2) the symbiotic-relationship test, (3) the joint-action test, and (4) the public-function test. *Id.* at 1448-57. Here, VDARE relies on the "nexus test," arguing that because the real message of the City's Statement was "that the Cheyenne Resort should cancel VDARE's conference," the Resort's decision to cancel the Conference should be treated as state action. Appellant's Opening Br. at 13. We conclude that VDARE hasn't satisfied the nexus test.

1. Legal Standards for the Nexus Test

Under the nexus test, a plaintiff must demonstrate "'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 v. Metro. Edison Co.*, 419 U.S. 345, 351, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974)). In other words, the City is responsible for the Resort's private decisions "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 [City]." *Id.* (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982)). "The test insures 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.* (citation omitted).

In *Gallagher*, we reviewed a number of general principles regarding the nexus test derived from Supreme Court cases. *Id.* at 1448. For instance, we noted that "the existence of governmental regulations, standing alone, does not provide the required nexus." *Id.* (citing *Blum*, 457 U.S. at 1004; *Jackson*, 419 U.S. at 350). We also noted that "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." *Id.* (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-42, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 544, 107 S. Ct. 2971, 97 L. Ed. 2d 427 (1987)). Likewise, we explained that the "[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." *Id.* (alteration in original) (quoting *Blum*, 457 U.S. at 1004-05); *see also Am. Mfrs. Mut. Ins. v. Sullivan*, 526 U.S. 40, 54, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999) ("[P]ermission of a private choice cannot support a finding of state action."). Similarly, we observed that a state's subsidizing the operating costs of a private facility or having broad involvement in the administrative side of a private process is also insufficient to satisfy the test. *Id.*; *see also Blum*, 457 U.S. at 1011; *Am. Mfrs. Mut. Ins.*, 526 U.S. at 54; *S.F. Arts & Athletics*, 483 U.S. at 544 ("The Government may subsidize private entities without assuming constitutional responsibility for their actions.").

In short, the following factors do not alone satisfy the nexus test: (1) state regulation of private functions, *Blum*,

457 U.S. at 1004; (2) state contracts with private entities, *id.*; (3) receipt of state funds or other types of assistance, *Rendell-Baker*, 457 U.S. at 840-42; (4) state approval of private decisions, *Am. Mfrs. Mut. Ins.*, 526 U.S. at 54; (5) state subsidization of private costs, *Blum*, 457 U.S. at 1011; (6) private use of certain state procedures, *Am. Mfrs. Mut. Ins.*, 526 U.S. at 54, and (7) broad involvement of state officials in the administration of private processes, *id.*; *Blum*, 457 U.S. at 1010. Though VDARE argues that "significant encouragement" short of coercion can sometimes satisfy the test, Appellant's Opening Br. at 15-16, the dispositive question is always "whether the State 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*." *Am. Mfrs. Mut. Ins.*, 526 U.S. at 52 (emphases added) (citations and internal quotation marks omitted).

2. VDARE's Reliance on *Bantam Books v. Sullivan*

VDARE argues that "[t]he facts in this case closely resemble those in *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963)." Appellant's Opening Br. at 14. *Bantam Books* considered state action in a state censorship context. There, a Rhode Island commission had begun threatening distributors with legal sanctions unless they suppressed publications that the Commission found objectionable. *See id.* at 15-18. VDARE contends that, as in that case, the City's Statement—when considered in full and in the context of the surrounding events—significantly encouraged the Resort's behavior,

thereby rendering the Resort's decision to cancel the Conference state action. We disagree.

In *Bantam Books*, the Court reviewed the actions of an entity created by the Rhode Island Legislature, namely, the "Rhode Island Commission to Encourage Morality in Youth." 372 U.S. at 59. That Commission was responsible for reviewing and educating the public about printed materials containing "obscene, indecent or impure language, or manifestly tending to the corruption of the youth," as defined by the State's general laws. *Id.* It was also authorized "to investigate and recommend the prosecution of all violations of [the relevant] sections" of the State's general laws and to "encourage morality in youth by (a) investigating situations which may cause, be responsible for or give rise to undesirable behavior of juveniles, (b) educate the public as to these causes and (c) recommend legislation, prosecution and/or treatment which would ameliorate or eliminate said causes." *Id.* at 60 n.1.

Within this role, the Commission drew up lists of objectionable books and magazines on official Commission stationary, which it then provided to book or magazine distributors. *Id.* at 61. In addition, it served multiple notices that threatened criminal action against vendors who circulated the listed publications. *Id.* at 62-63.

Typical notices stated that the Commission had "reviewed" publications and "by majority vote" declared which ones were "completely objectionable" for sale, distribution, or display for youths. *Id.* at 62 n.5. The

notices relayed that the "Chiefs of Police" had been given the names of the objectionable publications, and the notices reminded recipients of the Commission's duty to recommend to the Attorney General the prosecution of purveyors of obscenity. *Id.* The notices also stated that the Attorney General would "act" for the Commission in the case of "non-compliance." *Id.* Then the notices would thank recipients for their "cooperation." *Id.* After sending the notices, the Commission often had local police officers visit the distributors to learn what actions the distributors had taken to comply with the notices. *Id.* at 63.

The Supreme Court ruled that the Commission's system was unconstitutional and amounted to state-sponsored censorship. *Id.* at 72. The Court explained that though the Commission lacked authority to regulate or suppress content, it had done so anyway by using "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" to deliberately suppress publications deemed "objectionable." *Id.* at 66-67 (footnote omitted). The Court further noted that though the plaintiff was "'free' to ignore the Commission's notices, in the sense that his refusal to 'cooperate' would have violated no law," his "compliance with the Commission's directives was not voluntary." *Id.* at 68 ("People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them . . . . The Commission's notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped the circulations of the listed publications.").

Bantam Books provides VDARE little help. In *Bantam Books*, the Supreme Court described the Commission's notices as "instruments of regulation" "phrased virtually as orders" that contributed to a "form of effective state regulation superimposed upon the State's criminal regulation of obscenity." *Id.* at 68-70. The Court found that the Commission's regulatory system (its notices, blacklists, police visitations, and implied criminal sanctions) "create[d] hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." *Id.* The City's Statement differs markedly from such a system.

