Appeal No. 24-6008

IN THE

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

DAYMON JOHNSON,
Appellant/Plaintiff,

v.

STEVE WATKIN, in his capacity as Interim President, Bakersfield College; et al.,
Appellees/Defendants.

Appeal from the United States District Court for the Eastern District of California
The Honorable Kirk E. Sheriff, Presiding
District Court Case No.: 1:23-cv-00848-KES-CDB

APPELLEES/DEFENDANTS' ANSWERING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

State Statutes

State Regulations

I. INTRODUCTION

The Kern Community College District (the "District" or "KCCD") employs Plaintiff Daymon Johnson ("Johnson") as a professor in its Social Sciences Department. By this appeal, he seeks to overturn the District Court's dismissal of his First Amended Complaint for lack of standing. Although he had not been disciplined or threatened with discipline, Johnson asserted claims under 42 U.S.C. section 1983 seeking, among other things, preliminary injunctive relief barring the District from disciplining him under California Education Code sections 87732 and 87735, District Board Policy 3050 ("BP 3050"), which is the District's "Institutional Code of Ethics" containing provisions on civility, and California Code of Regulations, title 5, sections 51200, 51201, 53425, 53601, 53602, and 53605, the applicable State regulations on "Diversity, Equity, and Inclusion in the California Community Colleges" (the "DEIA Regulations").

As the District Court properly determined, Johnson's First Amended Complaint did not allege a sufficient actual threat that any of these authorities would be asserted against him and thus did not satisfy the requirements of Article III standing to assert pre-enforcement challenges. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014); *Unified Data Servs., LLC v. FTC*, 39 F.4th 1200, 1210 (9th Cir. 2022). First, as to the Education Code sections, Johnson alleged only that, in the 2023-2024 school year and beyond, he planned and plans

to teach and publicize matters that involve particular ideologies, but he fails to allege with sufficient specificity that anything he will say or do will actually constitute "unprofessional conduct" or "unfitness" proscribed by the Education Code. Instead, Johnson's speculation that the District will discipline him under the Education Code for violating the DEIA Regulations and BP 3050 is based almost entirely on KCCD's termination of Professor Matthew Garrett in April 2023. The District Court recognized that Johnson's speculation is unfounded because none of the disciplinary charges against Garrett related to Garrett's instruction in the classroom. KCCD terminated Garrett for a pattern of half-truths and actions outside of the classroom that disrupted KCCD's operations, and the termination charges against Garrett did not include violating the DEIA Regulations or BP 3050. Johnson nowhere alleges he will engage in the same conduct that led to Garrett's termination. *Driehaus,* 573 U.S. at 164.

Nor has Johnson alleged anything specific he would say or do that comes within the terms of BP 3050, including "physical or verbal forms of aggression, threat, harassment, ridicule, or intimidation." He alleges that KCCD investigated him in 2021 for supposedly violating BP 3050 when another professor complained Johnson was bullying him on Facebook. Johnson was ultimately exonerated, and he does not allege he will engage in this type of activity in the future.

As to the State's DEIA Regulations, the District Trustees and administrators named as defendants (the "District Defendants") are basically caught between Johnson's ideological conflict with the Regulations and KCCD's obligation to comply with them. The DEIA Regulations are mainly aspirational, but in places require California community college districts, for example, to create policies on evaluation and tenure of faculty that incorporate the Regulations' standards. As the District Court properly observed, KCCD's local interpretation and implementation of the DEIA Regulations does not appear anywhere in the record in this case. Nor does Johnson allege specifically how what he will teach will contradict the Regulations in a way that will necessarily lead to a poor evaluation of him. This presents an imagined worst-case scenario for a plaintiff trying to prove standing in that Johnson's allegations not only fail to demonstrate what exactly he will say but also fail to identify what standards are being challenged. The District Court properly dismissed the instant case for lack of standing.

II. STATEMENT OF THE ISSUES

1. Whether Johnson lacks Article III standing to assert the claims in his First Amended Complaint.

2. Whether Johnson's First Amended Complaint was properly dismissed.

III. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Johnson is a full-time faculty member at Bakersfield College.[1] ER-206, ¶ 15. He teaches history courses and serves as the Faculty Lead for an organization called the Renegade Institute for Liberty ("RIFL"). ER-215, ¶ 59-60. The District is an individual community college district within the larger California Community College system. ER-208, ¶ 32.

1. The District Investigates a Harassment Complaint Against Johnson

In September 2021, Bakersfield College Professor Andrew Bond filed a Human Resources complaint alleging Johnson engaged in harassment and bullying based on a Facebook post and commentary Johnson posted online. ER-148. Bond created a post on his personal Facebook page in August 2019 criticizing comments made by President Trump. ER-149. Two years later, in May 2021, Johnson reposted Bond's original post to the Renegade Institute for Liberty ("RIFL") Facebook page with the commentary: "Here's what one critical race theorist[] at BC sounds like. Do you agree with this radical [Social Justice Warrior] from BC's English Department? Thoughts?" *Id.* The District investigated Bond's complaint.

[1] Bakersfield College is one of several colleges in the Kern Community College District.

ER-148. On February 23, 2022, then-College President Zav Dadabhoy sent Johnson the District's administrative determination of the complaint, which stated that Johnson's conduct presented no cause for discipline under the Education Code. ER-148–156. The administrative determination also stated the District "will investigate any further complaints of harassment and bullying and, if applicable, will take appropriate remedial action including but not limited to any discipline determined to be appropriate." *Id.*

There is no evidence in the record that the District imposed discipline on Johnson, or took any further action against him based on Professor Bond's complaint.

2. The District Terminates Garrett for Misconduct Unrelated to Johnson

Many of Johnson's claims hinge on facts and circumstances surrounding the District's discipline and eventual termination of another Bakersfield College faculty member, Matthew Garrett. On November 21, 2022, Defendant-Appellee McCrow issued Garrett a 90-day notice pursuant to California Education Code Section 87734. ER-158–166. A 90-day notice provides a faculty member 90 days to correct identified performance deficiencies before the district employer initiates formal disciplinary proceedings. Cal. Educ. Code, § 87734; ER-158, 165. Garrett's 90-day notice identified his acts of unprofessional conduct and

unsatisfactory performance, including filing frivolous complaints against his colleagues, violating campus COVID policies, and making false statements about the District and its faculty. ER-158–164. The 90-day notice cited BP 3050. ER-158; SER-26–28.

Then-President Dadabhoy formally recommended Garrett's termination to the District's Board of Trustees on April 11, 2023, following Garrett's failure to correct his performance deficiencies following the 90-day-notice period. ER-168, 170, 171. On April 13, 2023, the Board of Trustees terminated Garrett's employment with the District. ER-168. The District terminated Garrett's employment pursuant to the grounds listed in the California Education Code, including immoral or unprofessional conduct (Cal. Educ. Code, §§ 87732(a), and 87735); dishonesty (Cal. Educ. Code, § 87732(b)); unsatisfactory performance (Cal. Educ. Code, § 87732(c)); evident unfitness for service (Cal. Educ. Code, § 87732(d)); persistent violation of, or refusal to obey, the school laws of the state or reasonable regulations prescribed for the government of the community colleges by the board of governors or by the governing board of the community college district employing him or her (Cal. Educ. Code, § 87732(f)); and willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing district (Cal. Educ. Code, § 87732(c)). ER-172.

The Statement of Charges accompanying President Dadabhoy's recommendation stated that Garrett failed to follow the directives in the 90-day notice and failed to cure his "deficient job performance," and went on to describe the bases for the termination of Garrett's employment. ER-172–190. The Statement of Charges contained no reference to BP 3050 or indicated that the District based Garrett's termination on any violation of BP 3050. Rather, the District anchored Garrett's termination on his abuse of the EthicsPoint Management System through which faculty filed internal complaints with the District, the waste of District resources spent on investigating Garrett's repeated public, baseless accusations against Bakersfield College, the District, and his colleagues, Garrett's damage to Bakersfield College and the District's standing amongst peer community college districts, Garrett's significant disruption of the working environment of the District, and his failure to comply with the directives listed in the 90-day-notice.[2] ER-179–180, 187–189.

