Marc J. Randazza, NV Bar # 12265
D. Gill Sperlein (*pro hac vice*)
Alex J. Shepard, NV Bar # 13582
RANDAZZA LEGAL GROUP, PLLC
4035 S. El Capitan Way
Las Vegas, NV 89147
Telephone: 702-420-2001
Facsimile: 305-437-7662
ecf@randazza.com

Attorneys for Plaintiff,
William Deans

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILLIAM DEANS, an individual,

Plaintiff,

vs.

LAS VEGAS CLARK COUNTY LIBRARY DISTRICT,

Defendant.

Case No. 2:16-cv-02405-APG-PAL

PLAINTIFF WILLIAM DEANS'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT LAS VEGAS CLARK COUNTY LIBRARY DISTRICT

Plaintiff William Deans hereby files his Reply in Support of his Motion for Summary Judgment and requests that the Court enter summary judgment in his favor as to all claims.

1.0 INTRODUCTION

On October 13, 2016, Plaintiff William Deans was exercising his First Amendment right to engage in political speech by obtaining signatures for a petition to place the Automatic Voter Registration Initiative on the ballot in Nevada and by instructing his fellow citizens how to register to vote prior to the October 18, 2016 deadline. He did this at the West Charleston Public Library (the "Library"), a public library located at the College of Southern Nevada, where many civically-minded citizens come to educate themselves.

Rather than encouraging this innocuous activity, Defendant and its employees told Plaintiff that he had to "register" with the Library staff before he could engage in this protected activity. They also told Mr. Deans he could only engage in his protected activity in a small area away from any likely foot traffic.

When Plaintiff rightfully pointed out he had a First Amendment Right to engage in this activity, a College of Southern Nevada ("CSN") security officer, acting as an agent of the Library, threatened Mr. Deans with arrest if he did not leave the premises immediately.

Mr. Deans did ultimately leave the premises in response to this threat of arrest, but that was not enough for Defendant. It also issued Plaintiff a "Notice of Trespass" requiring him to leave the Library and forbidding him from visiting **any** LVCCLD branch for a period of at least **one year**. In the absence of the preliminary injunction the Court entered, Mr. Deans is subject to arrest if he visits *any* branch of the LVCCLD, whether to check out books, to participate in Library activities, or to advocate for voter registration outside any public libraries anywhere in Clark County. Defendant's actions chilled core political speech

and imposed an unconstitutional prior restraint on Plaintiff's attempts to engage the voting public.

The parties have already undergone discovery and had an extensive evidentiary hearing on the merits of this case. There are no disputed material facts, and thus the matter is ripe for summary judgment. The Court should permanently enjoin Defendant from further infringing Plaintiff's constitutional rights, and order Defendant to pay attorneys' fees and costs to compensate Plaintiff for the expense of vindicating his constitutional rights. Further proceedings may be required to determine the appropriate amount of money damages.

2.0 FACTUAL BACKGROUND

Rather than repeat the factual recitation found in the Motion for Summary Judgment, Mr. Deans will only respond to new factual allegations in Defendant's opposition that warrant a response.

Defendant claims that Mr. Deans, by his own admission, was "standing approximately 16 feet from the doors" of the West Charleston Library. (ECF No. 56 at 9.) This is a cherry-picked statement from Mr. Deans that gives the misleading impression he conducted most of his petitioning activity this distance from the library's entrance. On the contrary, Mr. Deans was in excess of 16 feet from the doors, and most often approximately 30 feet from the doors. (*See* ECF No. 30 at 29: 1-3.)

Defendant states that after Sam Kushner showed Mr. Deans the library's petitioning spot, Mr. Deans "positioned himself in front of the library doors, interfering with library visitors' ability to enter and exit the building." (ECF No. 56 at 9) (quoting ECF No. 30 at 145:7-9.) The quoted material in the previous sentence is a blatant misrepresentation of the record; Mr. Kushner never claimed

that Mr. Deans interfered with any library visitor's ability to enter and exit the building. The exchange Defendant quoted is as follows: "Q. And what - how did Mr. Deans respond to this information, when you showed him the designated location? A. He just didn't go – go to the designated location." (ECF No. 30 at 145:7-9.) At most, Mr. Kushner testified that a hypothetical gathering of people 15 to 20 feet in front of the entrance had the potential to obstruct ingress or egress, and that he did not observe Mr. Deans actually obstruct any library patron's ingress or egress. (*See* ECF No. 30 at 153:14-20; 179:15-180:11.)

