No. 20-1162

IN THE
United States Court of Appeals for the Tenth Circuit

VDARE FOUNDATION,

Plaintiff-Appellant,

v.

MAYOR JOHN SUTHERS,
CITY OF COLORADO SPRINGS
Defendants-Appellees,

On Appeal from the
United States District Court for the District of Colorado
Civil Action No. 18-cv-03305-CMA-KMT
(Hon. Judge Christine M. Arguello)

APPELLEE'S ANSWER BRIEF

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ORAL ARGUMENT IS NOT REQUESTED

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STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the trial court properly found no state action when a private business terminated a contract.

2. Whether VDARE waived or forfeited its theory that the district court improperly considered the government speech doctrine or, alternatively, if it is barred by judicial estoppel.

3. Whether the district court properly concluded that the amended complaint did not a state claim for First Amendment Retaliation.

4. Whether the district court properly concluded that Mayor Suthers is entitled to qualified immunity.

STATEMENT OF THE CASE

VDARE Foundation ("VDARE") is § 501(c)(3) non-profit organization whose "controversial subject matter" and "controversial viewpoints and published content in opposition to current immigration policies" generates "negative media attention." Aplt. App. at 9. The Cheyenne Mountain Resort (the "Resort"), a private business, entered into a contract with VDARE to host a conference. *Id.* at 8. Almost 5 months later, the Resort terminated the contract on August 15, 2017. *Id.* at 9. The Resort's action came days after a deadly rally involving "neo-Nazis, KKK members and other white nationalist groups" and counter protestors. *Id.* at 9,

fn. 2. After protestors disrupted the rally, James A. Fields, Jr. drove his car into a crowd of protestors killing Heather Heyer and injuring 19 other people. *Id.*

On August 14, 2017, as national and local debate raged over the incident in Charlottesville, Mayor John Suthers ("Mayor Suthers" or "Mayor") issued a public statement that stated in its entirety:

> 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.

All of VDARE's claims are premised on this single statement. VDARE asserted three claims in its amended complaint. It alleged a "Violation of U.S.C. § 1983" when "Defendants unlawfully threatened to withhold city services based upon Plaintiff's speech and association[,]" *Id.* at 10-11, First Amendment Retaliation, and Intentional Interference with Contract.

On March 27, 2020, the district court adopted the recommendation of the magistrate judge and granted the motion to dismiss filed by Mayor Suthers and the

City. *Id.* at 71. In its order, the district court found that "VDARE fail[ed] 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." *Id.* at 85. The district court concluded "Defendants' public statement was permissible government speech which in no way directed Cheyenne Resort to take any action." *Id.* at 92. The district court also found that Mayor Suthers was entitled to qualified immunity, *Id.* at 96, and the second element of the First Amendment claim was defective. *Id.* at 98. The district court noted that VDARE did not object to the recommendation to dismiss its equal protection claim and dismissed it. *Id.* at 99-100. Finally, the district court declined to exercise supplemental jurisdiction over the state law claim. *Id.* at 102.

SUMMARY OF THE ARGUMENT

VDARE prides itself on stoking the flames of controversy. It now seeks shelter from the natural product of those flames—criticism. But, debate, especially political debate, is not a one-sided monolog. The district court's order dismissing VDARE's amended complaint should be affirmed.

On the heels of a deadly clash between protest groups in Charlottesville, Virginia on August 12, 2017, many people in Colorado Springs and across the nation began to take a closer look at the connection between VDARE and the deadly events. Some discovered VDARE's upcoming conference at the Resort and

questioned why the Resort was hosting the event. The Resort, sensitive to its public image like many businesses, chose to terminate the contract. Frustrated by the loss of the contract and what it perceived as unfair criticism, VDARE looked for someone to blame. It settled on a public statement issued by the Mayor.