[2] Johnson claims the District terminated Garrett for political speech, including various RIFL Facebook posts. *See* AOB at 23-24. According to Johnson, he, and not Garrett, wrote 15 of the 18 RIFL Facebook posts identified in the Statement of Charges. *Id.* Johnson fails to identify anywhere in the record which posts or their specific content were written by Garrett and led to his termination. *Id.*

3. Johnson Perceives Statements by District Officials As Threats Against RIFL and Johnson

a. Dr. Dadabhoy Issues a Holiday Greeting to the College Community

On December 8, 2022, then-President Zav Dadabhoy sent an email to the Bakersfield College community wishing employees and their families "a happy and joyous holiday season" and "share[d] some personal thoughts." ER-144. Dadabhoy noted "members of BC's communities of color, and LGBTQ community, have shared that many do not feel peace on our own campus" and that it was "disheartening to see attacks on members of our campus." *Id.* Dababhoy then referenced a portion of Cal. Code Regs. tit. 5 § 51201 about embracing diversity that resonated with him personally before remarking that the Bakersfield College community "must not allow the discontent or views of a few to supersede what we are required to provide at our college and the work that we have intentionally developed to support all members of our communities." *Id.* Dadabhoy's e-mail said nothing more specific than this about his concerns. *Id.* The email does not refer to Johnson or RIFL.

b. District Trustee John Corkins Makes a Comment During a District Board of Trustees Meeting

Johnson alleges that, at a Board of Trustees meeting on December 12, 2022, Defendant-Appellee Corkins stated that he felt the District had "to get the bad actors out of the room" and that it bothered him the "bad actors are paid staff and faculty." ER-216, ¶ 66. Johnson claims Corkins stated that these "bad actors" are in the "five percent that we have to continue to cull." ER-204, ¶ 3, ER-216, ¶ 66. Johnson perceived that the "five percent" included Johnson and RIFL. ER-204, ¶¶ 4, 6.

4. <u>The District Complies with State Regulations</u>

a. The State Establishes a Regulatory Framework for DEIA

The Board of Governors of the California Community Colleges ("Board of Governors") is tasked with setting policy and providing guidance pursuant to California's policy of affording all persons equal rights and opportunities in postsecondary educational institutions (Cal. Educ. Code §§ 66251, 66261.5) for the 73 districts that constitute the postsecondary education system of community colleges. *Id*. § 70900. The Board of Governors determined that all "community college employees should develop the professional skills, knowledge, and behaviors necessary to provide our diverse student population with the welcoming

and inclusive campus environments that are necessary to student success and more equitable outcomes through the reduction of achievement gaps." ER-137.

To achieve this goal, the Board or Governors adopted several DEIA Regulations, which establish a DEIA competency and criteria framework that serves "as a minimum standard for evaluating all California Community College employees" and "enable[s] colleges and districts to discuss and adopt the minimum skills, abilities, and knowledge, employees must possess or would need to acquire to teach, work, and lead at California Community Colleges." ER-137. These include the adoption of Title 5, California Code of Regulations, sections 52510, 53425, 53601, 53602, and 53605,[3] the amendment of sections 53400, 53401, and 53403, and the repeal of section 53402. ER-140. The DEIA Regulations became effective April 16, 2023. ER-137.

Title 5 Regulations sections 51200 and 51201 outline the Board's broad intent, goals, ideals, and position regarding the public policy objectives behind the DEIA Regulations to "guide the administration of all programs in the California Community Colleges, consistent with all applicable state and federal laws and

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[3] Johnson challenges California Code of Regulations, title 5, sections 51200, 51201, 53425, 53601, 53602, 53605. ER-242. He does not challenge the adoption of section 52510, which includes definitions of operative terms that inform the interpretation of the other DEIA Regulations, including, but not limited to, the terms "diversity," "accessibility," "equity," "inclusion," "evaluation," "anti-racist," "competencies," and "criteria." Cal. Code Regs. tit. 5, § 52510.

regulations." Cal. Code Regs. tit. 5, § 51200. As part of providing that direction and furthering its "goal of ensuring the equal educational opportunity of all students, the California Community Colleges embrace diversity among students, faculty, staff and the communities we serve as an integral part of our history, a recognition of the complexity of our present state, and a call to action for a better future." *Id.* § 51201(a).

Title 5 Regulations, sections 53425, 53601, 53602, and 53605, outline the specific DEIA requirements for California community college districts. Section 53425 states all district employees must "demonstrate the ability to work with and serve individuals within a diverse community college campus environment as required by local policies regarding DEIA competencies," but does not otherwise state what must be included in these "local policies." *Id.* § 53425. Section 53601(a) requires the State Chancellor to adopt, publish, and maintain guidance for community college districts, whereas section 53602(b) requires local districts to use the Chancellor's model DEIA competencies and criteria (ER-129–135) "as a reference for locally developed minimum standards in community college district performance evaluations of employee and faculty tenure reviews." *Id.* § 53601. Section 53602 requires districts to adopt policies that evaluate employees on "demonstrated, or progress toward, proficiency in the locally-developed DEIA competencies or those published by the Chancellor" and outlines steps districts

must take in implementing the DEIA component of employee evaluations. *Id.* § 53602. Section 53605 outlines the DEIA obligations specific to the faculty, administrator, and staff classifications of community college employees. *Id.* § 53605.

Additionally, on May 5, 2023, the California Community Colleges Chancellor's Office issued a memorandum "to provide information regarding the Evaluation and tenure review of district employees and the resources that are available to support districts and colleges with local implementation of these regulations." ER-138. This guidance document informed districts of the policy goals behind the DEIA Regulations, what the DEIA Regulations changed, and the next steps for local districts. ER-138–142. The State Chancellor's office also referenced other non-binding guidance materials, such as a glossary of DEIA terminology ("Glossary").[4]

b. How The District Has Implemented the DEIA Regulations is Not in the Record

Community college districts must comply with all regulatory requirements outlined in Title 5 of the California Code of Regulations. *Id.* § 52010. District

[4] The Glossary is not included in the record. However, it is incorporated by reference in the FAC and available to the Court through the following perma.cc link: https://perma.cc/T22V-V866. *See* ER-012, fn. 6.

Defendants, however, retain "local authority and control in administration" of the District and possess final authority on the administration and implementation of the challenged DEIA Regulations. Cal. Educ. Code § 70901(a); *see also* Cal. Code Regs. tit. 5, § 53602(a) (stating "[d]istrict governing boards" are responsible for adopting evaluation policies based on "locally-developed DEIA competencies"). The District's "local policies regarding DEIA competencies," however, are not in the record. Cal. Code Regs. tit. 5, §§ 53425, 53601(b).

Johnson "successfully completed an evaluation period" in 2023 and will not be evaluated again until 2026. ER-227, ¶ 113. It has been over a year since Johnson first filed his complaint. Johnson has not alleged that he has received any negative evaluations, discipline, or threats of discipline resulting from the Board of Governors' adoption of the DEIA regulations and the District's implementation.

B. PROCEDURAL BACKGROUND

Johnson filed an initial complaint on June 1, 2023, and a First Amended Complaint ("FAC") on July 6, 2023. Johnson's FAC alleged the following violations of law: (1) viewpoint discrimination under the First Amendment through an as applied challenge to California Education Code sections 87732 and 87735; (2) viewpoint discrimination under the First Amendment through an as applied to challenge to BP 3050; (3) vagueness under the First and Fourteenth Amendments through a facial challenge to BP 3050; (4) viewpoint discrimination under the First

Amendment through an as applied challenge to the DEIA Regulations; and (5) compelled speech under the First Amendment through an as applied challenge to the DEIA Regulations. ER-235–241, ¶¶ 157-185.

Johnson moved the Court for a preliminary injunction prohibiting the District Defendants from taking any adverse action against him because of "the content and viewpoint of his speech on political issues" pursuant to California Education Code sections 87732 and 87735 governing discipline of academic employees, or pursuant to BP 3050 governing Institutional Ethics. ER-005. Johnson also sought a preliminary injunction prohibiting District Defendants from enforcing the DEIA Regulations. *Id.* State and District Defendants separately moved to dismiss Johnson's FAC. ER-005–006.

Then-District Court Judge Ana de Alba referred Johnson's motion for preliminary injunction and Defendants' motions to dismiss to Magistrate Judge Christopher Baker for findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. ER-006. Magistrate Judge Baker issued his findings and recommendations ("Magistrate F&Rs") on November 14, 2023. The Magistrate F&Rs concluded both motions to dismiss should be denied and that the preliminary injunction be granted in part. ER-055. All parties filed objections to the Magistrate F&Rs and responses to those objections. ER-007.

After then-Judge de Alba's appointment to the Ninth Circuit was confirmed on November 13, 2024, this matter was assigned to "No District Court Judge" effective December 4, 2024. On March 14, 2024, the Eastern District of California assigned District Court Judge Kirk Sherriff to decide the pending motions.

On September 23, 2024, the District Court Judge issued an Order ("Order") declining to adopt the Magistrate F&Rs, dismissing the case for lack of standing, and denying Johnson's motion for preliminary injunction as moot. ER-4. The District Court painstakingly applied Johnson's allegations to each challenged statute, board policy, and regulation to determine whether Johnson possessed Article III standing to challenge any of them. ER-017–052. The Court found Johnson failed to sufficiently establish his intended conduct and speech are arguably proscribed by the statutes, policies, and regulations he challenges. ER-022. The Court further found many of Johnson's allegations of chilled speech lacked the requisite specificity to pull them out of the realm of "mere 'some day' intentions" required to support the injury in fact required for standing. ER-023–024.