3.0 ARGUMENT

3.1 Fed. R. Civ. P. 5.1 Does Not Apply Here

Defendant attempts to twist Mr. Deans's claims to argue that he is actually challenging the constitutionality of NRS 293.127565, and has thus violated Fed. R. Civ. P. 5.1 by not certifying to the attorney general that the statute is being challenged. (ECF No. 56 at 10.) This is a mischaracterization of NRS 293.127565 and Mr. Deans's claims. Defendant made a similar argument in its opposition to Mr. Deans's motion for a preliminary injunction. (*See* ECF No. 10 at fn. 6.) Since the Court's Order granting the preliminary injunction made no mention of either Fed. R. Civ. P. 5.1 or NRS 293.127565, it apparently found this argument unpersuasive. (*See generally* ECF No. 25.)

Defendant argues that because NRS 293.127565 requires that buildings open to the general public shall designate a space for signature-gathering, any challenge to its Petition Policy must necessarily be a challenge to the statute. This argument relies on interpreting the statute such that it actually *restricts* petitioning activity, which is simply untrue.

NRS 293.127565(1) requires buildings open to the general public to designate a spot for petitioning activity, and subsection (2) provides that a person must notify a public officer or employee prior to *using that spot*.

The statute creates an **affirmative obligation** on the part of government entities to set aside an area in which people petition, even at buildings that are not traditional public fora. It **creates** a limited public forum in areas that are otherwise nonpublic fora. The statute does not, however, mandate a restriction on petitioning to *only* these designated spots. To interpret the statute in this way would make it facially unconstitutional,[1] as it would restrict such activity in all public fora. The statute creates a floor, not a ceiling, for petitioning activity. *See Univ. & Cmty. College Sys. Of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712 (2004) ("NSG"). The Nevada Supreme Court discussed NRS 293.127565, but the government did not rely on the statute as a basis for **restricting** speech. They argued that they could impose reasonable restrictions *despite* NRS 293.127565. *See id*. at 725 (appellant conceding that 293.127565 creates a limited public forum at public buildings, regardless of the building's use).

Looking at the statute's legislative history, the court found that:

> NRS 293.127565(1)(c) expresses the state's public policy that election laws . . . should be liberally construed to effectuate the will of the people. Correspondingly, any time, place, or manner restriction associated with buildings to which NRS 293.127565 pertains must not work unreasonably, in light of the totality of the circumstances, so as to deny a petition circulator his or her right to gather signatures.

Id. at 734. The purpose of the statute is "to provide petition circulators areas at public buildings in which to conduct signature-gathering activities." *Id*. at 735. Accordingly, any restrictions on such activities at a public building "under the statute's purview must also comport with the spirit and intent of NRS 293.127565 in light of the particular circumstances." *Id*. at 736. Nothing in the statute **restricts** an individual's right to circulate petitions.

[1] The Court should not read this statement to mean Mr. Deans is challenging the constitutionality of the statute. Rather, it simply provides an example of how Defendant's interpretation of the statute is plainly wrong.

Defendant also claims that its check-in policy is justified under NRS 293.127565, but this argument fails for the same reasons. The notification requirement of NRS 293.127565(2) applies only to a person's use of a designated petition spot under the statute. The statute does not create a general requirement that all people wishing to engage in petitioning activity at any location of a building open to the general public must provide notice before petitioning.

Defendant cannot rely on its erroneous reading of NRS 293.127565. Because the entry plazas around the West Charleston Library are traditional or designated public fora, Defendant cannot cite NRS 293.127565 as a basis for restricting petitioning activity, since the statute does not limit such activity. Mr. Deans's claims do not implicate NRS 293.127565 in any way. Accordingly, there is also no presumption that the Petition Policy and its check-in requirement are constitutional or reasonable, as Defendant argues. (*See* ECF No. 56 at 12.)