3. *R.C. Maxwell v. Borough of New Hope*

About two decades after the Supreme Court's decision in *Bantam Books*, the Third Circuit applied that case to a situation in which the government had exerted deliberate pressure on a private party to terminate a private business relationship. In *R.C. Maxwell Co. v. Borough of New Hope*, a case on which Defendants rely, the plaintiff leased commercial billboards from Citibank in the Borough of New Hope, Pennsylvania. 735 F.2d 85, 86 (3d Cir. 1984). The billboards advertised alcoholic products as well as businesses located outside of the Borough. *Id.* at 86-87. Because the Borough viewed itself as a historic town with a "quaint atmosphere," the Borough's Council grew frustrated by the billboards' content and size and sent several letters to Citibank. *Id.* at 86.

The letters advised Citibank that the Borough sought its "personal assistance" in removing the billboards at

the end of their leases and that it hoped Citibank would do so by a professional agreement rather than through more expensive "legal procedures." *Id.* at 86 n.2. The letters also mentioned that though this was a "courteous request," the town was near enacting a zoning ordinance prohibiting such advertising and that a federal agency might also soon require the billboards' removal. *Id.* Unlike in *Bantam Books*, the letters contained no threats of criminal prosecution and expressed a clear desire to avoid legal proceedings. *See id.* And though the letters didn't say that the Council could proscribe the billboards' contents, their size, or Citibank's right to own them, they expressed the Council's strong desire for the billboards to be removed because of their "offensive" size and their "unsightly" content. *See id.* at 86-87.

After receiving the letters, Citibank agreed to remove the billboards, explaining that it was "concerned as to how it [was] seen" by the community in which it own[ed] land." *Id.* at 87 (citation omitted). Further, Citibank admitted that it wanted to stay in the "good graces" of the Council in case Citibank might later choose to develop land or engage in other business endeavors in the Borough. *Id.* (citation omitted). Citibank then repeatedly ordered the plaintiff to remove the billboards by the end of the plaintiff's year-to-year tenancy, but when the time came to do so, the plaintiff refused. *Id.* So Citibank successfully sued the plaintiff in Pennsylvania state court to remove the billboards. *Id.* After that, the plaintiff sued the Borough in federal court, arguing under *Bantam Books* that the Borough had "coerced" Citibank into removing the billboards, which violated plaintiff's First Amendment

rights. *Id.* Ultimately, the two cases were consolidated in federal court, and the court ruled against the plaintiff-lessee in both actions. *Id.*

On appeal, the Third Circuit affirmed the order granting summary judgment to the Borough for the alleged First Amendment violation. *Id.* In so doing, the court commented that, unlike in *Bantam Books*, the Borough's two letters were "devoid" of "any enforceable threats," and thus "amounted to nothing more than a collective expression of the local community's distaste for the billboards." *Id.* at 88-89. It further concluded that "[t]he [F]irst [A]mendment is not ordinarily implicated when private actors [impose] restrictions on expression; indeed, in many instances the [F]irst [A]mendment has been held to guarantee private actors the right to make such restrictions." *Id.* at 87 (listing cases).

Put simply, the Third Circuit acknowledged that private businesses may restrict private expression. *See id.* And it further noted that because businesses care about their public image, they may be *influenced* by public sentiment without being *coerced* by the government. *See id.* at 89 ("Businesses are naturally sensitive to their images in the community. If we were to apply constitutional standards to every private action intended to conform to civic sentiment, we would erode the ambit of private action greatly."). With this case juxtaposed to *Bantam Books*, we now assess VDARE's argument that the City's Statement provided such significant encouragement as could satisfy the nexus test.

4. Application of the Nexus Test to the Resort's Cancellation

VDARE argues that its situation is akin to that described in *Bantam Books*. Based on the cases above, we disagree. Unlike in *Bantam Books*, nothing in the City's Statement plausibly threatens the Resort with legal sanctions. Indeed, the first line of the Statement states the opposite: "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." Appellant's App. at 8 (emphasis added).

We find that this sentence is more comparable to the communications in *R.C. Maxwell* and another case, *Penthouse International, Ltd. v. Meese*, 939 F.2d 1011, 291 U.S. App. D.C. 183 (D.C. Cir. 1991), rather than to those in *Bantam Books*. In *Penthouse*, several public officials serving as members of the United States Attorney General's Commission on Pornography accused multiple major American companies of selling pornographic material. *Id.* at 1012-13. Pursuing their mission "to determine the nature, extent, and impact on society of pornography in the United States," the Commission sent letters to corporations such as Time Inc. and Southland Corporation (owner of the 7-Eleven chain) on Justice Department stationary. *Id.* The letters stated that "the Commission received testimony alleging that your company is involved in the sale or distribution of pornography. The Commission has determined that it would be appropriate to allow your company an opportunity to respond to the

allegations prior to drafting its final report section on identified distributors." *Id.* at 1013.

In response, Southland advised the Commission that it had "decided to stop selling adult magazines in light of the public concern about the effects of pornography," and it "urge[d] that any references to Southland or 7-Eleven be deleted from [the Commission's] final report." *Id.* (alternations in original). In arriving at this decision, Southland noted a telephone call to its Vice President from a member of the Commission, who stated that the content of *Playboy* and similar magazines was "linked to child abuse" and that the Commission intended to comment about this link in its published report. *Id.*

Playboy Enterprises, Inc. and Penthouse International Ltd. then filed lawsuits (later consolidated) seeking to (1) permanently enjoin the Commission from disseminating what they termed a "blacklist" to censor or suppress their magazines, and (2) obtain money damages for a deprivation of their First Amendment rights. *See Playboy Enters., Inc. v. Meese*, 746 F. Supp. 154, 155 (D.D.C. 1990), *aff'd sub nom. Penthouse*, 939 F.2d 1011. After the district court granted the defendants' summary judgment motions on both claims, Penthouse appealed, and the D.C. Circuit assessed the Commissions' letters under the holding of *Bantam Books. See Penthouse*, 939 F.2d at 1014-15. The court concluded that, unlike in *Bantam Books*, the letters "contained no threat to prosecute, nor intimation of intent to proscribe the distribution of the publications." *Id.* at 1015 ("It may well be that the Commission came close to implying more authority than it either had or explicitly

claimed. Nevertheless . . . we do not believe that the Commission ever threatened to use the coercive power of the state against recipients of the letter." (citation omitted)).

So too here. The City's first sentence acknowledges its lack of authority to restrict freedom of speech or to direct private businesses about which events they may host. *See* Appellant's App. at 8 ("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.").