The District Court dismissed Johnson's complaint without prejudice, required him to amend his complaint within 45 days, and denied the motion for preliminary injunction as moot. Johnson appealed without amending his FAC. The

District Court litigation is currently administratively stayed pending the outcome of this appeal. ER-053.

IV. SUMMARY OF ARGUMENT

The District Court correctly decided that Johnson lacks standing to pursue his pre-enforcement challenges. Johnson does not have standing to challenge Education Code sections 87732 and 87735. Those provisions allow community colleges to discipline faculty for such matters as "unprofessional conduct" and "unfitness." He does not allege conduct, either through his scholarship and teaching or in his personal capacity in social media or otherwise, that Education Code 87732 or 87735 would proscribe. Nor does he sufficiently allege any plausible threat that the District Defendants would try to apply these sections against him for any of the conduct he asserts. Johnson argues that a colleague with similar ideological views, Professor Garrett, was terminated in 2023 pursuant to these general Education Code sections. But as the District Court correctly observed, the disciplinary materials of Garrett, attached to and incorporated by Johnson's FAC, show that Garrett's discharge rested basically on disruptive conduct outside the classroom and not any conduct in which Johnson expresses any interest to engage. (*See infra* Section V.A.1.)

Johnson does not have standing to challenge the District's BP 3050, which contains provisions on civility among students, faculty, and staff. BP 3050 is

largely aspirational and in the nature of guidance to community members, but also advises that the following will not be tolerated: "physical or verbal forms of aggression, threat, harassment, ridicule, or intimidation." Johnson's FAC nowhere articulates any conduct in which he intends to engage, or in which he allegedly refrains from engaging, that BP 3050 would proscribe. (*See infra* Section V.A.2.)

Also, Johnson lacks standing to challenge California Code of Regulations, Tit. 5, §§ 51200, 51201, 53425, 53601, and 53605, the DEIA Regulations. Although much of the language of the Regulations is aspirational, precatory, or inoperative, there are provisions that require local community college districts to establish tenure and faculty evaluation criteria based on DEIA standards and anti-racism, and for faculty to "employ teaching, learning, and professional practices that reflect DEIA and anti-racist principles." *Id.*, §§ 53602, 53605(a). But how the District implements these criteria locally is not in the record, nor are the actual policies and practices that the regulations require the District to design and apply. As the District Court determined, whether Johnson's planned speech, including his teaching, would be "proscribed" by these Regulations cannot be determined because the record does not contain the District's local implementation standards. It is also wholly speculative whether the District would actually rate Johnson negatively in some way based on how the District interprets and applies the Regulations locally. (*See infra* Section V.A.3.)

Although the District Court did not reach the merits, Johnson's demand for a preliminary injunction lacks merit. The evidence he presented to the District Court does not satisfy the stringent requirements for preliminary injunctive relief. The balance of equities and public interest counsel strongly against federal court intervention in the decision making of an academic institution, particularly in this case where the local community college district had not even implemented the regulations at issue. Also, no immediate need exists to prevent irreparable injury. (*See infra* Section V.B.2.) In fact, well over a year has passed since Johnson filed his motion for a preliminary injunction in July 2023, decisively defeating any argument that immediate injunctive relief would somehow maintain rather than disrupt the status quo. (*See infra* Section V.B.3.)

Johnson's claims on the merits in any event fail, and do not have any likelihood of success that would support preliminary injunctive relief. Education Code sections 87732 and 87735, which have operated in California for many decades, properly proscribe faculty misconduct in all forms, and Johnson asserts no planned speech in which he intends to engage that both has constitutional protection and to which the District would actually apply these disciplinary statutes. (*See infra* Section V.B.4.a.) His pre-enforcement claims under the First Amendment and Fourteenth Amendment due process principles to BP 3050 lack merit as well. Public employees like community college faculty have diminished

First Amendment rights compared to the general public, at least with regard to their employer, *Garcetti v. Ceballos,* 547 U.S. 410, 421 (2006); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968), and the District has the right to maintain a civility policy like BP 3050. Also, BP 3050 uses commonly understood terms, and is in any event essentially aspirational, as the District Court observed, and survives a due process vagueness challenge. (*See infra* Section V.B.4.b.)

Finally, Johnson's pre-enforcement challenges to the State's DEIA regulations as viewpoint discrimination and compelled speech lack merit. How the District Defendants implement the regulations, through evaluations, tenure determinations, or otherwise, does not appear in the record and cannot be the basis for a determination against them. Nor, in fact, can the District Defendants suffer liability under 42 U.S.C. section 1983 for following mandatory state law by interpreting and applying the DEIA Regulations. (*See infra* Section V.B.4.c.)

V. ARGUMENT

A. THE DISTRICT COURT CORRECTLY DECIDED THAT JOHNSON LACKS STANDING TO PURSUE HIS PRE-ENFORCEMENT CHALLENGES

"At the preliminary injunction stage, the plaintiffs 'must make a clear showing of each element of standing.'" *L.A. All. for Hum. Rts. v. County of Los Angeles*, 14 F.4th 947, 956 (9th Cir. 2021) (quoting *Yazzie v. Hobbs*, 977 F.3d 964,

966 (9th Cir. 2020)). Where there is a motion to dismiss for lack of standing, the plaintiff must establish as an "irreducible constitutional minimum" that they have "(1) suffered an injury in fact, (2) that it is fairly traceable to the challenged conduct of the defendant, and (3) that it is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Because "standing is not dispensed in gross," Johnson bore the burden to show injury in fact as to each challenged statute, board policy, and regulation. *Davis v. FEC*, 554 U.S. 724, 734 (2008). The "injury in fact" element of standing requires a plaintiff to show for each challenged provision that they possess "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Driehaus*, 573 U.S. at 159.

1. Johnson Lacks Standing to Challenge Education Code Sections 87732 and 87735 [5]

a. Johnson Failed to Allege an Intent to Engage in Conduct Arguably Affected with a Constitutional Interest

To adequately allege his intention to engage in a course of conduct, Johnson was required to plead the "specific" conduct in which he intends to engage "with some degree of concrete detail," including "information about the 'when, to whom, where, or under what circumstances'" he plans to do so. *Driehaus*, 573 U.S. at 161; *Unified Data Servs., LLC v. FTC*, 39 F.4th 1200, 1210-11 (9th Cir. 2022) (citing *Lopez v. Candaele*, 630 F.3d 775, 786-87 (9th Cir. 2010)). "Without these kinds of details, a court is left with mere 'some day' intentions which do not support a finding of the actual or imminent injury that our cases require." *Id.* (quoting *Lopez*, 630 F.3d at 787-88) (cleaned up).

The FAC relied primarily on Johnson's assertion that he intends to engage in some of the same speech for which Johnson alleges Garrett was terminated. But Johnson's characterizations of Garrett's transgressions are exaggerated and contradicted by the Statement of Charges against Garrett attached to Johnson's

[5] Subsequent statutory references are to the California Education Code unless specifically noted.

FAC. *Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112, 1115 (9th Cir. 2014) (a court need not accept as true plaintiff's factual allegations that are contradicted by attached exhibits). Further, Johnson never expressed his desire to engage in conduct similar to that which actually led to Garrett's termination, as shown by the FAC's exhibits.

For example, Garrett's termination notice charged him with filing "knowingly false" complaints, which forced KCCD to spend time and money on its investigations. ER-174. Johnson, by contrast, did not allege any intention to file knowingly false complaints. Johnson also argued Garrett was punished for opining that the Equal Opportunity & Diversity Advisory Committee ("EODAC") is staffed by faculty who "hold one particular point of view" and criticizing the committee chair's conduct at a meeting. ER-219, ¶ 80b. It was according to the Notice to Correct Deficiencies, however, that Garrett's comments were found to be "demonstrably false," consistent with his history of making knowingly false accusations against KCCD personnel. ER-159, ¶ 4; *see also* ER-175, ¶ 3. Johnson did not allege he intends to make demonstrably false accusations, over and over again, against his colleagues.

Also, among the causes for termination, Garrett threatened to blackmail Trustee John Corkins by claiming to possess documents showing Corkins' "past indiscretions." ER-185, ¶ 17. Johnson alleged no intention or desire to blackmail

anyone. Garrett also told a part-time faculty member and member at EODAC to "get the fuck out," which prompted her to report her fear that "Matt Garrett will verbally attack me again" and request that the college ensure her safety at future committee meetings. ER-183, ¶ 13. Johnson expressed no desire to engage in similar conduct.