The state action doctrine is clear—Fourteenth Amendment due process standards are not invoked for purely private conduct. The amended complaint does not allege sufficient facts to attribute the Resort's decision to terminate to the State. There are no allegations that the Mayor or the City directed, communicated with, influenced, contacted or otherwise coordinated with the Resort. Nothing in the amended complaint plausibly attributes the decision to cancel the contract to anything other than the exercise of business judgment by a private party with an eye squarely on public perception.

As for the Mayor's statement, it was simply a proper comment on a matter of public concern. Elected officials are expected to make statements and take positions on issues of public concern. In an effort to satisfy the nexus test and show state action, VDARE contorts the Mayor's words and arrives at its own subjective interpretation of the statement. But, decisional law from this Circuit, the Supreme Court, and its sister circuits makes clear that the Mayor's statement was not an improper "threat" as VDARE terms it. Rather, under the nexus test, the City's *actions* must rise to the level of being such *significant* encouragement or coercion

to attribute the Resort's private conduct to the State. The nexus test leaves ample room for urging, requesting, approval of or acquiescence of private conduct, appeals to conscience and, maybe most importantly, criticism. This space, at most, is where the Mayor's comment falls. As such, the district court correctly found no state action.

Next, VDARE claims that the district court erred by giving any weight to the government speech doctrine in reaching its decision. VDARE, though, never raised this issue before the district court and does not, now, argue plain error in its opening brief. These omissions are fatal to this Court's consideration of the argument on appeal.

If the Court elects to consider the argument, it should find that the government speech doctrine was properly considered by the district court. The nexus test is a fact-driven inquiry that lacks rigid simplicity. The gravamen of VDARE's amended complaint was the loss of the conference and the alleged connection to the Mayor's public statement. Because of this, the State's alleged "action"—here, merely a statement by an elected official—is central to the state action determination. As such, whether the Mayor's statement constituted permissible speech under government speech doctrine was properly considered by the district court.

The district court also correctly held that the second and third elements of the retaliation claim were defective. The person of ordinary firmness element is substantial enough that a party engaged in political debate is required to cure any misperceptions through its own speech and debate. The Mayor's statement, read as a whole, would not chill a person of ordinary firmness from continuing to engage in protected activity. The amended complaint's conclusory and speculative allegations are insufficient to show the second element. As for the third element, VDARE relies merely on the temporal proximity of the statement and nothing more. This is insufficient to show the state-of-mind element.

Finally, the district court correctly held that the Mayor was entitled to qualified immunity. The presumption of qualified immunity shields the Mayor if state action is missing from the complaint. VDARE also did not identify controlling precedent that puts the Mayor on notice that his conduct was clearly unconstitutional. As such, the district court properly found that the Mayor was entitled to qualified immunity.

For all of these reasons, the district court correctly dismissed VDARE's amended complaint. The district court's order should be affirmed.

ARGUMENT

I. Standard of Review

This Court reviews "de novo the grant of a Rule 12(b)(6) motion to dismiss

for failure to state a claim and uphold[s] the district court's dismissal if the complaint doesn't contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Wasatch Equal. v. Alta Ski Lifts Co.*, 820 F.3d 381, 386 (10th Cir. 2016) (internal quotation marks and citations omitted).

"[T]o withstand a motion to dismiss, a complaint must contain enough allegations of fact "to state a claim to relief that is plausible on its face." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008). "The burden is on the plaintiff to craft an adequate complaint that contains enough factual allegations to state facially plausible claims for relief and provide fair notice to defendants of the nature of the claims against them." *Bridges v. Lane*, 351 F. App'x 284, 286 (10th Cir. 2009) (unpublished). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks, citations and alterations omitted). Finally, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

II. The district court correctly found that the complaint failed to allege state action

"A private party, acting on its own, cannot ordinarily be said to deprive a

citizen of her right to Free Speech." *Wilcher v. City of Akron*, 498 F.3d 516, 519 (6th Cir. 2007). Here, the Resort took the decisive step to terminate the contract. The amended complaint does not set forth facts that support attributing the decision to the City. As such, the district court's order finding the lack of state action should be affirmed.