3.2 The Plazas Outside the Library Are Traditional or Designated Public Fora

The first step in determining whether Defendant's regulations are constitutional is to discern whether the location to which the regulations apply is a traditional public forum, a designated public forum, or a limited public forum. The type of forum at issue determines the applicable standard in deciding whether the regulations are constitutional.

A traditional public forum is "property that has always been open to the public, such as public parks or sidewalks," and a designated public forum is "property that has been opened to all or part of the public." *Kroll v. Incline Vill. Gen. Improvement Dist.*, 598 F. Supp. 2d 1118, 1126 (D. Nev. 2009). Where the government has generally opened a place to the public, such as a University campus, any restrictions on speech there are judged by the same standards as a traditional public forum. *See Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981).

Content-based restrictions on activity within these fora are reviewed using strict scrutiny. Limited public fora are "a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics." *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999). Content-based restrictions in these fora are permissible if they are "viewpoint neutral and reasonable in light of the purpose served by the forum." *Id*. at 1075.

The Ninth Circuit applies a three-factor test in determining whether an area is a traditional public forum: "1) the actual use and purposes of the property, particularly status as a public thoroughfare and availability of free public access to the area; 2) the area's physical characteristics, including its location and the existence of clear boundaries delimiting the area; and 3) [the] traditional or historic use of both the property in question and other similar properties." *Am. Civil Liberties Union of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1100-01 (9th Cir. 2003).

Prigmore v. City of Redding, 150 Cal. Rptr. 3d 647 (Cal. Ct. App. 2012) remains the closest analogue to the circumstances here, despite Defendant's attempts to distinguish it. The *Redding* court made a vital distinction between the interior of a public library, where patrons are typically expected to be quiet and respectful of other patrons' study, and the exterior of a library, which is characterized by its large, open areas that are especially well-suited to public conversation. *See id*. at 1339. The California constitution may be more protective of free speech rights than the First Amendment,[2] but *Redding* still provides the most useful factual analogue and is highly persuasive. It is precisely because of the distinction *Redding* makes that the cases Defendant cites as

[2] The Court should note that, "[d]espite this broader protection, in analyzing speech restrictions under the California Constitution, California courts employ the same time, place and manner test as the federal courts." *Id*. at 660.

examples of other courts finding public libraries to be limited public fora are of limited use. None of those cases discuss the exterior of a library as being distinct from the interior.

Other federal courts have found public libraries to be designated public fora. The Tenth Circuit in *Doe v. City of Albuquerque*, 667 F.3d 1111, 1129-30 (10th Cir. 2012) found that (1) because "the government opens up a library to the public to engage in myriad ways to receive information suggests that a library constitutes a designated public forum," (2) since the city did not require pre-approval for use of the library, this "indicates that the City's libraries are designated public fora," and (3) "there is no evidence in the record that the City's intent in creating is libraries was anything other than to provide a forum for all of the City's residents to engage in the receipt of information. We therefore conclude that the City's public libraries constitute designated public fora." The court in *Lu v. Hulme*, 133 F. Supp. 3d 312, 325 (D. Mass. 2015), citing *Doe*, determined that "[b]y intentionally opening the library up for the exercise of the First Amendment rights to access information, the City has created a designated public forum."

Defendant's legal argument to the contrary is largely centered on *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242 (3d Cir. 1992), and several subsequent courts citing *Kreimer*, which found public libraries to be limited public fora. But this string of case law is due to a confusion in terms. As the *Doe* court explains, despite these courts using the term limited public forum, "**they each applied the standard applicable to designated public fora in reviewing regulations the restricted permitted expressive activity** . . . in the library . . . . Thus, these courts did not apply the reasonableness standard applicable to 'limited public fora,' as that term has now been defined, but in fact used the analysis appropriate to designated public fora." *Doe*, 667 F.3d at 1130 (emphasis

added). The only reason *Kreimer* and its ilk used the term "limited public forum" to describe public libraries was "the general confusion in terminology among many courts as the Supreme Court has only recently clarified the terminology of 'designated' and 'limited' public fora." *Id*. Accordingly, by relying on *Kreimer* and its successors, Defendant effectively concedes that the Library entrance plaza is at least a designated public forum.