Further, while Johnson alleged he now refrains from certain conduct, Garrett was not terminated for any such similar conduct. For instance, Johnson contends he authored 15 posts referencing "Cultural Marxism" on RIFL's Facebook[6] page but now distances himself from that term by canceling guest speakers who were to discuss that term and by not recommending books with that phrase in the title. AOB at 23, 33, 46-8; ER 224–25, ¶ 101-102. Garrett was not terminated for any Facebook post referencing "Cultural Marxism," securing speakers wishing to speak about that term, or recommending books on that topic. See *generally* ER-168–202. Indeed, while Garrett's termination notice cites certain Facebook posts as examples of unprofessional conduct, none of those posts references "Cultural Marxism." *Id*.

Johnson also alleged he has refrained from finalizing agreements with speakers who would present viewpoints "Defendants have already condemned,

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[6] Johnson did not indicate which posts are his or describe their content.

including in the course of disciplining Garrett." ER-227, ¶ 103. Garrett was not terminated for such conduct. *See generally* ER-168–202. In fact, Garrett's Notice of Termination specifically noted "the Administration has approved other conservative speakers sponsored by Garrett's organization the Renegade Institute for Liberty (RIFL) as requested by Garrett. Sample events include a screening of the film 'Uncle Tom: An Oral History of the American Black Conservative' and 'Taboo: Race and Other Topics You Just Can't Talk About' a speech by Dr. Wilfred Reilly." ER-174, ¶ 2d.[7] Johnson also alleged that he requires his students to read materials that are inconsistent with Diversity, Equity, and Inclusion ("DEI") principles, but again, Garrett was not terminated for such conduct. *Compare* ER-233–34, ¶¶ 149-151, 153 *with* ER-168–202.

In comparing Garrett's Notice of Termination and Johnson's FAC, the only commonality that can be reasonably inferred is their similar political views, but this is not sufficient. The District Court agreed with this analysis:

> The grounds on which Garrett was terminated included extensive conduct that Johnson does not state an intent to engage in, such as threatening and attempting to intimidate defendant Corkins, violating campus COVID-19 policies that were in effect in 2021, and making numerous "demonstrably false" allegations regarding his

[7] This portion of the termination notice charges Garrett with disregarding campus COVID-19 policies with respect to an event. ER-174. Johnson alleged no intention to do the same.

> colleagues and the school, including, in some instances, repeating a "knowingly false and demonstrably false misrepresentation" after a third-party investigator found it to be unfounded.

ER-020.

In his Opening Brief, Johnson argues that he was not required to detail every aspect of his planned speech because he has already expressed himself in ways that now risk his job, citing *Tingley v. Ferguson*, 47 F.4th 1055, 1068 (9th Cir. 2022). *See* AOB at p. 45. He argues that "corroborating past practices" support his intent. *Id.*

In *Tingley*, a therapist was found to have adequately pleaded his intent to violate a law banning conversion therapy, where he did not specify when, to whom, where, or under what circumstances he planned to do so, but "his complaint describe[d] 'specific past instances' of working with minors in a way that would violate the law" and alleged he intended to continue doing so. 47 F.4th at 1068. The Court noted that specific details are not required when a plaintiff has shown "they have already violated the law in the past." *Id.* at 1068.

However, cases relaxing the specificity requirement do not aid Johnson, as he failed to allege any specific past instances that violated sections 87732 and 87735. For example, Johnson's Declaration concedes that he used the term "Cultural Marxism" at least 15 times on RIFL's Facebook page, with no resulting discipline, for him or for Garrett. ER-109, ¶¶ 39-40. There is no mention at all of

any Facebook posts referencing "Cultural Marxism" in Garrett's notice of termination. *See generally* ER-168–202. The fact that neither Johnson nor Garrett were ever disciplined for discussing "Cultural Marxism" in other contexts completely negates the idea that Garrett was punished simply for using that term in his Op-Ed piece or that the District will punish Johnson for doing something similar in the future. Neither Johnson's nor Garrett's use of "Cultural Marxism" establish "they have already violated [sections 87732 or 87735] in the past." Tingley, 47 F.4th at 1068. Therefore, Johnson's assertion that he was not punished because the District Defendants "misattributed" his posts to Garrett is irrelevant.[8] (*See* AOB at p. 46.) Given the absence of "corroborating past practices," the District Court correctly found that Johnson failed to allege with the required specificity his intent to invoke "Cultural Marxism" in the future or under what circumstances he would recommend books with that term in the title. *Unified Data Servs.*, 39 F.4th at 1211 (citing *Lopez*, 630 F.3d at 787-88).

Similarly, Johnson concedes that he has already criticized the Bakersfield curriculum committee and the "Cesar E. Chavez Leadership Certificate and Landmarks in California courses," with no resulting discipline. ER-111, ¶ 46.

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[8] And, as noted by the District Court, the District Defendants have known since at least July 2023 (when this case was first filed) that Johnson authored some of these posts, but have taken no action to discipline Johnson. ER-025.

This negates any assumption that the District punished Garrett simply for criticizing the courses, as opposed to the disruptive manner in which did so. ER-175–176. Johnson's prior criticism of the curriculum does not establish any "direct violations" of sections 87732 or 87735 in the past. *Stormans, Inc. v. Selecky,* 586 F.3d 1109, 1123 (9th Cir. 2009). While Johnson alleged he is "reticent" to engage in similar speech again, he failed to allege what the content of his speech would be or when he would make it. The District Court correctly found Johnson's allegations lacking the requisite specificity.

With respect to participation in media and social media, Johnson again failed to allege any of his past practices violated sections 87732 or 87735. Rather, Johnson alleged only that he had been asked to appear on Terry Maxwell's Radio Show, but declined the opportunity "for fear of making a statement that Defendants would claim to be 'unprofessional' and grounds for termination." ER-226, ¶ 111; ER-113, ¶ 55. The District Court correctly found these allegations lacking specificity as Johnson "failed to address the most important part: the "what," regarding what he plans to say." ER-022.

In his Opening Brief, Johnson argues this finding was erroneous because he declared that he wanted to "[go] on conservative television [and] radio show[s]" to "criticiz[e] school policy, funding, and [offer] comments in [his] area of expertise." AOB at 49. But Johnson never actually alleged that those topics were what he

intended to discuss. ER-113, ¶ 55. The cited paragraph in Johnson's declaration refers to Johnson's unfounded conclusion that Garrett was punished for discussing these topics. *Id*. He was not. ER-178. Rather, the cited misconduct in Garrett's termination notice refers to Garrett making demonstrably false and misleading claims on the Terry Maxwell show, including that Bakersfield College pays students to write propaganda pieces and funds "fake news" websites. *Id*. These topics do not support Johnson's unsupported assumption that "criticizing school policy, funding, and even making comments in a professor's area of expertise, will get [him] fired." ER-113, ¶ 55. The District Court correctly declined to jump to this conclusion. *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) ("unwarranted inferences are insufficient to defeat a motion to dismiss").

Johnson's assertion that he was not required to plead the requisite level of specificity because of past corroborating practices fails for the simple reason that none of his past conduct established he has "already violated [sections 87732 or 87735] in the past." *Tingley*, 47 F.4th at 1068. In fact, Johnson describes a variety of "controversial" speech he has engaged in without any resulting discipline. ER-100–29, ¶ 3 (no discipline for promoting RIFL events); ¶ 4 (no discipline for past voting on EODAC proposals); ¶ 12 (no discipline for expressing opposing views on DEI issues); ¶¶ 39-40 (no discipline for Johnson or Garrett for 18 Facebook posts about "Cultural Marxism"); ¶ 46 (no discipline for criticizing courses); ¶ 50

(no discipline for not censoring RIFL Facebook post); ¶ 59 (no discipline for expressing views on transgender issues); ¶¶ 100-105 (no discipline for teaching topics that criticize the "DEIA and anti-racist/racist ideology" as "I normally would and always have"). Johnson further admits that he "just successfully completed an evaluation period," despite "criticizing" the "DEIA and anti-racist/racist ideology." ER-116–126, ¶¶ 62, 100–105. This confirms that the District does not regard his past conduct to constitute "immoral or unprofessional conduct," "unsatisfactory performance," or "evident unfitness for service" under the California Education Code.

Johnson failed to allege a single instance of District Defendants taking any action to reprimand or punish him for conduct that violates sections 87732 or 87735. The only incident that comes marginally close is when the District was required to investigate the bullying and harassment complaint against Johnson. AOB at 46. But even then, the resulting administrative investigation resulted in "no findings to support a cause for discipline under the Education Code" for Johnson's speech or actions. ER-156.[9] To the extent Johnson argues the District Defendants should have simply "dismiss[ed] Bond's complaint out of hand" (AOB

[9] Moreover, as evidenced by Garrett's 90-day notice and Statement of Charges, the District investigated complaints against both sides of the "ideological divide" Johnson describes. *See generally* ER-158—167.

at 15), such a response would violate an employer's remedial obligations upon learning of a harassment complaint. *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 876 (9th Cir. 2001) (failing to investigate a harassment complaint violates an employer's remedial obligations). KCCD was obligated by law to investigate these allegations. *Swenson v. Potter*, 271 F.3d 1184, 1192 (9th Cir. 2001).