"In accord with the text and structure of the Constitution, [the Supreme Court's] state-action doctrine distinguishes the government from individuals and private entities." *Manhattan Cmty. Access Corp. v. Halleck*, — U.S. —, 139 S. Ct. 1921, 1928 (2019). "[S]tate action requires *both* an alleged constitutional deprivation 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, *and* that the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (emphasis in original) (internal quotation marks omitted). This is because the doctrine "not only to preserve[s] an area of individual freedom by limiting the reach of federal law and avoid[s] the imposition of responsibility on a State for conduct it could not control, 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." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (internal citations

omitted) (emphasis in original).

While the Supreme Court has devised a number of ways private action can be attributed to the State, VDARE only argues that the nexus test is applicable here. Aplt. App. at 43, 82; Aplt. Opening Brief at 11. Under the nexus test, "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.'" *Brentwood Acad.*, 531 U.S. at 295 (quoting in part *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). "The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis in original). In this case, like the Supreme Court observed in *Blum*, "the importance of this assurance is evident when . . . the complaining party seeks to hold the State liable for actions of private parties." *Id.* Thus, it is "*only* when [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 that of the State." *Id.* (emphasis added). Anything less than a true exercise of coercive power or significant encouragement does not amount to state action.

Under the nexus test, "the required inquiry is fact-specific[,]" *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1448 (10th Cir. 1995), and "begins by

identifying the specific conduct of which the plaintiff complains." *Sullivan*, 526 U.S. at 51. (internal quotation marks omitted). As the district court noted,

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

Aplt. App. at 82 (quoting *Gallagher*, 49 F.3d at 1448).

Because determining whether state action is present is "a matter of normative judgment" and "lack[s] rigid simplicity[,]" *Brentwood Acad.*, 531 U.S. at 295, "examples may be the best teachers . . . ." *Id.* at 296.

The nexus test is often traced back to *Blum*, *supra*. There, the Supreme Court found the discharge or transfer of patients from privately operated nursing homes and the State's corresponding adjustment of Medicaid benefits was not

sufficiently connected to support a finding of state action. In *Blum*, the State required nursing homes to complete a "long term care placement form" and had regulations imposing penalties and fines on facilities that violated the regulations. 457 U.S. at 1009-10. Nevertheless, the Court held, "[t]hese regulations do not require the nursing homes to rely on the forms in making discharge or transfer decisions, nor do they demonstrate that the State is responsible for the decision to discharge or transfer particular patients. Those decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Id.* at 1008.

In *Sullivan*, *supra*, the Supreme Court, again, declined to find state action when private insurance carriers, and others, withheld payments for disputed medical treatments pursuant to a state law that created a utilization review. The Supreme Court reject plaintiff's challenge "that, in amending the Act to provide for utilization review and to grant insurers an option they previously did not have, the State purposely 'encouraged' insurers to withhold payments for disputed medical treatment." 526 U.S. at 53. The Court, instead, held, "[t]he most that can be said of the statutory scheme . . . is that whereas it previously prohibited insurers from withholding payment for disputed medical services, it no longer does so. Such *permission of a private choice* cannot support a finding of state action." *Id.* at 54 (emphasis added).

In this Circuit, a panel found no state action when a private security outfit conducted pat-down searches at a concert held on a university campus. *Gallagher*, 49 F.3d at 1457-58. In *Gallagher*, a university operations manual required the university's public safety department to provide security and public safety control. *Id.* at 1445. Additionally, the university public safety executive director was aware of the searches, and uniformed university public safety officers were present and observed the searches. *Id.* at 1450. The Court found that none of these facts were sufficient to find state action under the nexus test. *Id.* at 1450-51. The Court held "it is well established that a state official's mere approval of or acquiescence to the conduct of a private party is insufficient to establish the nexus required for state action." *Id.* at 1451.