Next, VDARE points to the second sentence in the City's Statement to argue that the first sentence was a "covert veneer." Appellant's Opening Br. at 13. The second sentence states: "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." Appellant's App. at 8. We agree with the district court that this sentence contains no threat and only expresses the City's views on the need for private businesses to pay attention to the types of events they accept and groups they invite. *See id.* at 88. Notably, this sentence doesn't name VDARE or express any "distaste" for VDARE's speech, as did the Council's letters to Citibank in *R.C. Maxwell*, stating that the billboards were "unsightly" and ill-suited to the Borough's aesthetic. 735 F.2d at 86.

VDARE next turns to the third sentence in the Statement: "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." Appellant's App. at 8. VDARE contends that this too was a "thinly-veiled threat to prosecute VDARE and those who cooperated with it" and that "Mayor Suthers' statement not only 'encourage[d]' pariah treatment for VDARE but exercised 'coercive power' to that end." Appellant's Opening Br. at 18-19.

We disagree. As with the first two sentences in the Statement, this sentence contains no plausible threat—let alone a threat of prosecution. It's a statement of Colorado law. As the district court concluded, it isn't analogous to the direct warnings and threats contained in the notices in *Bantam Books. See supra*, Discussion, Part I.A.2; *cf. Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996) ("In the context of a government prosecution, a *decision to prosecute which is motivated by a desire to discourage protected speech or expression* violates the First Amendment and is actionable under § 1983." (emphasis added) (citation omitted)).

Another case, *X-Men Security, v. Pataki*, 196 F.3d 56 (2d Cir. 1999) serves as a helpful comparator. There, a subsidized housing complex located in a crime-ridden part of New York City employed plaintiffs, X-Men Security, Inc., a private security company. *Id.* at 60. A majority of X-Men's employees were of "Black African American descent" and "followers of the Islamic Religion." *Id.* (citation omitted). Questioning the propriety of employing

X-Men under a government contract, two New York politicians campaigned to prevent the housing complex from renewing its contract with X-Men. *Id.* at 61-62. In a letter they wrote to the housing commissioner, they "accused [X-Men] . . . of hating Jews, women, Catholics and others." *Id.* at 61. They added that awarding X-Men a contract would "subsidize[] the activities of a hate group and help[] fund the racist and anti-Semitic goals of Louis Farrakhan and the Nation of Islam." *Id.*

Facing this pressure, the housing complex terminated X-Men's month-to-month contract, awarding it instead to a company that hadn't even submitted a bid. *Id.* at 62 (citation omitted). X-Men then sued a host of defendants, including New York State officials, asserting claims based on freedom of religion and association, due process, and equal protection. *Id.* Though the district court partially dismissed the complaint, it kept alive the First Amendment retaliation claim against the officials. *Id.* at 63.

The Second Circuit unanimously reversed the district court's First Amendment retaliation ruling. *Id.* at 72. Assessing whether the language in the letter could color a First Amendment claim, the court concluded that "the legislators were not the decisionmakers" and had "no power to control the award of contracts." *Id.* at 68. So even though the letter accused X-Men of being part of a "hate group" and practicing racism, the court concluded that it wasn't threatening. *Id.* at 71 ("We see neither in this letter nor in any of the other allegations of the complaint any semblance of threat, coercion, or intimidation by the legislators."). The same is true here. The City made clear that it lacked any power to control the Resort's events.

Finally, VDARE points to the fourth sentence in the Statement, which states that the City "will not provide any support or resources to this event, and does not condone hate speech in any fashion." Appellant's App. at 8. This, VDARE argues, encouraged "a heckler's veto." *Id.* at 20.[2] Moreover, VDARE argues that the surrounding circumstances—including the "natural import" of the Statement, its timing, and basic fairness—show that the Resort cancelled the Conference *because* of the Statement and its lack of "reassurance that the City would protect [its] properties and keep the peace." *Id.* at 20-23. We disagree with VDARE that this is a plausible interpretation of the last line of the City's Statement.

First, the "surrounding circumstances" included the violent protests that occurred in Charlottesville only three days before the Resort's cancellation. *See supra*, Background, Part I. VDARE's allegations don't acknowledge that the Resort may have cancelled its contract after observing news coverage of that event. This likelihood matters because under *Iqbal*, we can't infer that the Resort's cancellation is attributable to the City based on just the possibility of its being so. *Iqbal* provides that it isn't sufficient for a plaintiff to plead facts that are "merely consistent with" a defendant's liability and that such facts "stop[] short of the line between possibility and probability." 556 U.S at 678 (quoting *Twombly*, 550 U.S. at 557).

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2. A "heckler's veto" is "[t]he government's restriction or curtailment of a speaker's right to freedom of speech when necessary to prevent possibly violent reactions from listeners." *Heckler's Veto, Black's Law Dictionary* (11th ed. 2019).

Indeed, the circumstances in this case are reminiscent of a case in which a New York City public official sent letters to department stores critiquing a satirical boardgame at a time that coincided with public controversy over the subject of the game. *See Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33 (2d Cir. 1983). In *Hammerhead*, the Human Resources Administrator of New York City had urged several department stores to refrain from carrying a board game named "Public Assistance—Why Bother Working for a Living." *Id.* at 34-37. The Administrator sent at least thirteen national department stores a letter on official stationery urging them not to carry the game. *Id.* at 36-37. The letters stated that "[b]y perpetuating outdated myths, . . . [the] game does a grave injustice to taxpayers and welfare clients alike." *Id.* at 36 n.2. It concluded: "Your cooperation in keeping this game off the shelves of your stores would be a genuine public service." *Id.*

After several department stores stopped carrying the game, the game's creators sued the Administrator, the Mayor, and several New York City entities, alleging that the letter violated their First Amendment rights and was libelous, defamatory, and tortiously interfered with contractual relations. *Id.* at 38. The Southern District of New York disagreed and ruled that "the letter was not censorship; it was an appeal to conscience and decency." *Hammerhead Enters., Inc. v. Brezenoff*, 551 F. Supp. 1360, 1370 (S.D.N.Y. 1982), *aff'd*, 707 F.2d 33. The Second Circuit affirmed, reasoning that the letter was "nothing more than a well-reasoned and sincere entreaty in support of [the public official's] own political perspective." *Hammerhead*,

707 F.2d at 38. And it concluded that despite the letters and other similar pressure tactics aimed at specific stores, the subsequent "decision to cancel [selling the game] . . . may have been spurred by the continuing controversy in the press or by business reasons wholly unrelated to the . . . letter." *Id.* at 37.

Here too, VDARE's Conference subjects overlapped with worrisome events to a business owner. So absent factual allegations that the Resort cancelled the Conference because the Resort felt that the City had *directed* it to do so, VDARE hasn't plausibly alleged that the Resort's conduct was state action.