Given the lack of "past corroborating practice," the District Court correctly found that with respect to the majority of Johnson's alleged intended acts, Johnson failed to plead the requisite level of detail required to state his intention to engage in a course of conduct arguably affected with a constitutional interest. *Unified Data Servs.*, 39 F.4th at 1210-11 (citing *Lopez*, 630 F.3d at 786-87).

However, the District Court found that some of Johnson's actions arguably met the requisite degree of specificity and are arguably affected with a constitutional interest, including: (1) cancelling and refraining from holding a RIFL event where the guest speaker would have spoken on "cultural Marxism [and] academia," (2) ceasing attending and making certain comments at EODAC meetings, and (3) refraining from finalizing agreements with RIFL speakers. ER-024. As explained below, the District Court correctly concluded that Johnson failed to allege this conduct is arguably proscribed by sections 87732 or 87735, or that there is a substantial threat of enforcement of the statutes against him.

b. Johnson's Intended Conduct is not Arguably Proscribed by Sections 87732 and 87735

A claim of future harm fails, for purposes of establishing standing, when the challenged statute, by its terms, does not apply to plaintiff, or the enforcing authority has disavowed the applicability of the challenged law. *Lopez*, 630 F.3d at 788; *Barke v. Banks*, 25 F.4th 714, 719-20 (9th Cir. 2022).

Nothing in Johnson's FAC or his lengthy declaration establishes that sections 87732 and 87735 arguably apply to his speech. See *Lopez*, 630 F.3d at 791 (finding that plaintiff did not adequately allege the policy he challenged applied to his speech and "declin[ing] to give the policy such an interpretation of [the court's] own accord"). Sections 87732 and 87735 operate only if Johnson engages in "immoral" or "dishonest" or other proscribed conduct. On their face, sections 87732 and 87735 have no application to Johnson's (1) cancelling and refraining from holding a RIFL event where the guest speaker would have spoken on "cultural Marxism [and] academia," (2) ceasing attending and making certain comments at EODAC meetings, and (3) refraining from finalizing agreements with RIFL speakers.

The District Court agreed, stating "the Court here '[does] not see, nor does [Johnson] explain, how the policy applies to him, given that his statements and

proposed topics do not, on their face, constitute' unprofessional conduct or any of the other grounds for discipline under sections 87732 and 87735." ER-025.

Indeed, Johnson admittedly does not intend to engage in conduct that violates the Education Code. AOB at 50. He only fears that the Education Code might be construed in a particular manner. *Id.* This falls short of the showing required to establish standing. *Friends of George's, Inc. v. Mulroy*, 108 F.4th 431, 440 (6th Cir. 2024) (fear of wrongful prosecution and conviction under the challenged statute is inadequate to generate a case or controversy the federal courts can hear). His fears concern an alleged possibility (at most), and a mere possibility is insufficient to satisfy the constitutional standing requirement. *Hoye v. City of Oakland*, 653 F.3d 835, 859 (9th Cir. 2011) (courts "decline[] to entertain as-applied challenges that would require [them] to speculate as to prospective facts").

Relying again on Garrett's termination, Johnson argues that he "challenges the Education Code as *defendants* apply it." AOB at 50 (original italics). But again, the conduct for which Garrett was terminated is not comparable to the alleged conduct Johnson wishes to engage in. (See *supra* Section III.A.2.) Moreover, Johnson's perception of how the District Defendants *could* apply the Education Code is irrelevant. The pertinent question is "whether the challenged law is inapplicable to the plaintiffs, either by its terms or as *interpreted by the government.*" *Lopez*, 630 F.3d at 786 (emphasis added).

The District Court correctly recognized that the "District Defendants have stated that they cannot conclude that any of the speech or conduct in which Johnson has indicated he intends to engage would be inconsistent with sections 87732 or 87735. [Citation.] This acknowledgement by the District Defendants that Johnson's conduct is not inconsistent with the statutes undermines Johnson's claim that he faces a substantial threat of enforcement." ER-026–27. This conclusion is well supported by the fact that Johnson has already participated in several of the allegedly intended acts and has never been subject to sanctions or threat of sanctions by the District Defendants. Johnson failed to challenge this finding by the District Court and has therefore waived this issue. *Momox-Caselis v. Donohue*, 987 F.3d 835, 842-43 (9th Cir. 2021) (matters not specifically and distinctly raised and argued in opening brief are waived).

c. Johnson Failed to Plead a Substantial Threat of Enforcement

Merely stating a plaintiff faces "serious civil penalties" is insufficient to establish that the penalties resulting from threatened enforcement of the challenged law are actually "imminent or realistic." *Unified Data Servs.*, 39 F.4th at 1211. Furthermore, "generalized threats of prosecution do not confer constitutional ripeness," and therefore fail to show a reasonable likelihood of enforcement. *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1154 (9th Cir. 2017). Relevant in

assessing whether there is an objective substantial threat that a statute will be enforced against a plaintiff is whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings against the plaintiff and the history of past prosecution or enforcement under the challenged statute. *See, e.g.*, *Unified Data Servs.*, 39 F.4th at 1210. Additionally, whether a plaintiff has shown a "substantial threat" of enforcement "often rises or falls with the enforcing authority's willingness to disavow enforcement," *Peace Ranch, LLC v. Bonta*, 93 F.4th 482, 490 (9th Cir. 2024), though the defendants' "disavowal must be more than a mere litigation position." *See*; *Lopez*, 630 F.3d at 788.

As noted, the District Court's determination that the District Defendants' disavowal of the applicability of sections 87732 and 87735 to Johnson's conduct is not a "mere litigation position" weighs heavily against a finding of standing. *Peace Ranch, LLC*, 93 F.4th at 490. Johnson failed to address this finding and has therefore waived this issue. *Momox-Caselis*, 987 F.3d at 842-43.

In his Opening Brief, as in the District Court, Johnson argues he faces a realistic danger of termination based on (1) the District Defendants' investigation of Bond's complaint against him, (2) an alleged off the cuff remark by a single Trustee that the District Defendants "seek to "cull" "bad actors," and (3) Garrett's termination. AOB at 55-56. None of these actions constitutes a substantial threat of enforcement.

First, as to the investigation of Bond's complaint, the District Defendants' investigation concluded that "there were no findings to support a cause for discipline under the Education Code" and that "no further action [would] be taken regarding this complaint." ER-156. A reasonable person would not be chilled from engaging in similar speech in the future based on the favorable outcome of an investigation. *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2020) ("informal measures" may violate the First Amendment when the government's acts "would chill or silence a person of ordinary firmness from future First Amendment activities") (citation omitted). Johnson's claims that the investigation hampers his ability to express himself amount to nothing more than "[a]llegations of a subjective 'chill'" which "are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Lopez*, 630 F.3d at 787 (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)). Indeed, the outcome of the investigation confirmed that Johnson's ability to express his opinions is protected. *Lopez*, 630 F.3d at 792 ("[S]elf-censorship alone is insufficient to show injury.").

On appeal, Johnson argues that at the conclusion of the investigation, he was "warned that [the District Defendants] would continue to investigate complaints about his speech." AOB at 55. But this plainly mischaracterizes the alleged "threat." This investigation stemmed from a "harassment and bullying" complaint (ER-148) against Johnson, which KCCD was legally obligated to investigate. *See*

Swenson, 271 F.3d at 1192-93. In accordance with this obligation, the investigation noted "[t]he District will investigate any *further complaints of harassment and bullying* and, if applicable, will take appropriate remedial action including but not limited to any discipline determined to be appropriate." ER-156. This comment is at most a "general threat[] by officials to enforce those laws which they are charged to administer" and is insufficient to establish "the necessary injury in fact." *Lopez*, 630 F.3d at 787. The District's affirmation of its legal obligation to investigate harassment complaints is insufficient to show that the District Defendants have "communicated a specific warning or threat to initiate proceedings" based on sections 87732 and 87735. *Unified Data Servs.*, 39 F.4th at 1210 (citation omitted); *see also Nichols*, 256 F.3d at 876 (failing to threaten more serious discipline if harassment continued violates an employer's remedial obligations).