Similarly, another Tenth Circuit panel, in *Wittner v. Banner Health*, 720 F.3d 770 (10th Cir. 2013), found no state action present in a private hospital staff's treatment of an individual admitted to the hospital on a mental health hold authorized by state statute. The private hospital received government compensation in exchange for being a "designated facility" and was required to "consent . . . to the enforcement of standards set by the executive director of the state Department of Human Services." *Id.* at 773-74. The hospital was also the only "designated facility" that police used to admit individuals subject to involuntary mental health holds. *Id.* at 774. Finally, the State oversaw the administration of medication,

required specific recordkeeping, developed training curricula and staff evaluation, and reserved the power to monitor the distribution of medications. *Id.* Despite the state involvement, the *Wittner* court found the State neither significantly encouraged nor coerced the hospital. The court held the decision to admit under the state mental hold statute "'ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State' are not decisions we can fairly attribute to the state." *Id.* at 776 (citing in part *Blum*, 457 U.S. at 1011).

To be sure, VDARE has not identified one factually analogous case where state action was found. Rather, this Court's sister circuits have declined to find state action in circumstances where the encouragement far exceeded anything that could possibly be gleaned from the Mayor's statement. *See Mead v. Indep. Ass'n*, 684 F.3d 226, 232 (1st Cir. 2012) (no state action when private organization responsible for overseeing state licensed and regulated assisted living facilities terminated a state-approved administrator finding that the state did not order administrator's firing and the private entity "acted at least in part for its own reasons"); *Campbell v. PMI Food Equip. Grp., Inc.*, 509 F.3d 776, 784 (6th Cir. 2007) (state-created incentives to make a particular decision not significant encouragements and, thus, not state action); *Perry v. Chicago Housing Authority*, 791 F.3d 788, 790-91 (7th Cir. 2015) (Posner, J.) (no state action when private

building owners required drug testing at the request of a housing authority finding "urging is not requesting" and "request and command are not synonyms."); *Sabri v. Whittier Alliance*, 833 F.3d 995, 1000 (8th Cir. 2016) (preconditioning public funding on the development of "democratic processes and elections" insufficient encouragement for state action).

Finally, the district court correctly found VDARE's reliance on *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) misplaced. Aplt. App. at 90. *Bantam Books, Inc.* involved notices sent by a Commission that had the power to investigation and recommend prosecution for all violators of a state law targeting publications "containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth . . . ." *Id.* at 59. The notices advised publishers of the Commission's duty to recommend prosecution and sought compliance with the Commission's objectives. *Id.* at 62. Plaintiff, one such publisher, was notified that lists of objectionable publications were provided to police. *Id.* at 62-63. Police, in turn, visited plaintiff shortly after issuance of the letter to inquiry about "what action he had taken." *Id.* at 63. As the district court observed, in *Bantam Books, Inc.*, "[t]he Supreme Court held that the Commission's system was a 'scheme of state censorship effectuated by extralegal sanctions[,]' that amounted to unconstitutional state action in violation of publishers' First Amendment rights, including the prior restraint of protectable publications, which

bears a 'heavy presumption against' such a system's 'validity.'" Aplt. App. at 89 (internal citation omitted).

Although VDARE describes its allegations as "closely resembl[ing]" *Bantam Books*, the complaint do not bear this out. *See* Aplt. App. at 90 (The district court remarking that "*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."*). Here, unlike *Bantam Books, Inc.* where "[t]he Commission's notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped circulation of the listed publications ex proprio vigore[,]" *Bantam Books, Inc.*, 372 U.S. at 68, the Mayor's statement was simply was not an order. It demanded nothing. It did not seek to compel or significantly encourage a particular action. Neither the City nor the Mayor visited or otherwise contacted the Resort or VDARE to reinforce, follow-up or follow-through on any alleged "threat" contained in the public statement. Further, the City had no contractual relationship or control over the Resort. Finally, nothing in the amended complaint suggests that VDARE or the Resort sought out or needed assistance, and the City declined the request.