Second, VDARE speculates that regardless of what future circumstances would have unfolded, the City would have allowed the "breakdown of law and order." Appellant's Opening Br. at 20. But VDARE hasn't plausibly alleged that the City was declaring that it would not intercede with police or fire personnel if faced by the mayhem that VDARE envisions. That's just its subjective interpretation, and an implausible one too. What VDARE wanted, it had no right to demand—municipal resources to monitor a private entity's private event.

Third, VDARE doesn't plausibly allege that the Statement was *significantly* encouraging or coercive. VDARE doesn't allege that the City followed up on its Statement with any actions. This too contrasts with *Bantam Books*, in which the Commission followed up on its threatening notices with visits from police officers so that distributors "reasonably understood"

that they had to comply with the notices. 372 U.S. at 68; *see also Hammerhead*, 707 F.2d at 37 (finding no coercion or censorship present where the Administrator "took no further steps to trace the consequences of his correspondence," "did not investigate whether any merchants were in fact carrying the game," and did not "contact any government agency which might have regulatory power over [the] department stores." (footnote omitted)). Indeed, the threat of imposing criminal sanctions, and how it was continually reinforced, is what led the Supreme Court in *Bantam Books* to conclude that the Commission's tactics amounted to a state-sponsored system of prior restraints. *See* 372 U.S. at 68-69.

And fourth, as noted, nothing in the Amended Complaint plausibly alleges that the City used its power to *control* the Resort's independent decision-making process. *See X-Men*, 196 F.3d at 68, 71 (explaining that the public officials who sent letters criticizing X-Men didn't violate the First Amendment when they had "no power to control the award of contracts" and only exerted "pressure" in the form of speech).

In sum, the allegations don't show that the City ever threatened or ordered the Resort to take any action akin to what the Commission did to distributors in *Bantam Books*. Nor does it allege that the City sent police officers to intimidate anyone as in *Bantam Books*.[3] Likewise,

3. Similarly, VDARE's reliance on *Marcus v. McCollum*, 394 F.3d 813 (10th Cir. 2004), is misplaced. That case also involved the physical presence of police officers, who told plaintiffs that they would "go to jail" if they didn't keep their "mouth[s] shut." *Id.* at 817 (citation omitted).

VDARE hasn't pleaded that the Resort and the City were intertwined through regulatory, administrative, financial, or contractual regimes, such as those discussed in *Blum* and its progeny or in *Gallagher*, which could have given the City direct influence over the Resort. As well, VDARE's allegations don't compare to the facts in *R.C. Maxwell, Hammerhead*, *X-Men*, or *Penthouse*, cases in which a government official directly communicated with a private third party in an effort to pressure that party to take a specific action.

In sum, we agree with the district court 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 [F]irst [A]mendment rights." Appellant's App. at 92. The City didn't engage in such conduct here. Thus, we conclude that VDARE hasn't plausibly alleged that the Resort's cancellation of the Conference was state action.[4]

4. This section of VDARE's Amended Complaint also alleges that Defendants' actions violated its "rights to . . . equal protection of the laws as guaranteed by the Fourteenth Amendment." Appellant's App. at 11. The magistrate judge recommended dismissing this claim due to VDARE's "cursory" pleading. *Id.* at 45-46. Neither party objected, and the district court adopted the Recommendation. On appeal, VDARE makes a single passing reference to equal protection, stating that "[w]hen a First Amendment and equal protection claim are intertwined, the First Amendment provides the proper framework for review of both claims." Appellant's Opening Br. at 30 (citations omitted). This perfunctory mention of equal protection doesn't present a proper argument on appeal. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998) ("Arguments inadequately briefed in the opening brief are waived."

B. Government Speech

Having concluded that the Resort's decision to cancel the Conference doesn't plausibly constitute state action, we now turn to VDARE's second argument—that the City's Statement itself violated VDARE's First Amendment rights. On this issue, the district court ruled that the City's Statement was "permissible government speech" and that Defendants were "entitled to speak for themselves [and] express their own views, including disfavoring certain points of view." *Id.* at 88.

VDARE argues that the district court "insulated" the City's Statement from a First Amendment challenge by characterizing it as a "neutral expression of government policy." Appellant's Opening Br. at 23. As before, it adds that "[t]he Mayor's words were less a 'statement' than a thinly veiled threat" that were "directed specifically at VDARE," and the words had the distinctive features of "adjudication," such as "accusing and then convicting VDARE of hate speech," and then "imposing the punishment of pariah status and withdrawal of municipal resources." *Id.* at 23-24 (citation omitted).

Defendants first counter that VDARE waived or forfeited its challenge to the district court's ruling on this issue by first raising it on appeal. They also argue that the district court properly applied the government-speech doctrine, under which a government may "interject its

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(citations omitted)). If anything, VDARE's statement is a concession that it isn't raising a separate equal protection argument requiring separate analysis. Thus, we don't further address it.

own voice into public discourse" and participate in the "marketplace of ideas." Appellees' Response Br. at 20-21. We address each argument in turn.

1. Waiver or Forfeiture

The City argues that VDARE has waived or forfeited its challenge to the district court's government-speech analysis. VDARE responds that the government-speech doctrine "appeared, more or less *sua sponte* . . . in the District Court's decision." Appellant's Reply Br. at 14-15. And, it explains, when a district court independently rules on an unraised issue, "the appellant may challenge that ruling on appeal on the ground addressed by the district court." *Id.* at 15 (quoting *Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 991-92 (10th Cir. 2019)).

We agree with VDARE. "[W]aiver is the intentional relinquishment or abandonment of a known right," which "comes about when a party deliberately considers an issue and makes an intentional decision to forego it." *Tesone*, 942 F.3d at 991 (alteration in original) (citations omitted). And forfeiture occurs when an appellant presents an argument on appeal that "simply wasn't raised before the district court." *Id.* (citation omitted). The forfeiture rule, however, doesn't apply "when the district court explicitly considers and resolves an issue of law on the merits" because "[a]ppellate courts can reach issues that were . . . 'passed upon' by[] the lower court." *Id.* at 991-92 (first alteration in original) (citations omitted). "[A] court 'passes upon' an issue when it applies 'the relevant law to the relevant facts.'" *Id.* at 992 (citation omitted).