Second, Johnson's continued reliance on Trustee Corkins' alleged comment that the District needs to "cull" "bad actors" is misplaced. AOB at 55; ER-216, ¶ 66. As described by Johnson, Corkins' communication was not on its face directed at him: it did not mention Johnson or RIFL by name. ER-102–103, ¶ 10; ER-216, ¶ 66. Nor did it identify any speech that would violate sections 87732 and 87735. *Id.* The statement alleged by Johnson is far too generalized, and even if Johnson subjectively believed these comments were directed at him, "an implied threat does

not meet the standard necessary to show injury in fact." *Lopez*, 630 F.3d at 789. Also, Corkins is one member of a seven-member board, with no authority to take any action individually. Cal. Educ. Code § 72000(d)(3).

The District Court agreed, finding Corkins' statement too attenuated to support pre-enforcement standing as to sections 87732 and 87735. ER-029.

Third, Johnson's lengthy attempt to analogize Garrett's discipline and subsequent termination falls short of establishing a substantial threat of enforcement under the California Education Code. On this point, Johnson cursorily argues the District Defendants "fired RIFL's previous faculty lead [Garrett] for his similar and identical speech, as well as for Johnson's speech." AOB at 55-56. Johnson is incorrect.

For a threat to be credible based on allegations of past enforcement, a plaintiff must allege "[p]ast enforcement against the *same conduct*." *Driehaus*, 573 U.S. at 164 (emphasis added). For Garrett's termination to support a credible threat of enforcement of these statutes against Johnson, Johnson must be "similarly situated" to Garrett. *Lopez*, 630 F.3d at 786-87. Simply that KCCD terminated Garrett under sections 87732 and 87735, based on his specific conduct, does not establish a credible threat of enforcement of the statutes against Johnson. *See Unified Data Servs.*, 39 F.4th at 1211 n.10.

Indeed, the FAC grossly mischaracterizes the reasons for Garrett's termination. A review of Garrett's termination notice confirms the District terminated Garrett in large part for his unprofessional *conduct* by abusing of the District's resources with numerous frivolous complaints against his peers, thereby wasting District resources in investigating those baseless allegations. *See generally* ER-168–202. Garrett's termination notice also found that he repeatedly made "demonstrably false and misleading" allegations against his colleagues and the college; repeated a "knowingly false and demonstrably false misrepresentation" about faculty members after a third-party investigation determined that his accusations were unfounded; knowingly violated campus COVID-19 policies; and threatened and attempted to intimidate Trustee Corkins. *Id.* The District would have proper grounds to discipline this type of disruptive conduct, regardless if the conduct implicated protected speech. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) ("[I]t has never been deemed an abridgment of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed") (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

The District Court correctly found that Johnson alleges no intention of engaging in such conduct or that he "wishes to act in a manner comparable to the

overall conduct described in Garrett's termination notice." ER-031. In fact, the District Court went further and analyzed the limited actions Johnson alleged he refrains from engaging in because of his belief that Garrett was disciplined for similar conduct. ER-031–32. The District Court correctly found that even those actions are distinguishable and do not establish a reasonable likelihood of enforcement against Johnson. *Id.* Johnson's Opening Brief fails to explain any portion of the District Court's ruling that was incorrect and has therefore abandoned the issue. *Smith v. Sch. Bd.*, 88 F.4th 588, 594-96 (5th Cir. 2023).

On appeal, Johnson also argues that he "is already barred from screening committees unless he undergoes DEIA/anti-racism 'training.'" AOB at 56. But he fails to explain how that is relevant to a substantial threat of sections 87732 or 87735 being enforced against him, and therefore the issue is waived. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) (failure to present a specific, cogent argument for the court's consideration results in waiver). Moreover, Johnson fails to show any negative consequences at all from his decision not to complete the training, which undermines any argument that the District Defendants would consider his failure to do so cause for discipline under sections 87732 or 87735. Finally, a mere requirement to attend training, absent a compulsion to engage in expression as part of it, does not implicate First Amendment interests. *Norgren v. Minn. Dep't of Hum. Servs.*, 96 F.4th 1048, 1057-58 (8th Cir. 2024). Johnson does

not allege the contents of any required training at KCCD.

2. Johnson Does Not Have Standing to Challenge Board Policy 3050

a. Intent to Engage in Conduct Arguably Affected with a Constitutional Interest

BP 3050, in relevant part, requires "that [the KCCD community] conduct [itself] with civility in all circumstances of [their] professional lives" and "not participate in or accept, condone, or tolerate physical or verbal forms of aggression, threat, harassment, ridicule, or intimidation." Supplemental Excerpt of Record ("SER") at 020. Johnson's challenge to BP 3050 seems to be based on the same allegations as his challenges to sections 87732 and 87735 and is primarily based on Garrett's termination, though he did not specifically identify any conduct he wishes to engage in that would violate BP 3050.[10] As explained above (section V.A.1.a), for the majority of his intended conduct, Johnson failed to allege with the requisite specificity that he wishes to engage in that conduct in the future. However, the District Court found that Johnson adequately alleged his intent to engage in the following conduct, which it found was arguably affected with a constitutional interest: (1) holding a RIFL event where the guest speaker would

[10] Nor does Garrett's termination notice rely on BP 3050. *See generally* ER-158–167; ER-168–202.

have spoken on "cultural Marxism [and] academia" and refraining from finalizing agreements with RIFL speakers and (2) that he has stopped attending EODAC meetings to avoid expressing certain views and opinions. ER-034–35.

This conduct is not "arguably proscribed" by BP 3050, and there is no "substantial threat" that the policy will be enforced against him.

b. Johnson's Intended Conduct is not Arguably Proscribed by BP 3050

Johnson altogether failed to explain how holding a RIFL event featuring a speaker on "Cultural Marxism" would violate BP 3050. Not once have the District Defendants attempted to claim that Johnson's (or Garrett's) mere use of the term, engaging speakers who discuss the term, or recommending texts discussing that term violates BP 3050. *See generally* ER-158–167; ER-168–202. Similarly, there is no explanation at all as to how expressing his political views at EODAC meetings (or elsewhere) would violate BP 3050.

Similarly, Johnson's Opening Brief fails to identify any statements he plans to make that would violate BP 3050. Johnson also concedes that Garrett was not terminated for violations of BP 3050: "defendants did not explicitly cite the policy in terminating Garrett." AOB at 51. Nevertheless, Johnson notes that the termination notice mentioned Garrett's "incivility" seven times. *Id*. But merely describing some of Garrett's misconduct as "uncivil" does not establish that the

District terminated Garrett for violating BP 3050. In fact, that descriptor was used in conjunction with phrasing from section 87732 to conclude that Garrett's termination was due to his dishonesty, lack of professionalism, and failure to perform assignments, which are statutory causes for discipline under the Education Code. *See e.g.*, ER-183–186.

Johnson failed to make any showing whatsoever that BP 3050 arguably applies to his intended speech. *See Lopez,* 630 F.3d at 790. His "bare assertion" to the contrary is insufficient to preserve this argument and should therefore be deemed waived. *Greenwood,* 28 F.3d at 977.

c. Johnson Failed to Plead a Substantial Threat of Enforcement

As with sections 87732 and 87735, Johnson failed to allege that there has been a threat of enforcement against him or a history of enforcement of BP 3050 supporting the existence of a credible threat.[11]

On appeal, as in the District Court, Johnson seems to argue that his fear BP 3050 will be enforced against him is reasonable because of (1) the District Defendants' prior investigation of Bond's harassment and bullying complaint

[11] Johnson's Opening Brief combines his standing arguments as to sections 87732 and 87735 with his arguments regarding BP 3050. As noted, standing is not dispensed in gross, and Johnson bears the burden of establishing injury in fact as to each challenged provision. *Davis*, 554 U.S. at 734.

against him, (2) Trustee Corkins' off the cuff comments about needing to "cull" bad actors, and (3) Garrett's termination. These allegations are insufficient to support standing for the same reasons addressed in Section V.A.1.

Neither the FAC nor Johnson's declaration identified any speech or conduct Johnson plans to engage in that the District Defendants could conclude is inconsistent with BP 3050. The District Court recognized that this disavowal is more than a "mere litigation position," since Johnson has already engaged in his intended conduct and has never been subject to discipline for violating BP 3050. *See Peace Ranch*, 93 F.4th at 490. Having failed to counter this argument, Johnson has waived this issue and the District Court's ruling should be affirmed on this additional basis. *Smith*, 88 F.4th at 594-96.

d. Johnson Lacks Standing to Bring a Facial Challenge to BP 3050

Johnson can bring a facial challenge to BP 3050 only if he has standing to challenge it himself. *Lopez*, 630 F.3d at 785-86 ("Even when plaintiffs bring an overbreadth challenge to a speech restriction, i.e., when plaintiffs challenge the constitutionality of a restriction on the ground that it may unconstitutionally chill the First Amendment rights of parties not before the court, they must still satisfy 'the rigid constitutional requirement that plaintiffs must demonstrate an injury in

fact to invoke a federal court's jurisdiction.'") (quoting *Dream Palace v. County of Maricopa,* 384 F.3d 990, 999 (9th Cir. 2004)).