The amended complaint contains no factual allegations that VDARE's ability to communicate, associate, publish, recruit or otherwise express or disseminate its views generally or in Colorado Springs specifically were, indeed, restricted. The amended complaint, instead, makes sweeping, speculative and conclusory statements alleging infringement of its rights without alleging the factual support to back them up. As for the termination itself, the Resort, at all points, maintained complete authority to exercise its business prerogative to perform, or not, under the contract. *See, e.g., R.C. Maxwell Co. v. Borough of New Hope*, 735 F.2d 85, 89 (3d Cir. 1984) ("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."). Thus, as the Supreme Court held, "where the [State] has not put its own weight on the side of the proposed practice by ordering it, . . . a practice initiated by the [private party] and approved by the [State does not transmute it] into 'state action.'" *Jackson*, 419 U.S. at 357.

Lastly, VDARE characterizes the Mayor's statement as an expression of intent to withhold services at some later date under some speculative circumstances. Aplt. Opening Brief at 4; Aplt. App. at 11. But, "[a]s [the Supreme Court] ha[s] said before, [its] cases will not tolerate the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the

State's inaction as authorization or encouragement." (internal quotation marks omitted)). *Sullivan*, 526 U.S. at 54. Simply, as the district court correctly concluded, VDARE has failed to allege state action. Accordingly, the district court's order should be affirmed.

III. VDARE waived or forfeited the argument that the government speech doctrine should not have been considered before the district court

The Mayor's ability to speak as an elected official was central to the City's motion to dismiss and briefing before the district court. Aplt. App. at 29; Aplee Supp. App. at 29-31, 33. VDARE argues for the first time on appeal that the district court erred when it consider the Mayor's ability to speak and government speech doctrine. VDARE either waived or forfeited the theory by failing to raise it below. Insofar that it said anything about the doctrine below, VDARE's argument now directly contradicts its previous position. Thus, alternatively, VDARE is judicially estopped from arguing error.

"Where . . . a plaintiff pursues a new legal theory for the first time on appeal, that new theory suffers the distinct disadvantage of starting at least a few paces back from the block. If the theory was intentionally relinquished or abandoned in the district court, [the Tenth Circuit] usually deem[s] it waived and refuse[s] to consider it. By contrast, if the theory simply wasn't raised before the district court, [this Court] usually hold[s] it forfeited." *Richison v. Ernest Grp., Inc.*, 634 F.3d

1123, 1127–28 (10th Cir. 2011) (Gorsuch, J.). "Waiver is accomplished by intent, but forfeiture comes about through neglect." *Id.* at 1128. In order to advance a forfeited theory on appeal, a party must show plain error. *Id.* Plain error is an "extraordinary, nearly insurmountable burden." *Id.* at 1130. "To show plain error, a party must establish the presence of (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

VDARE expends considerable effort in its opening brief seeking to persuade this Court that the district court improperly considered the government speech doctrine. Aplt. Opening Brief at 23-28. VDARE did not present the argument below. It did not ask the district court to reconsider its ruling, despite the opportunity. *See* Fed. R. Civ. P. 59(e). It does not argue plain error in its opening brief. As such, VDARE has waived or forfeited the argument and this Court should not consider it.

Before the district court, VDARE merely said the following about the government speech doctrine: "*Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) states that government speech need not be viewpoint neutral, *a proposition with which Plaintiff does not disagree*." Aplee. Supp. App. at 12 (emphasis added). Insofar as this passing reference suffices to preserve the issue, VDARE now says it disagrees with its prior position. Aplt. Opening Brief at 2, 27. Judicial estoppel is designed to

"protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001). When determining whether judicial estoppel applies, three factors are typically considered:

> First, a party's subsequent position must be clearly inconsistent with its former position. [Second], a court should inquire whether the suspect party succeeded in persuading a court to accept that party's former position, so that judicial acceptance of an inconsistent position in a later proceeding would create the *perception* that either the first or the second court was misled. [Third], the court should inquire whether the party seeking to assert an inconsistent position would gain an unfair advantage in the litigation if not estopped.