Defendant attempts to compare the facts here with *United States v. Kokinda*, 497 U.S. 720, 727-28 (1990) to support the proposition that the exterior of the Library is a limited public forum. The first problem with this comparison is that *Kokinda* is not binding on this point. The portion of the plurality opinion that held the post office sidewalk was not a public forum was signed by only four members of the court, with Justice Kennedy finding it unnecessary to decide this issue in light of the reasonable time, place, and manner restrictions in the case. *See id*. at 739 (Kennedy, J., concurring). The other four justices disagreed and felt the sidewalk was a traditional or designated public forum. *See id*. at 593 (Brennan, J., dissenting). As this issue was considered by an equally divided court and not actually decided, the plurality's decision on whether sidewalks outside a post office are a limited public forum is non-binding dicta.

Even if *Kokinda* were binding, however, it is distinguishable. There is no mention of a larger area in front of the post office with benches for people to congregate, sit and rest, and discuss what they learned in the post office. There are no statements from the government regarding the historically open use of the sidewalks. The plurality placed great weight on the fact that "postal property is expressly dedicated to only one means of communications: the posting of public notices on designated bulletin boards." *Id*. at 730. Defendant's own policies undermine its attempts to compare this case with *Kokinda*.

Defendant also proposes three factors[3] laid out in *Seattle Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489, 496 (9th Cir. 2015) for determining the type of public forum the Library entrance plaza is. (*See* ECF No. 56 at 14.) It is important to note that the *Seattle Mideast* court used these three factors to determine whether a metro bus advertising campaign was a *traditional* public forum, and did not use them to assess whether it was a *designated* public forum. *See Seattle Mideast*, 781 F.3d at 496. The case is thus of limited use in determining whether the Library is a designated public forum. Second, these factors do not favor Defendant for the same reasons that the *Doe* and *Hulme* courts found that public libraries are designated public fora. The Library is open to the general public for expressive activity, and Defendant does not claim to impose pre-approval for general use. *Compare Doe*, 667 F.3d at 1129-30. The first two *Seattle Mideast* factors thus do not make it at all likely that the library entrance plaza is a limited public forum. The Motion for Summary Judgment already discusses the physical characteristics of the Library entrance plaza, and Defendant does not provide any new evidence regarding these characteristics that was not available to the Court when it found that the entrance plaza:

> Is an aesthetically attractive, circular outdoor space of about 75 feet in diameter. Three partial spirals of large stone columns flank the library entrance on the west end of the plaza and help set the plaza apart from the parking lot. A bench sits on the east side. The plaza's ample physical space (around 5,000 square feet) both invites public discourse and mitigates concern that speech activity will necessarily interference with library ingress and egress.

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[3] These factors are "(1) The terms of any policy the government has adopted to govern access to the forum; (2) How any policy governing access to the forum has been implemented in practice; and (3) the nature of the government property at issue." *Id*. at 196-97. The court did not state or suggest that these factors are exclusive, nor did it suggest that these factors somehow supplant the three-factor test in *Am. Civil Liberties Union*, 333 F.3d at 1100-01.

(ECF No. 25 at 4 [citations omitted]; *see also* ECF No. 17-1.) The Library entrance plaza is a traditional or designated public forum.

Finally, in its order granting Mr. Deans's motion for a preliminary injunction, the Court noted that "the plaza is a traditional public forum, **especially absent evidence that treating the plaza as such will seriously undermine the normal activity of the library**." (ECF No. 25 at 5) (emphasis added.) Defendant did not provide such evidence at the preliminary injunction hearing, and its Opposition to the instant Motion does not contain any new evidence on this point; the Opposition is based entirely on preliminary injunction hearing testimony and evidence that was already on record at the time of the Court's earlier order. All record evidence shows that the Library entrance plaza is open to the general public, that it is often used as a thoroughfare, that its physical characteristics are well-suited to public discussion, and that Defendant thinks of it and promotes it as a place for the general public to gather and discuss ideas. The entrance plaza is thus either a traditional or designated public forum.