Given that Johnson lacks standing to challenge BP 3050 as applied to himself, Johnson also necessarily lacks standing to challenge the policy as overbroad. *Lopez*, 630 F.3d at 785-86; *Phelps v. Hamilton*, 122 F.3d 1309, 1326 (10th Cir. 1997) ("[A] plaintiff bringing a facial challenge to a statute on First Amendment grounds must still satisfy the 'injury-in-fact' requirement in order to demonstrate standing.").

3. Johnson Does Not Have Standing to Challenge California Code of Regulations, Tit. 5, §§ 51200, 51201, 53425, 53601, 53602, and 53605

a. Johnson Fails to Allege Conduct Arguably Proscribed by the DEIA Regulations

i. *Sections 51200 and 51201*

Sections 51200 and 51201 of the DEIA Regulations embody the "official position of the Board of Governors and the California Community Colleges" and simply do not apply to Johnson. Cal. Code Regs, tit. 5, §§ 51200, 51201. These sections are government speech. Sections 51200 and 51201 express the Board of Governors' "commitment to diversity and equity in fulfilling the [community college] system's educational mission." *Id.* § 51200. They embody the California

Community Colleges' opinion, speak for the California Community Colleges system, and help formulate policies ensuring equal educational opportunity for students. *Id.; see Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828, 833 (1995) (noting "the government may not regulate speech based on its substantive content," but "when the State is the speaker, it may make content-based choices"); *Shurtleff v. City of Boston, Massachusetts* 596 U.S. 243, 248 (2022) ("[T]he government must be able to 'promote a program' or 'espouse a policy' in order to function") (internal citations omitted).

As aspirational government speech, sections 51200 and 51201 do not reach Johnson's speech in his personal capacity nor do they restrict Johnson's ability to express his contrary personal views in that capacity through media appearances, editorials, or social media posts. *See, e.g., Webster v. Reproductive Health Servs.*, 492 U.S. 490, 505-07 (1989) (finding precatory statuary preambles that express a "value judgment" imposing no substantive restrictions or requirements on conduct as inappropriate to "pass on the constitutionality of the . . . preamble").

ii. *Sections 53601 and 53602*

Sections 53601 and 53602 apply to the District, not Johnson. These sections require that local community college districts adopt "locally developed minimum standards . . . [for] performance evaluations of employees and faculty tenure reviews" (Cal. Code Regs., tit. 5, § 53601(b)) and that "*District governing boards*

shall adopt policies for the evaluation of employee performance, including tenure reviews," that include "consideration of an employee's demonstrated, or progress toward, proficiency in "locally-developed DEIA competencies." *Id*. § 53602 (emphasis added). The plain language of these sections does not reach Johnson, much less restrict or compel his speech, in a manner that grants him standing.

iii. *Sections 53425 and 53605 (a)*

Finally, sections 53425 and 53605(a) arguably apply to Johnson as a faculty member. Section 53425 applies to "all district employees" and section 53605(a) applies to faculty members. However, section 53425's requirements hinge on "local policies regarding DEIA competencies" not before the Court. *Id*. § 53425. As the District Court correctly noted, section 53605's requirements refer to teaching *practices* that reflect DEIA and anti-racist principles – section 53605 does not require Johnson to advance, promote, speak, or teach any particular content. *Id*. § 53605(a); *see also* ER-047–048.

It remains unclear on this record how a "teaching, learning, and professional practice[]," such as providing students with lecture slides in advance of the lecture or conducting anonymous grading somehow restricts or compels Johnson to speak, teach, or act in a way that "contravenes his conscience." Cal. Code Regs. tit. 5, § 53605(a); ER-117, ¶ 67. Although Johnson articulates why he disagrees with different portions of the Regulations and will not conform his speech to them, his

statements are ultimately conclusory. E.g., ER-125, ¶ 100 ("Almost everything I teach violates the new DEIA requirements – not just by failing to advance the DEIA and anti-racist/racist ideology, but also by criticizing it."). Johnson's reliance on the State Chancellor's sample Competencies and Criteria document (ER-130–135) to speculate as to how the District will apply the DEIA Regulations further muddies the water as the District may choose not to adopt the State Chancellor's sample, fully or even in part, or may incorporate it in the evaluation process (or otherwise) in a way Johnson does not anticipate. Johnson's claims that his intended conduct violates the unexplained local implementation of the DEIA Regulations is wholly speculative.

b. There is No Threat of Enforcement

As to threats of enforcement of the DEIA Regulations, there are none. Nothing in the District's administrative investigation, Garrett's termination, or Corkins' statement at the Trustees meeting involved the DEIA regulations. Indeed, the Board approved Garrett's statement of termination before the April 16, 2023 effective date of the DEIA Regulations (ER-137) so the action cannot show threat of enforcement. While Dadabhoy's December 8, 2022 email quoted Section 51201(b), nothing in that email can plausibly be interpreted as a threat that the District will enforce the aspirational policy language against Johnson. ER-049, 144. Johnson's speculative fear that the DEIA Regulations *may be* "construed in a

particular manner" falls short of a credible threat of enforcement to grant standing. *Wolfson v. Brammer*, 616 F.3d 1045, 1063 (9th Cir. 2010).

c. Johnson's Inadequate Factual Allegations Place This Court in An Inappropriate Posture to Adjudicate the Constitutionality of the DEIA Regulations

The U.S. Supreme Court recently warned federal courts about shortcutting the standing analysis to jump to the merits of a case, especially in the context of a preliminary injunction. *Murthy v. Missouri*, 144 S. Ct. 1972, 1986 (2024) (noting a Plaintiff relying on a speculative chain of possibilities cannot meet their burden to show future harm.); *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 379 (2024) ("[F]ederal courts [do not] operate as an open forum for citizens to press general complaints about the way in which the government goes about its business.") (internal quotations omitted). Careful evaluation and application of the standing doctrine allows "issues to percolate and potentially be resolved by the political branches in the democratic process" such that "democratic debate can occur and a wide variety of interests and views can be weighed." *All. for Hippocratic Med.*, 602 U.S. at 380. Article III standing "screens out plaintiffs who might have only a general legal, moral, ideological, or policy objection to a particular government action," even if those objections are sincere. *Id*. at 381. "An Article III court is not a legislative assembly, a town square, or a faculty lounge. Article III does not

contemplate a system where 330 million citizens can come to federal court whenever they believe that the government is acting contrary to the Constitution or other federal law." *Id*. at 382.

This case displays the benefit of a concrete case or controversy and the issues that arise from an underdeveloped factual record. The record before this Court as to the application and interpretation of the DEIA Regulations, as applied to Johnson or any other California community college faculty member, is basically non-existent. The State Chancellor's "sample" Competencies and Criteria serve as a "starting point" for districts, but there is nothing further in the record indicating that the District Defendants have adopted all, some, or none of the State Chancellor's Competencies and Criteria. ER-130. In fact, the State Chancellor has explicitly encouraged local districts to "innovate and locally discuss the list of recommended DEIA competencies and criteria." ER-139. Further, there is nothing in this record as to the District's required "clear expectations regarding employee performance related to DEIA principles, appropriately tailored to [Johnson's] classification." Cal. Code Regs. Tit. 5, § 53602 (c)(3). Nor is there anything on how the District has set out to "ensure" faculty evaluators "have a consistent understanding of how to evaluate employees on DEIA competencies and criteria" or even what that consistent understanding would look like. *Id*. § 53602(c)(2). Moreover, there is nothing in the record to indicate how the District

plans to apply local DEIA policies to *Johnson specifically*. Instead, this Court is left to guess and speculate about key interpretation, implementation, and application issues, much like Johnson does. This is a far cry from the "concrete factual context conducive to a realistic appreciation of the consequences of judicial action" that the standing doctrine provides. *All. for Hippocratic Med.*, 602 U.S. at 379 (internal quotation marks omitted); *see also TransUnion LLC v. Ramirez*, 594 U.S. 413, 423-24 (2021) ("Under Article III, federal courts do not adjudicate hypothetical or abstract disputes."); *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 486 (1982) (noting "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy").

Indeed, the democratic processes are slowly refining the proper scope and place of DEIA initiatives within academia, with individual educational institutions and organizations independently arriving at their own conclusions. Some institutions, such as MIT[12] and Harvard,[13] have determined they will no longer

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[12] Anemona Hartocollis, *M.I.T. Will No Longer Require Diversity Statements for Hiring Faculty*, May 6, 2024, https://www.nytimes.com/2024/05/06/us/mit-diversity-statements-faculty-hiring.html (last visited Nov. 15, 2024).