Eastman v. Union Pac. R. Co., 493 F.3d 1151, 1156 (10th Cir. 2007) (emphasis in original) (internal quotation marks and citations omitted).

Here, as mentioned above, VDARE's position on appeal is, at a minimum, inconsistent with its stance before the district court. Second, VDARE never argued below that the magistrate judge or the district court should not consider the government speech doctrine. Third, VDARE certainly would gain an unfair advantage on appeal because it seeks to "lose in the district court on one theory of the case, and then prevail on appeal on a different theory." *Lone Star Steel v. United Mine Workers of Am.*, 851 F.2d 1239, 1243 (10th Cir. 1988). Thus, for these reasons, VDARE should be barred from presenting its opposition to the application of the government speech doctrine on appeal.

IV. The district court properly considered the government speech doctrine

The idea that a government may "interject its own voice into public discourse[,]" *Phelan v. Laramie Cty. Cmty. Coll. Bd. of Trustees*, 235 F.3d 1243, 1247 (10th Cir. 2000), is far from "scandalous[,]" Aplt. Opening Brief at 23, and is, in fact, entirely uncontroversial. As to the question of state action and the First Amendment claims, the district court correctly concluded the Mayor's statement "was permissible government speech which in no way directed [the Resort] to take any action." Aplt. App. at 92.

The Mayor's ability as an elected official to speak on matters of public significance played an important role in analyzing the viability of the claims. First, VDARE's claims rest on the Mayor's statement—and his statement alone. Second, as noted above, the state action inquiry is fact-specific and "[e]ven facts that suffice to show public action (or, standing alone, would require such a finding) may be outweighed in the name of some value at odds with finding public accountability in the circumstances." *Brentwood Acad.*, 531 U.S. at 303. Surely, the Mayor's rights to speak and the governmental speech doctrine are weighty considerations under the state action inquiry. *See, e.g., Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 687 (4th Cir. 2000) ("The nature of the alleged retaliatory acts has particular significance where the public official's acts are in the form of speech. Not only is there an interest in having public officials fulfill their duties, a

public official's own First Amendment speech rights are implicated."). Third, as it pertains to the retaliation claim, "[c]ourts have not been receptive to retaliation claims arising out of government speech." *Goldstein v. Galvin*, 719 F.3d 16, 30 (1st Cir. 2013).

"The First Amendment is intended to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (internal quotation marks omitted). "That marketplace of ideas is undermined if public officials are prevented from responding to speech of citizens with speech of their own." *Mulligan v. Nichols*, 835 F.3d 983, 989 (9th Cir. 2016). Certainly, then, it is expected that the Mayor, as an elected official, would speak about matters of public concern. *See*, *e.g.*, *Novoselsky v. Brown*, 822 F.3d 342, 356 (7th Cir. 2016) ("[T]he First Amendment gives wide berth for vigorous debate, and especially for statements by public officials."); *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1015 (D.C. Cir. 1991) ("As part of the duties of their office, [government] officials surely must be expected to be free to speak out to criticize practices, even in a condemnatory fashion, that they might not have the statutory or even constitutional authority to regulate."); *Goldstein*, 719 F.3d at 30 ("Not only do public officials have free speech rights, but they also have an obligation to speak out about matters of public concern.").