Here, VDARE neither waived nor forfeited its argument on government speech. It didn't waive this argument because nothing shows that VDARE ever "intentionally relinquished" its position on it. Quite the opposite. Because the Recommendation didn't address whether the Statement itself was permissible speech, VDARE objected to the Recommendation.

As to forfeiture, though VDARE didn't present its current government-speech argument to the district court, the issue came to the fore only in the district court's ruling. So while the City is right that VDARE didn't "ask the district court to reconsider its ruling" under Fed. R. Civ. P. 59(e), Appellees' Answer Br. at 18, the forfeiture rule doesn't apply when, as here, the district court "passe[d] on" the issue by applying the relevant law to the facts of this case. *Tesone*, 942 F.3d at 992 (citation omitted).

Having said that, our review "is subject to the same standard of appellate review that would be applicable if the appellant had properly raised the issue." *Id.* (citing *United States v. Hernandez-Rodriguez*, 352 F.3d 1325, 1328 (10th Cir. 2003)). Here, that standard of review is de novo because the district court held that VDARE didn't plausibly plead a First Amendment claim based on the City's Statement, and we "review de novo the grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim." *Gee*, 627 F.3d at 1183 (citation omitted). With this standard established, we now address the merits of the parties' government-speech argument.

2. The Statement is Government Speech

VDARE first argues that "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." Appellant's Opening Br. at 26. We disagree.

To determine whether certain communication is government speech, we assess the following: (1) whether the forum has historically been used for government speech; (2) whether the public would interpret the speech as being conveyed by the government; and (3) whether the government has maintained control over the speech. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 209-10, 135 S. Ct. 2239, 192 L. Ed. 2d 274 (2015) (citation omitted). Though the district court didn't articulate the three *Walker* factors, neither party disputes that the City's Statement satisfied them: (1) it was delivered as government speech; (2) it was perceived as being conveyed by the government; and (3) it was controlled by the government. *See id.*

3. Viewpoint Neutrality

VDARE's second argument on this issue is that the district court erred by seeking to characterize the Statement as "a neutral expression of government policy" rather than as a "thinly veiled threat." Appellant's Opening Br. at 23. Threats, it argues, are not constitutionally protected speech.

On this, we note that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009) (citations omitted). This is because "[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, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (2000)). "[I]t is entitled to say what it wishes," *id.* at 467-68 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)), "and to select the views that it wants to express," *id.* at 468 (citations omitted); *see also Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 598, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998) (Scalia, J., concurring in judgment) ("It is the very business of government to favor and disfavor points of view . . . ."). "Indeed, it is not easy to imagine how government could function if it lacked this freedom." *Summum*, 555 U.S. at 468.

The doctrine goes so far as to hold that "[w]hen the government speaks, . . . it is constitutionally entitled to make 'content-based choices,' and to engage in 'viewpoint-based funding decisions.'" *Wells v. City & County of Denver*, 257 F.3d 1132, 1139 (10th Cir. 2001) (citations omitted). Hence, in *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), the Supreme Court held that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Id.* at 193. In so doing, it

explained, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Id.*; *see also Rosenberger*, 515 U.S. at 833 ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." (citation omitted)). At the same time, "the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828 (citation omitted). That is, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another" or "[d]iscriminat[e] against speech because of its message." *Id.* (citations omitted).

Before addressing whether the City's Statement was plausibly threatening, we note that the district court never ruled that the City's Statement was "a neutral expression of government policy." Rather, it stated that "Defendants are entitled to speak for themselves, express their own views, including disfavoring certain points of view" and that "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 the groups that they invite to their City." Appellant's App. at 88.

This isn't the same as ruling that the Statement was "neutral." The district court acknowledged that the Statement expressed at least one view—that businesses should be attentive about whom they invite to the City. But whether one finds the Statement "neutral" or not doesn't matter because, as discussed, government speech need not be so. Indeed, this core principle, that the government

can have views and take strong positions—which it can express through various forms of speech—is at the heart of government-speech doctrine. *See Walker*, 576 U.S. at 207 ("[G]overnment statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas . . . . Were the Free Speech Clause interpreted otherwise, government would not work." (citation omitted)). Having concluded that the City's Statement didn't need to be neutral, we address VDARE's argument that it was unconstitutional as a "thinly veiled threat." Appellant's Opening Br. at 23.

VDARE argues that the City's Statement was a "thinly veiled threat" and that "[w]hat is a threat must be distinguished from what is constitutionally protected speech." *Id.* (quoting *Watts v. United States*, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)). VDARE argues that the Statement was a threat because it "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." *Id.* But VDARE doesn't explain why the Mayor's words were a threat, especially when the Statement was neither directed at VDARE nor involved municipal resources to which VDARE has shown it was entitled. And the City's Statement is unlike the speech at issue in VDARE's cited cases, for instance those cases in which courts assessed threats to the United States President's life, *Watts*, 394 U.S. at 708, and threats to use violence against government officials, *Nielander v. Bd. of Cnty. Comm'rs*, 582 F.3d 1155, 1168 (10th Cir. 2009).

Nor does VDARE explain how the Statement had "the distinctive features of adjudication." Presumably, VDARE is invoking the discussion from *Bantam Books* in which the Supreme Court concluded that the Commission's system functioned as a system of prior restraints because the Commission could effectively ban publications for purchase without using any judicial processes. *See* 372 U.S. at 70-71. For example, the Court there noted that the Commission didn't provide notice, an opportunity to be heard, or a means for judicial review of publications it listed as "objectionable." *See id.* The instant situation isn't comparable. The City never formally banned VDARE from expressing a single view as the *Bantam Books* Commission did through its statutory mandate. *See id.* Moreover, we've already explained why we agree with the district court that nothing in the City's Statement was plausibly a threat, order, mandate, or exercise of control over a private entity's decision-making process. *See supra*, Discussion, Part A.2.

In sum, the Statement didn't plausibly exceed the bounds of constitutionally permissible speech by threatening the Resort. *See Penthouse*, 939 F.2d at 1016 ("[W]e know of no case in which the [F]irst [A]mendment has been held to be implicated by governmental action consisting of no more than governmental criticism of the speech's content." (alteration in original) (citation omitted)); *X-Men*, 196 F.3d at 71 (concluding that legislators' allegedly discriminatory and false statements in letters were themselves protected speech because "[w]hat the legislators [were] alleged to have done [was] to express their views. The only concrete acts ascribed

to them [were] attending meetings, making statements, and writing letters."); *Hammerhead*, 707 F.2d at 35 (explaining that when an individual chooses to engage in speech that elicits a reaction, it can't use the First Amendment as both a shield and sword: "The right to free speech guarantees that every citizen may, without fear of recrimination, openly and proudly object to established government policy. It does not immunize the challengers from reproach.").