3.3 The Petition Policy is Not a Reasonable Time, Place, and Manner Restriction

A content-neutral time, place, and manner restriction in a traditional or designated public forum is only valid under the First Amendment if the restriction (1) is narrowly tailored to serve a significant government interest; and (2) leaves open ample alternatives for communication. *See Seattle Affiliate of the October 22nd Coalition to Stop Police Brutality, Repression & the Criminalization of a Generation v. City of Seattle*, 550 F.3d 788, 798 (9th Cir. 2008). The Petition Policy has two provisions that are at issue here: (1) the "check-in" requirement; and (2) restricting petitioning activity to a specific area. Because the Library entrance plaza is not a limited public forum, the authorities cited by Defendant on this standard are inapplicable. (*See* ECF No. 56 at 18:3-21.)

3.3.1 The Petition Policy is Not Narrowly Tailored

In order for a time, place, and manner restriction to be narrowly tailored it must further a substantial government interest and must not burden substantially more speech than is necessary to further than interest. *See Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 861 (9th Cir. 2004). There must be a legitimate harm the government is trying to redress or prevent; mere speculation that speech would be disruptive is insufficient, as "undifferentiated fear or apprehension of a disturbance is not enough to overcome the right to freedom of expression on a college campus." *Healy*, 408 U.S. at 191. An "assertion of abstract interests" is not sufficient to satisfy intermediate scrutiny. *See Rideout v. Gardner*, No. 15-2021, 2016 U. S. App. LEXIS 17622 (1st Cir. Sept. 28, 2016) (finding that law forbidding "ballot selfies" was unconstitutional because it sought only to remedy hypothetical problems).

Mr. Deans admits that ensuring the safety of library patrons is a significant government interest, but this does not mean any restriction is warranted to achieve that interest. Defendant claims that its "check-in" procedure is justified because

> it allows the Library District to be aware of activities that are occurring on its premises and to take appropriate action if others engage in improper activities. It also allows the Library District staff to respond promptly and knowledgeably if other patrons question a Petitioner's actions or right to be present. Furthermore, it provides the Library District staff with an opportunity to explain the Guidelines to petitioners to ensure that any petitioning is orderly and non-disruptive.

(ECF No. 56 at 23, citing declaration of Jennifer Schember.) The declaration of Ms. Schember is the only evidence provided to support these assertions. These interests are not in any way coterminous with the orderly function of the Library and patron safety or access, and there is no record evidence demonstrating that they serve any significant government interest. There is nothing on the

record to indicate that these are actual, rather than hypothetical, problems that are likely to occur absent a "check-in" requirement, either. Defendant does not require petitioners to disclose their identity "or the nature or subject of the petition." (ECF No. 11 at 5.) Thus, any concern about stopping improper conduct are served equally well simply by having Library staff look out the glass doors of the entrance. Florence Jakus admitted at the preliminary injunction hearing that the "check-in" policy was not necessary to resolve such problems.

> THE COURT: If you looked outside through the windows of the glass doors and saw a problem, you could go out and address it; correct?
>
> THE WITNESS: I could.
>
> THE COURT: So, the advance notice of a petitioner doesn't necessarily avoid problems created by the petitioner; correct?
>
> THE WITNESS: It does not necessarily avoid problems.
>
> THE COURT: Is there, in your mind, a sufficient basis that if a problem arises, you could address it on the back end without prior notice?
>
> THE WITNESS: Sure.

(ECF No. 30 at 243:23-244:9.) The "check-in" policy is not narrowly tailored to serve a significant government interest, and is thus unconstitutional.