VDARE, as an organization that prides itself in publishing "controversial

subject matter" and "seeks to influence public debate[,]" Aplt. App. at 7, 9, must know, "the nature of political debate is rough and tumble." *Eaton v. Meneley*, 379 F.3d 949, 956 (10th Cir. 2004). Thus, VDARE and other "[p]laintiffs in public debates are expected to cure most misperceptions about themselves through their own speech and debate." *Id.* Because the Mayor's statement only asked businesses to be attentive to the events they host and thoughtfully noted his inability to restrict free speech or direct businesses, the statement did not exceed the bounds of constitutionally permissible speech by an elected official. As such, the district court properly considered the government speech doctrine, the Mayor's right to speak out on matters of public concern, and correctly dismissed the amended complaint.

V. The district court properly dismissed the First Amendment retaliation claim

The district court correctly concluded that the second element of the First Amendment retaliation claim was inadequately alleged, and adopted the magistrate's recommendation that found the third element was inadequately alleged. Aplt. App. at 75-76, 98.

To state a claim for retaliation, a plaintiff must allege "(1) [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) (internal quotation marks omitted).

The second element, the objective "person of ordinary firmness" element, "is substantial enough that not all insults in public debate become actionable under the Constitution." *Eaton*, 379 F.3d at 956; *see also Valdez v. New Mexico*, 109 Fed. App'x 257, 263 (10th Cir. 2004) (unpublished) (describing the ordinary firmness standard as "a vigorous one."). The Mayor's statement did not cause an injury that would chill a person of ordinary firmness from engaging in protected activity.

The statement itself readily acknowledges the City's inability to "restrict freedom of speech, nor to direct private businesses like the Cheyenne Mountain Resort as to which events they may host." Aplt. App. at 8. While it noted that the City did not intend on providing any support or resources to the event,[1] it also expressly stated the City's intent to "remain[ ] steadfast in its commit to the enforcement of Colorado law, which protects *all* individuals . . . ." Aplt. App. at 8 (emphasis added).[2]

VDARE argues that the Mayor "singled out [it] for invidious treatment and condemned it for promoting 'hate speech.'" Aplt. Opening Brief at 29. But, [u]nconstitutional retaliation by a public official requires more than criticism or

[1] The complaint does not allege that the City was required to provide support or resources or that such services were needed or requested.
[2] Nothing suggests that VDARE was excluded from the broad protections afforded to "all individuals."

even condemnation." *Novoselsky*, 822 F.3d at 356. Instead of providing factual allegations to support its position, VDARE relies only on its subjective interpretation of the statement, speculative leaps and self-styled conclusions.[3] Speculation, though, that protests and unrest might happen—just as they might not—is not entitled to a presumption of truth. *Iqbal*, 556 U.S. at 679. The amended complaint also does not include the necessary facts to support the conclusion that future events were impossible to hold. As the district court pointed out, "there is a difference between an inference and an assumption[,]" Aplt. App. at 95, and allegations that are "conclusory and speculative . . . cannot [be] rel[ied] upon . . . in determining whether VDARE has stated a plausible claim." *Id.* at 94. Here, the amended complaint fails to provide factual allegations to show that the Mayor or City took action beyond issuing the statement. Accordingly, the district court correctly held that the second element of the retaliation claim was deficient.

Finally, and alternatively, the magistrate judge correctly found,

> 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.

[3] The complaint, for instance, alleged the "planned [c]onference might give rise to protests or unrest[,]" Aplt. App. at 10, and the statement "made it impossible for VDARE to conduct future conferences, discussions and events in Colorado Springs." Aplt. App. at 13.

Aplt. App. at 47 (emphasis in original). Absent from the amended complaint is any description of the *detrimental actions* Mayor Suthers or the City took beyond the "mere approval of or acquiescence to the conduct of a private party . . . ." *Gallagher*, 49 F.3d at 1450. As such, the district court, in adopting the recommendation of the Magistrate Judge, correctly found that VDARE failed to allege the third element of a retaliation claim.

VI. The district court correctly held that the Mayor was entitled to qualified immunity

State action is a threshold inquiry. *See Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1930. Thus, the district court properly ruled that Mayor Suthers was entitled to qualified immunity since VDARE failed to allege state action.