II. First Amendment Retaliation Claim

VDARE's second claim is for First Amendment retaliation. Specifically, VDARE alleges that the City's intent to retaliate against it is evinced by the part of the Statement that characterizes VDARE's speech as "hate speech" and the part that urges local businesses to "be attentive to the types of events that they accept and groups they invite." Appellant's App. at 18. VDARE further claims that in stating that the City wouldn't provide any support or resources for the event, the City intended to "chill a person of ordinary firmness from continuing to engage in . . . constitutionally protected activity." *Id.* Finally, VDARE claims, because of the City's "expressed disapproval of [VDARE's] speech and [its] expressed intention to take action against [VDARE's] speech, [it] has not attempted to arrange another conference to engage in such activity in Colorado Springs." *Id.*

To state a claim for First Amendment retaliation, a plaintiff must allege (1) that it was engaged in constitutionally protected activity, (2) the defendant's actions caused it to suffer an injury that would chill a

person of ordinary firmness from continuing to engage in that protected activity, and (3) the defendant's actions were substantially motivated as a response to [its] protected conduct. *McBeth v. Himes*, 598 F.3d 708, 717 (10th Cir. 2010) (citations omitted). Of these, the second element—the "person of ordinary firmness" element—is a "vigorous standard." *Eaton v. Meneley*, 379 F.3d 949, 956 (10th Cir. 2004) (citation omitted). Not only is it assessed objectively, but it is also "substantial enough that not all insults in public debate become actionable under the Constitution." *Id.* (citation omitted).

The district court dismissed this claim, concluding that VDARE's speculations and conclusory allegations didn't plead a plausible claim. Specifically, it concluded that VDARE's "deficient allegations" were "insufficient to establish the second element of its retaliation claim" because "VDARE's conclusory and speculative allegations [were] insufficient to show a causal connection between Defendants' Statement and Cheyenne Resort's cancellation of the Conference." Appellant's App. at 98. Because the district court found that VDARE had not plausibly alleged the second element, it didn't address the other elements. *Id.*

We similarly conclude that VDARE hasn't plausibly alleged that the City's actions caused it to suffer an injury that would chill a person of ordinary firmness from continuing to engage in protected activity. The majority of VDARE's "factual allegations" on this claim aren't facts, but unsupported conclusions. As an example, VDARE states: "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." *Id.* at 18-19. This is a conclusion. It doesn't explain why, as a factual matter, it became "impossible" for VDARE to conduct future conferences at other venues in Colorado Springs or how VDARE now experiences a "disfavored status under the law." Likewise, though VDARE alleges that it wouldn't have been provided city services if it "attempted to host a conference or other gathering in the City," this too is speculation. *See id.* VDARE cannot expect us to assume that it enjoys a "disfavored status under the law" absent factual allegations suggesting, for example, that another entity received such resources.

In short, we find VDARE's Amended Complaint to be filled with legal conclusions rather than facts from which these conclusions plausibly flow. But "naked assertion[s] devoid of further factual enhancement," *Iqbal*, 556 U.S. at 678 (alteration in original) (internal quotation marks and citation omitted), do not "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (citation and footnote omitted). Because many of VDARE's causation claims "are no more than conclusions, they aren't entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679.

Even so, VDARE argues that it has satisfied the causation element by alleging that "[t]he Mayor singled out VDARE for invidious treatment and condemned it for promoting 'hate speech' . . . pursuant to an official 'Hate Speech' policy." Appellant's Opening Br. at 29. We disagree. The Statement didn't mention VDARE, and VDARE hasn't alleged that the City ever communicated

with it or the Resort or treated it differently than groups with different speech content, such that it was "singled out." Again, the court cannot just adopt VDARE's subjective interpretation of the Statement. *See McCook v. Spriner Sch. Dist.*, 44 F. App'x 896, 905 (10th Cir. 2002) ("Both sides mistakenly assume the 'chill' standard is subjective, which it is not." (citation omitted)).

Next, VDARE argues that it plausibly alleged causation because "[i]n 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'— [the Mayor] pointedly omitted those who engaged in dissident speech." Appellant's Opening Br. at 29. But this too is just a subjective interpretation of a sentence that simply relays Colorado law and doesn't exclude anyone.

Finally, VDARE argues that "[a]s 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 protesters without the benefit of basic police protection." *Id.* But the Amended Complaint lacks even one sentence providing the factual reason that the Resort gave VDARE for cancelling its contract—something that VDARE would surely know.

Indeed, all agree that the Resort cancelled the contract three days after what VDARE describes as "the pandemonium and violence that had washed over Charlottesville, Virginia." *Id.* at 6. Even if the Resort *possibly* cancelled the contract in part due to the Statement doesn't mean that VDARE has *plausibly*

pleaded allegations that the Resort was compelled to do so at the City's behest, as is required for a constitutional violation. *See supra*, Discussion, Part I.A. "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). "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.* (internal quotation marks omitted) (quoting *Twombly*, 550 U.S. at 557).

The only alleged fact that arguably supports a showing of causation is the temporal proximity of the Resort's cancelling the contract and the City's issuing the Statement. But that lone allegation doesn't alter our conclusion for several reasons. First, as noted already, VDARE must allege more than that the Statement possibly *influenced* a third party's business decision, which as we have discussed, government speech may do. *See, e.g., R.C. Maxwell*, 735 F.2d at 89 ("We conclude that [a private third party's] desire to create a receptive climate for any future [business] plans does not rise to the level of state-coerced action.").

Second, "mere temporal proximity" is "insufficient, without more," to establish the elements of retaliation. *Baca v. Sklar*, 398 F.3d 1210, 1221 (10th Cir. 2005) (citation omitted). Here, VDARE's need for additional factual allegations is particularly critical because though there is proximity between when the Statement was issued and when VDARE was allegedly chilled in exercising its speech, the occurrence of deadly protests in Charlottesville, which made national headlines and

likely affected local businesses' decisions, occurred contemporaneously. *Cf. Maestas v. Segura*, 416 F.3d 1182, 1189 (10th Cir. 2005) ("[E]vidence of intervening events . . . tend to undermine any inference of retaliatory motive and weaken the causal link.").