Defendant's restriction of petitioning activity to a single spot similarly is also not narrowly tailored. Defendant does not provide much argument at all attempting to justify its designation of the space, instead just blithely insisting that it is reasonable.[4] Defendant cites no studies, documents, or research it commissioned, reviewed, or conducted to determine that the Petition Policy was necessary at all, or that its designation of the petition spot was in any way reasonable. The only evidence Defendant cites providing any justification for any of this conduct is a statement in an interrogatory response stating "[b]ased

[4] Defendant claims that "[b]y limiting petitioning activity to areas 50 feet from the door, the Library District has taken reasonable steps to ensure that it will not be required to prefer one petitioner over another for a preferential location." (ECF No. 56 at 20.) This argument essentially is that Defendant must restrict the petition rights of petitioners to secure their rights, which is nonsensical.

on the totality of its experiences since its creation in 1965, the LIBRARY DISTRICT created and implemented the policies identified in Interrogatory No. 2 to ensure the orderly and safe administration of library business." (ECF No. 51-7 at Response No. 4.) This is no more than a conclusory statement, without any underlying discussion or analysis, that the Petition Policy is reasonable. Defendant makes no attempt to explain how allowing signature-gathering closer than 50 feet from a library branch entrance would cause any problems for anyone. Defendant instead argues that, because Mr. Deans at one point was gathering signature within approximately 15 feet of the Library's entrance,[5] its restrictions are justified. This does not follow, however, as we are not dealing with a hypothetical 15-foot petitioning restriction. Furthermore, Defendant provides no evidence that a categorical ban on petitioning activity within 15 feet of a library branch entrance is in any way necessary or serves any purported governmental interest.

3.3.2 The Petition Policy Does Not Leave Open Ample Alternative Channels of Communication

Defendant claims that the Library's designated petitioning spot gives a petitioner access to all three points of entrance to the Library's entrance plaza "because the physical structure requires that all visitors enter and exit the East Entrance on the far east side of the area, where the Petitioner Zone is located." (ECF No. 56 at 20.) This is so utterly wrong that Mr. Deans can only assume it is a typographical error. First, it is important to specify what the designated petition spot actually was at the time Mr. Deans was trespassed from the Library. Sam Kushner told Mr. Deans to stand in a spot at the extreme east edge of the entrance plaza approximately 70 feet from the entrance, between two pillars and in directly front of a handicap access ramp. (*See* ECF No. 3-1 at ¶¶ 21-23; ECF No. 3-2 at space "B"; ECF No. 30 at 154:12-156:2, 170:14-171:10, 172:20-173:3,

[5] This argument ignores that, for most of the time Mr. Deans was gathering signatures, he was approximately 30 feet from the Library entrance. (*See* ECF No. 30 at 29: 1-3.)

225:11-23, 254:4-9.) He was instructed to go to the space depicted at ECF No. 11-7 as the space between two pillars in the foreground of that photograph and immediately in front of the access ramp shown.[6]

With the actual petition spot identified, it is clear that the spot does not leave open ample alternative channels of communication. This spot does not have access to either of the Library entrance plaza's side entrances, and restricts petitioners to a small area directly in front of a handicap access ramp. It is so far away from most pedestrian traffic into and out of the Library that a signature-gatherer would have to shout at passersby to get their attention, severely reducing the efficacy of his First Amendment activities. (*See* ECF No. 13-3 at ¶¶ 25-28; *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014).) It would be difficult to conceive of a less accommodating, less obtrusive space for signature-gathering. Furthermore, Defendant's PIC Manual specifies that petition spots for a given library branch must be at least 50 feet from the library's entrance, without any regard for the shape or architecture of a given branch's entrance.

3.4 The Rules of Conduct are Not Reasonable Time, Place, and Manner Restrictions

Defendant argues that the Rules of Conduct are not actually at issue here because he was only told to comply with the Petition Policy. (ECF No. 56 at 21.) But this is not true; Defendant's employees gave Mr. Deans a notice of trespass, citing as the basis of the trespass "failure to follow staff instruction." (ECF No. 3-3.)

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[6] As the Court noted in its order granting the preliminary injunction, "Defendant does not appear to know where its designated petition spot is, with Florence Jakus testifying that a larger spot was designated after the suit was filed and in preparation for the preliminary injunction hearing. (*See* ECF No. 25 at 7, fn. 3.) "Neither of these areas matches the area described in the District's official designation on the Nevada Secretary of State's website." (*Id.*) Ms. Jakus also attempted to provide multiple different interpretations of the designated petition spot during the hearing. (*See* ECF No. 30 at 245:15-247:21.) Defendant's inability to keep its story straight does not create a genuine dispute as to an issue of material fact.