Government officials are entitled to the presumption of qualified immunity, *Pahls v. Thomas*, 718 F.3d 1210, 1227 (10th Cir. 2013), and are given "'breathing room to make reasonable but mistaken judgments about open legal questions.'" *Ullery v. Bradley*, 949 F.3d 1282, 1289 (10th Cir. 2020) (quoting in part *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)). "Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *al-Kidd*, 563 U.S. at 735. Because the district court found no state action, it properly determined that Mayor Suthers was entitled to qualified immunity.

Setting aside the state action prerequisite for a moment, in order to defeat the Mayor's assertion of qualified immunity, VDARE was required to identify "on-point Supreme Court or published Tenth Circuit decision; alternatively, the clearly established weight of authority from other courts must have found the law to be as [it] maintains." *Quinn v. Young*, 780 F.3d 998, 1005 (10th Cir. 2015) (internal quotation marks omitted); *see also White v. Pauly*, — U.S. —, 137 S. Ct. 548, 552 (2017) ("the clearly established law must be 'particularized' to the facts of the case."). VDARE relies on broad-brush passages from First Amendment jurisprudence, *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) and *Nat'l Commodity & Barter Ass'n v. Archer*, 31 F.3d 1521 (10th Cir. 1994) to support its contention that Mayor Suthers is not entitled to qualified immunity. Neither case is particularized to the factual allegations underlying this suit.

Archer involved a sprawling criminal investigation into an anti-tax group, which included the use of undercover agents, surveillance, and the execution of multiple—and sometimes faulty—search warrants and seizure of items such as membership lists, literature, correspondence, bank records and legal files. *Id.* at 1525-27. The Tenth Circuit found that the complaint stated actionable claims because it "plainly alleges specific *actions* by governmental employees of a different character [than those in *Laird v. Tatum*, 408 U.S. 1 (1972)]—numerous alleged seizures of membership lists and other property belonging to the NCBA,

not the mere existence, without more, of a governmental investigative and data-gathering activity . . . ." *Id.* at 1530 (emphasis in original) (internal quotation marks omitted). Quite clearly, the level of government action in *Archer* is missing in VDARE's amended complaint. The *Archer* court also denied qualified immunity because "[a]t the time of the specific seizures of membership lists and records allegedly occurred, it was clear that a reasonable government employee would understand that what he was doing violated those rights."[4] *Id.* at 1533 (internal quotation marks omitted).

Forsyth County, *supra*, lacks factual correspondence as well. There, the Supreme Court found a county ordinance which imposed a fee on rallies, speeches and public meetings was constitutionally infirm because it provided an administrator with unconstitutionally broad discretion and impermissibly imposed fees based upon the content of an applicant's speech. *Id.* at 133-36.

Here, of course, the City did not seek to regulate or burden the event financially or otherwise. Indeed, it was not the City's action, but its inaction that draws VDARE's criticism. Curiously, though, VDARE does not identify a law, ordinance or regulation that required the City to commit to providing governmental services to a purely private conference on private property should some speculative

[4] The Court remanded the case with instructions to determine whether the defendants were entitled to qualified immunity due to extraordinary circumstances. *Id.* at 1533.

future events arise. For these reasons, the instant matter stands in stark contrast from *Forsyth County*. Consequently, the district court correctly ruled that the Mayor was entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the City and Mayor Suthers respectfully request that this Honorable Court affirm the district court's order dismissing VDARE's federal claims.

Dated this 14th day of October, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(A) and (B) because it does not exceed 30 pages, and according to the word processing system used to prepare the brief, it contains 6528 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point type.

Dated this 14th day of October, 2020.

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify with respect to the foregoing:

1. All required privacy redactions have been made per 10th Cir. R. 25.5;
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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on the 14th day of October, 2020 I electronically filed the foregoing ***APPELLEE'S ANSWER BRIEF*** with the Clerk of the Court using the CM/ECF system and certify that a true and correct copy was furnished to the following:

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