Third, as demonstrated by *R.C. Maxwell* and other similar circuit decisions, the City's Statement is itself protected speech that must be egregious to be plausibly retaliatory. In *Suarez Corp. Industries v. McGraw*, the Fourth Circuit concluded that when the alleged retaliatory act is public speech, the bar for finding retaliation is elevated because "there is an interest in having public officials fulfill their duties," and "a public official's own First Amendment speech rights are implicated." 202 F.3d 676, 687 (4th Cir. 2000).

This high bar for retaliation is consistent with our precedent. For example, in *Eaton*, we held that a sheriff's running criminal-background checks against those who petitioned to remove him from office wasn't retaliation. 379 F.3d at 956. We explained that "the nature of political debate is rough and tumble," and "Plaintiffs in public debates are expected to cure most misperceptions about themselves through their own speech and debate." *Id.* Similarly, in *Phelan v. Laramie Cnty. Cmty. Coll. Bd. of Trs.*, we found no retaliation when a board of trustees censured one of its members by publicly announcing that she had violated its ethics policy. 235 F.3d 1243, 1247-48 (10th Cir. 2000). There, we reiterated that "the government may . . . interject its own voice into public discourse," and that "[t]he crucial question is whether, in speaking, the government is *compelling* others to espouse

or to suppress certain ideals and beliefs." *Id.* at 1247 (citations omitted)).

Here, VDARE hasn't plausibly alleged that the City's issuing the Statement alone prevented VDARE from expressing its views. At all times, VDARE remained "very much free to express [its] views publicly." *Eaton*, 379 F.3d at 956 (internal quotation marks and citation omitted). Accordingly, VDARE has not alleged a plausible First Amendment retaliation claim.

III. Qualified Immunity

In addition to the City of Colorado Springs, VDARE filed suit against Mayor John Suthers in his individual capacity. The Mayor claims that he is entitled to qualified immunity. We agree.

"In resolving a motion to dismiss based on qualified immunity, the court considers (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 the defendant's alleged misconduct." *Keith v. Koerner*, 707 F.3d 1185, 1188 (10th Cir. 2013) (citations and internal quotation marks omitted). Because it's the plaintiff's burden to satisfy this "strict two-part test," we may grant qualified immunity if a plaintiff fails under either prong. *Dodds v. Richardson*, 614 F.3d 1185, 1191 (10th Cir. 2010) (citation and internal quotation marks omitted). We review de novo the district court's grant of qualified immunity. *See Keith*, 707 F.3d at 1187.

Because we conclude that VDARE hasn't plausibly alleged a constitutional violation against any of the defendants, VDARE can't meet its burden on the first prong. As a result, we needn't reach the second prong regarding clearly established law. *Hesse v. Town of Jackson*, 541 F.3d 1240, 1244 (10th Cir. 2008) ("If the court concludes no constitutional right has been violated, no further inquiry is necessary and the defendant is entitled to qualified immunity."). Accordingly, we conclude that Mayor Suthers is entitled to qualified immunity on those claims.

IV. Intentional Interference with Contract

VDARE's final claim is a state tort claim for intentional interference with contract. Recognizing that "[f]ederal courts are courts of limited jurisdiction," *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994), the district court declined to exercise supplemental jurisdiction over this claim. Since we too conclude that VDARE didn't plausibly plead any federal claims, we decline to exercise supplemental jurisdiction over this claim. *See Smith v. City of Enid*, 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." (citations omitted)).

CONCLUSION

For the foregoing reasons, we affirm.

Appendix A

20-1162 – VDARE Foundation v. City of Colorado Springs, et al.

HARTZ, J., Circuit Judge, dissenting

I respectfully dissent. In my view the Complaint adequately alleges that the City, because it objected to the views of VDARE, intentionally caused the Cheyenne Mountain Resort to cancel the reservations for the VDARE conference.

I agree with so much of the panel majority opinion that my dissent can be brief. My difference with the majority centers on the import of the third sentence of Mayor Suthers's announcement: "The City of Colorado Springs will not provide *any* support or resources to this event, and does not condone hate speech in any fashion." Aplt. App. at 8 (emphasis added).

The Supreme Court opinion in *Ashcroft v. Iqbal* instructs us to use our "judicial experience and common sense" in assessing whether a complaint states a plausible claim. 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). In this case the first step of that process is to construe the Mayor's sentence. The most reasonable, perhaps the only reasonable, construction is that the sentence conveyed, and was intended to convey, that no police or fire protection would be provided for the VDARE conference at the Resort. What other "support or resources" would the City ordinarily provide? As counsel for VDARE stated at oral argument, "What else could the Mayor be conveying?" Oral Arg. at 7:23-25. And, according

to specific allegations in the Complaint, that is how the public interpreted the Mayor's statement. One television station allegedly reported, "Colorado Springs Mayor won't commit city assistance to upcoming white nationalist conference," and said that the local sheriff's office announced that its "deputies would not be participating *either* unless their presence is requested by the Colorado Springs Police Department for some reason." Aplt. App. at 9 & n.2 (emphasis added). Certainly, at this stage of the proceedings we should adopt that interpretation in determining whether the Complaint states a cause of action. This interpretation is not merely "consistent with" the Mayor's language; I question whether any other interpretation would be plausible.

Defendants contend that this statement by the Mayor was merely an expression of a particular point of view, which is protected from liability as government speech. Under the government-speech doctrine, "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207, 135 S. Ct. 2239, 192 L. Ed. 2d 274 (2015). The doctrine is usually invoked when the question is whether the control that the government exercises over a particular forum (in *Walker*, license plates) constitutes government regulation of private speech (which cannot discriminate on the basis of content) or is no more than the government determining what content it wishes to convey itself. *See, e.g., id.* at 206-07. There is no violation of the First Amendment protections of free speech when the government favors particular content, or even a particular

viewpoint, so long as it is the government that is speaking. *See, e.g., id.* at 219-20.

But the government-speech doctrine does not create an immunity for whatever the government chooses to say. For example, "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 208. And if the government cannot seek to *compel* favored speech, it surely cannot *punish* or seek to *deter* speech based on its (constitutionally protected) content or viewpoint. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61-63, 83 S. Ct. 631, 9 L. Ed. 2d 584 & n.5 (1963) (state decency commission notified magazine and book distributors that it had found particular publications to be objectionable for sale and noted that it could recommend obscenity prosecution to the attorney general); *cf. Chernin v. Lyng*, 874 F.2d 501, 502-03, 506-08 (8th Cir. 1989) (employee of meatpacker entitled to due-process hearing even though firing was by private employer, since government told employer it would have to fire employee to obtain government inspection services).