Defendant now argues that this language is merely explanatory, that the only thing the Rules of Conduct prohibit is "[c]onduct that endangers or disturbs library users or staff in any way, or that hinders others from using the library or its resources" (ECF No. 56-4), and that the "failure to comply with reasonable staff instruction" language cannot be analyzed separately. (ECF No. 56 at 21.) It provides no authority or explanation for this position, nor is there an intuitive reason to adopt it. If a policy forbids disruptive behavior, lists as an example of such behavior "saying the word 'Republican' when staff are present," and then a person receives a notice of trespass citing "saying the word 'Republican' when staff are present" as its basis, that portion of the policy is subject to constitutional challenge.

Defendant otherwise fails to provide any evidence that the "failure to comply with reasonable staff instruction" restriction is connected to any significant government interest; as with the Petition Policy, it provides no studies, research, or even declaration testimony to justify this restriction. Instead, the only justification on the record is that Defendant needed a "catchall" restriction on behavior its staff does not approve of.[7] (*See* ECF No. 13-2 at 5.) This is not a reasonable time, place, and manner restriction.

3.5 Defendant's Petition Policy is Void for Vagueness

3.5.1 Vagueness Standards

The constitutional guarantee of due process requires that regulations give individuals reasonable notice of prohibited conduct. To establish a void for vagueness claim, a plaintiff must establish that "a regulation's prohibitive terms

[7] Defendant also argues that one-year suspensions are not automatic, and that they are only a "last resort" for rules violations. (ECF No. 56 at 21.) But this only admits that library staff have free-wheeling discretion to trespass library patrons, and it does not challenge Defendant's earlier admission that all trespasses are presumptively one year long. (*See* ECF No. 30 at 236:5-7, 290:19-24, 291:17-24, 298:12-299:1.)

are not clearly defined such that a reasonable person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion." *Miller v. City of Cincinnatti*, 622 F.3d 524, 539 (6th Cir. 2010); *see United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1994). Similarly, criminal laws must be articulated "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A great degree of specificity and clarity is required when First Amendment rights are at stake. *Gammoh v. City of La Habra*, 395 F.3d 1114, 1119 (9th Cir. 2005); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1057 (9th Cir. 1986). Finally, an ordinance can be vague if it either fails to place people on notice of exactly which conduct is criminal, or, if the possibility for arbitrary enforcement is present. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). The void for vagueness doctrine ensures that laws providing "fair warning" of impermissible conduct and protect citizens against "impermissible delegation of basic policy matters for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id*. Consequently, a statute that fails to constrain an official's decision to limit speech with objective criteria is unconstitutionally vague. *See id*.

Defendant's arguments entirely ignore that, in addition to being indefinite, a regulation may be void for vagueness if it relies on a viewer's subjective interpretation of facts. *Morales*, 527 U.S. at 56-64 (holding a provision criminalizing loitering, which is defined as "to remain in any one place with no apparent purpose," void for vagueness because the provision was "inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene"); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 554-55 (9th Cir. 2004) (holding a statute requiring physicians to treat patients "with

consideration, respect, and full recognition of the patient's dignity and individuality" void for vagueness because it "subjected physicians to sanctions based not on their own objective behavior, but on the subjective viewpoint of others"); *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1095 (9th Cir. 1999), *aff'd sub nom*; *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 257-58 (2002) (holding a provision that criminalized sexually explicit images that "appear[] to be a minor" or "convey the impression" that a minor is depicted unconstitutionally vague because it was unclear whose perspective defines the appearance of a minor, or whose impression that a minor is involved leads to criminal prosecution).

Morales provides a useful guidepost for when enforcement of a statute or regulation may be unconstitutionally vague:

> If the police are able to decide arbitrarily which members of the public they will order to disperse, then the Chicago ordinance becomes indistinguishable from the law we held invalid in *Shuttlesworth v. Birmingham*, 382 U.S. 87, 90 (1965). Because an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse.

527 U.S. at 58-59.

3.5.2 The Petition Policy is Unconstitutionally Vague

There is no question that Defendant's designation of the petition spot at the Library entrance plaza is both imprecise and irreconcilable with the petition spot actually enforced at the time Mr. Deans was trespassed from the Library. The designation reads "[a]t the east entrance a [sic] the far edget [sic] **of the center circle**." (*See* ECF No. 11-3.)[8] As explained in the Motion for Summary

[8] Defendant argues that any difficulty in finding this designation is not problematic because ignorance of the law is no defense. But this is not a "duly promulgated and published regulation," as at issue in *United States v. Int'l*

Judgment, this designation has at least three different interpretations that a reasonable person could come up with. (*See* ECF No. 51 at 29-30.) And as already explained in Section 3.3.2, *supra*, the petition spot Defendant enforced against Mr. Deans was not located here, and the various interpretations of this spot provided by Ms. Jakus during the preliminary injunction hearing did not correspond with this language. Defendant now claims that the spot was the shaded area depicted in ECF No. 56-8, but as the Court noted in its preliminary injunction order, "this area was designated only after this lawsuit was filed, in preparation for the injunction hearing." (ECF No. 25 at 7, fn. 3.) Moreover, Defendant does not actually cite to any evidence establishing this area as the definitive petition spot, either before or after this suit was filed. It is telling that after 14 months of litigation, Defendant has still not unambiguously identified where its current (or, if different, former), petition spot at the Library entrance plaza is.

Rather than attempt to explain how a reasonable person could find the unmarked petition spot, Defendant argues that Mr. Deans did not suffer any constitutional harm because he was informed by Mr. Kushner that he was outside it.[9] In defense of this argument, Defendant cites *United States v. Szabo*, 760 F.3d 997, 1003 (9th Cir. 2014) for the proposition that a person who engages in conduct obviously prohibited by a statute cannot use vagueness as a defense. But this argument is not well-founded because *Szabo* dealt only with an as-applied challenge to a federal regulation, and the court found that it did not

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Minerals & Chem. Corp., 402 U.S. 558 (1971). This is a library policy that is present nowhere on Defendant's web site, and that would require a person to interpret a statute erroneously to even know where to look to find.

[9] It takes some chutzpah to make this argument. Had Mr. Deans somehow known to look at the Nevada Secretary of State's web site to learn about Defendant's restrictions on petitioning activity, he would have been even more confused after reading the imprecise published designation, and then being told by library staff to restrict his signature-gathering to a spot obviously not described in the designation.

have jurisdiction to assess a facial challenge to the regulation. *See id*. at 1003-04. This case is inapposite because Mr. Deans is challenging the facial validity of Defendant's policies.

Finally, Defendant argues that Mr. Deans could have clarified the petition spot by appealing to the Nevada Secretary of State under NRS 293.127565(3). This argument is unavailing because, again, that statute does not restrict petitioning activity. Furthermore, *Chalmers v. Los Angeles*, 762 F.2d 753 (9th Cir. 1985), cited by the *Szabo* court, establishes that conflicting information from government officials can establish constitutional injury. The court there found that receiving conflicting information from relevant officials on what conduct was permitted, followed by threats of arrest and prosecution, constituted a constitutional violation. *See id*. at 759. Defendant provided irreconcilable representations as to where the petition spot was and has failed even now to provide a clear, uniform explanation of the spot.

Defendant additionally provides no argument in response to the obvious potential for unfettered discretion and selective enforcement in the Petition Policy. (*See* ECF No. 51 at 30.) The Petition Policy is thus unconstitutionally vague.

4.0 CONCLUSION

For the foregoing reasons, the Court should enter summary judgment in favor of Mr. Deans, as to the issue of liability, for all of Mr. Deans's claims.

Dated: December 14, 2017

Respectfully Submitted,

/s/ Alex J. Shepard

Marc J. Randazza (NV Bar # 12265)
D. Gill Sperlein (*pro hac vice*)
Alex J. Shepard (NV Bar # 13582)
RANDAZZA LEGAL GROUP, PLLC
4035 S. El Capitan Way
Las Vegas, NV 89147

Attorneys for Plaintiff, William Deans

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 14, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that a true and correct copy of the foregoing document is being served via transmission of Notices of Electronic Filing generated by CM/ECF.

Respectfully submitted,

Trey A. Rothell
Employee, Randazza Legal Group, PLLC