A government effort to punish or deter disfavored speech is what VDARE adequately alleges. And the City accomplished its purpose. The Complaint plausibly alleges that the Mayor's statement caused the Resort to cancel the VDARE conference. The majority opinion opines that the statement was not "*significantly* encouraging or coercive." Maj. Op. at 25. I must respectfully disagree. I would think that most businesses would be strongly inclined to forgo a

customer if they were told that they would lose police and fire protection if they did business with the customer. And the Mayor's announcement did much more. It implicitly invited violence. It is one thing to refuse to provide police protection. It is quite another to announce far in advance that police protection will not be provided. VDARE espouses views that many find highly obnoxious. Any of its activities could engender protests, counter-protests, and clashes between the two sides. The Complaint alleges that VDARE has never espoused violence. Assuming that to be true, as we must in considering a motion to dismiss, the Resort would have little reason to fear violence from hosting a VDARE conference. After all, the Resort is on private property. It has no obligation to allow protesters on its grounds. Barring access to protesters should suffice to keep the peace. But an announcement that there would be no law-enforcement presence is an open invitation to those inclined to violence, as protesters, counter-protesters, or whatever.

The majority opinion raises the possibility that the Resort canceled its contract with VDARE because of the recent violence in Charlottesville, saying that VDARE's nexus argument is not plausible because it has not excluded that possibility. But I would think it more plausible that the Charlottesville violence enhanced the coercive force of the Mayor's announcement by highlighting the danger to the Resort from the denial of police protection, particularly when that denial is publicly announced in plenty of time for bad actors to make plans. Besides, if it was so likely that the Resort would cancel its plans because of what happened in Charlottesville, why would the Mayor bother

making an unnecessary announcement regarding an event that would not be occurring?

The majority opinion also appears to fault VDARE for not including in the Complaint any excuse given by the Resort for canceling the contract. But VDARE should not be bound by an unsworn statement by the Resort when the Resort may have various interests in being less than candid. I am not suggesting that VDARE has definitively proved the necessary nexus. But I would say that the Complaint makes a more than plausible claim of nexus.

For similar reasons, VDARE's First Amendment retaliation claim is also plausible. I would think it beyond debate that a person of ordinary firmness would be chilled from speaking if he could not depend on first responders protecting him from violence. We have recognized that "allegations of physical and verbal intimidation, including a threat by a deputy sheriff to shoot" a speaker "would surely suffice under our precedents to chill a person of ordinary firmness from continuing" to exercise his First Amendment rights. *Van Deelen v. Johnson*, 497 F.3d 1151, 1157 (10th Cir. 2007); *see Perez v. Ellington*, 421 F.3d 1128, 1132 (10th Cir 2005) (holding that chill requirement was satisfied by rushed imposition of tax assessments and delay in removing tax liens after their abatement). I do not join the majority in discounting to insignificance the effect on the Resort of the prospect of uncontrolled violence.

I should add, however, that I agree that the Mayor is entitled to qualified immunity.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, DATED MARCH 27, 2020

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.

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.

Appendix B

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

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.

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).

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." *Hull*, 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, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (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 U.S. Dist. LEXIS 45802, 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 U.S. Dist. LEXIS 45802, 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, 95 S. Ct. 449, 42 L. Ed. 2d 477 (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, 204 L. Ed. 2d 405 (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, 121 S. Ct. 924, 148 L. Ed. 2d 807 (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, 109 S. Ct. 454, 102

L. Ed. 2d 469 (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, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (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, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (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, 102 S. Ct. 2764, 73 L. Ed. 2d 418, (1982); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 544, 107 S. Ct. 2971, 97 L. Ed. 2d 427 (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, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009) (citing *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 553, 125 S. Ct. 2055, 161 L. Ed. 2d 896 (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, 93 S. Ct. 2080, 36 L. Ed. 2d 772 (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, 120 S. Ct. 1346, 146 L. Ed. 2d 193 (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, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (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, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (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.*, 576 U.S. 200, 135 S. Ct. 2239, 2245, 192 L. Ed. 2d 274 (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, 51 S. Ct. 532, 75 L. Ed. 1117 (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 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

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 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*.

3. ILLEGIBLE FOOTNOTE

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 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. 550 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

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.

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, 83 S. Ct. 631, 9 L. Ed. 2d 584 (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 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, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (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, 103 S. Ct. 897, 74 L. Ed. 2d 723 (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, 200 L. Ed. 2d 449 (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, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966), reconfirmed in *Carnegie-Mellon*

Univ. v. Cohill, 484 U.S. 343, 350, 108 S. Ct. 614, 98 L. Ed. 2d 720 (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*, 54 F.3d at 669.

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. Alliant Techsystems, Inc.*, 934 P.2d 830, 834 (Colo. App. 1996) (explaining that 28 U.S.C.

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]

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§ 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)).

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

5. VDARE's tortious interference claim is DISMISSED WITHOUT 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:

/s/ Christine M. Arguello
CHRISTINE M. ARGUELLO
United States District Judge

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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. Sch. 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.

APPENDIX C — RECOMMENDATION OF THE MAGISTRATE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, DATED JANUARY 29, 2020

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).

Appendix C

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, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550

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

U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (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 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).

Appendix C

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, 109 S. Ct. 454, 102 L. Ed. 2d 469 (2001)](quoting *Lugar [v. Edmondson Oil Co.*, 457 U.S. 922, 936-37, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (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, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982)](emphasis in original).

Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001) (first two alterations in *Brentwood Acad.*).

Appendix C

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, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (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, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (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.*

Appendix C

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 U.S. Dist. LEXIS 75173, 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, 129 S. Ct. 808, 172 L. Ed. 2d 565 (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, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (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, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (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, 108 S. Ct. 614, 98 L. Ed. 2d 720 (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:
/s/ Kathleen M. Tafoya
Kathleen M. Tafoya
United States Magistrate Judge

APPENDIX D — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED SEPTEMBER 20, 2021

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VDARE FOUNDATION,

Plaintiff-Appellant,

v.

CITY OF COLORADO SPRINGS, *et al.*,

Defendants-Appellees.

FILED
September 20, 2021

No. 20-1162

(D.C. No. 1:18-CV-03305-CMA-KMT)
(D. Colo.)

ORDER

Before **TYMKOVICH**, Chief Judge, **HARTZ**, and **PHILLIPS**, Circuit Judges.

Appellant's petition for rehearing is denied.

Appendix D

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/_____
CHRISTOPHER M.
WOLPERT, Clerk