[13] Melissa Alonso, Lauren Mascarenhas, and Nicquel Terry Ellis, *The Crimson: Harvard's Faculty of Arts and Sciences will no longer required diversity statements in hiring process*, June 4, 2024, https://www.cnn.com/2024/06/04/us/harvard-diversity-statements-reaj/index.html

require DEIA diversity statements from faculty candidates. Other institutions, such as the University of California and California Community College systems have decided to promote DEIA initiatives with regard to faculty. *See Haltigan v. Drake*, No. 5:23-cv-02437-EJD, 2024 U.S. Dist. LEXIS 6944, at *3 (N.D. Cal. Jan. 12, 2024); Cal. Code Regs., tit. 5, § 51201. The American Association of University Professors recently issued a statement indicating it supports the use of DEIA criteria in faculty evaluation, appointment, tenure, and promotion as "one instrument among many that may contribute to evaluating the full range of faculty skills and achievements within a diverse community of students and scholars." *See AAUP, Diversity, Equity, and Inclusion Criteria for Faculty Evaluation,* October 2024, https://www.aaup.org/file/DEI-Faculty-Evaluation.pdf (last visited Nov. 15, 2024).

The ongoing dialogue among faculty and educational institutions across the nation is evidence of the democratic and legislative processes in action. Educational institutions such as the California Community College system and the District may contribute to that dialogue, through their institutional academic freedom rights (*see Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)); *Heim v.*

(last visited Nov. 15, 2024).

Daniel, 81 F.4th 212, 229-34 (2d Cir. 2023)), or through the right of the government, as a speaker, to make content-based policy statements. *Rosenberger*, 515 U.S. at 828, 833; *Shurtleff*, 596 U.S. at 248. So too does Johnson remain free to espouse his views on these matters, including his disagreement. Granting Johnson's preliminary injunction would "short circuit" and artificially freeze these democratic processes, *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024), before the "wide variety of interests and views can be weighed." *See All. for Hippocratic Med.*, 602 U.S. at 380.

d. The Amici Curiae Professors' Arguments Fail to Show Johnson Has Standing to Challenge the DEIA Regulations

The *amici curiae* professors Palsgaard, Richardson, Blanken and de Morales argue the DEIA Regulations directly force faculty to "parrot the government's views or face discipline." Brief of *amici curiae professors*, Dct.Entry 14.1, *6. According to *amici*, failure to do so will result in faculty being "accused" of "weaponiz[ing] academic freedom" or "inflict[ing] curricular trauma" or "not being sufficiently 'anti-racist.'" *See, e.g.*, professors' amici brief at *14-16. Therefore, in their view, Johnson and other faculty who challenge or oppose the DEIA Regulations will necessarily receive "a lower overall performance rating" and incur an injury in fact sufficient for standing. *Id*. at *11.

Amici's hyperbolic fears are unfounded and fail to support Johnson's standing arguments for two reasons. First, the text of the DEIA Regulations contain none of the phrases, terms, and concepts *amici* fear, such as "inflict curricular trauma." Rather, *amici* quote non-binding, non-enforceable guidance that plainly states the guidance cited are samples, recommendations, starting points, resources, models, and/or tools which individuals may utilize, but are not mandates enforced by district employers. *See, e.g.*, *Glossary*, https://perma.cc/T22V-V866, at *1 ("The purpose of the [Glossary] is to serve as a *reference guide* of DEI terms . . .") (emphasis added); ER-130 ("this *sample* [set of DEI competencies and criteria] is a *starting point*, and it is meant to serve as a *reference* for districts/colleges as they engage in their own local process to develop and adopt a *personalized* set of DEI competencies and criteria . . .") (emphasis added). Second, like Johnson, the *amici* speculate that ideological opposition to the DEIA Regulations is necessarily non-compliance, and that their evaluations will be manipulated to terminate dissenting faculty members. *See* professors' *amici* brief at *11; AOB at 27-28. But *amici* ignore that the DEIA Regulations evaluation component is only a portion of the evaluation process (Cal. Code Regs. tit. 5, § 53602 (c)(4), (6)) and a "tool to provide and receive constructive feedback to promote professional growth and development." *Id.* § 52510(j); *see also* AOB

at 27-28. This type of speculation is insufficient to establish Article III standing to challenge the DEIA Regulations.

e. Academic Freedom Principles Militate Against a Finding of Standing

A finding of Article III standing in this case would itself offend principles of academic freedom, in particular the right of the faculty as a collective body to set academic standards. A federal court's finding standing and passing on the constitutionality of local implementation of the DEIA regulations, before local implementation of those regulations has even taken place, would constitute the Court wresting a fundamentally academic decision away from academics – in particular, the decision how to apply the DEIA regulations locally consistent with both their intent and constitutional standards. *Demers v. Austin*, 746 F.3d 402, 413 (9th Cir. 2014).

But academics could and should make that determination in the first instance – through the joint decision making of administrators and also by faculty, through a collective bargaining process. Indeed, although case law such as *Demers* speaks of individual faculty members' academic freedom rights in scholarship and teaching, academic freedom rights rest on the collective decision making of faculty within their disciplines and serve to protect this collaborative process from outside interference. *See Heim*, 81 F.4th at 233 ("courts 'should not substitute their

judgment for that of the college' because things like 'teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals.'") (quoting authority).

B. JOHNSON'S DEMAND FOR A PRELIMINARY INJUNCTION IN ANY EVENT LACKS MERIT

1. The District Court, and Not an Appellate Court, Should Decide Johnson's Motion for Preliminary Injunction in the First Instance

Johnson asks this Court to overrule the District Court's motion to dismiss ruling and take the next step of actually ordering injunctive relief. The request is improper because the District Court did not consider the merits; therefore, there is no ruling to review. The decision to issue such relief is properly vested, in the first instance, with the District Court. *See, e.g.*, *Evans v. Shoshone-Bannock Land Use Pol'y Comm'n*, 736 F.3d 1298, 1307 (9th Cir. 2013) (whether to grant a preliminary injunction "is a matter committed to the discretion of the trial judge") (quoting *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984)); *Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of Health & Hum. Servs.*, 946 F.3d 1100, 1111 (9th Cir. 2020) ("A district court is usually best positioned to apply the law to the record.").

2. Johnson's Evidence Does Not Satisfy the Stringent Requirements for Preliminary Injunctive Relief

If this Court addresses the merits of the preliminary injunction motion, it should deny the motion, because the record shows the requirements for preliminary injunctive relief are not met. A plaintiff seeking a preliminary injunction must establish that: (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *Winter v. Natural Resources Def. Council, Inc*., 555 U.S. 7, 20 (2008). In order to prevail at the preliminary injunction stage, a plaintiff must make a "clear showing" of their injury and that they are entitled to the injunction. *Id*. at 22. Irreparable harm for preliminary injunctive relief is not the same as allegedly threatened harm for Article III standing. The plaintiff must show "irreparable injury is *likely* in the absence of an injunction." *Id.* (emphasis in original). A mere "possibility of irreparable harm" is not enough and "is inconsistent" with a preliminary injunction's status as an "extraordinary remedy." *Id.*

On the record here, there is no "clear showing" of "likely" – and not just "possible" – irreparable injury. No evidence appears that any injury to Johnson is in any way "imminent." SER-31, Declaration of Chancellor Thomas Burke, District Court ECF No. 43-1, ¶¶ 1-2. Instead, there would be significant hardship

to the District Defendants from a preliminary injunction. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997).

In addition, the public interest overwhelmingly supports denial of Johnson's request. Johnson's First Amendment speech rights are diminished in contrast to those of members of the public generally, because he accepted work as a public employee. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *Demers*, 746 F.3d at 413. Also, his demand that this Court intervene in the management of the District, and by extension the California Community College system, infringes on the institutional academic freedom rights of both. *See Ewing*, 474 U.S. at 226 n.12 (citing *Keyishian*, 385 U.S. at 603); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result); *University of Cal. Regents v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.).

3. Over a Year has Passed Since Johnson Filed His Motion, Decisively Defeating Any Argument that Immediate Injunctive Relief is Needed to Maintain the Status Quo

The passage of many months since Johnson filed the Motion for Preliminary Injunction, and corresponding altered circumstances, also requires that the request

be denied. This has been the case for some time, and whether the motion is decided now, or months from now, will make no difference. Johnson's Motion was filed on a rush basis in July 2023 to block implementation of the State's DEIA Regulations that would be effective in Fall 2023. It is the now the end of 2024, and the Regulations have been in effect statewide for more than an entire academic year. There is no longer any exigency whatsoever to justify preliminary injunctive relief. This is not the fault of the District Court, but of the unique circumstances that have existed in the Eastern District of California, including a long period in which "No District Court Judge" was assigned to the instant case.

Even absent these circumstances, delay in any ruling in fall and winter of 2023 (necessary in any judicial process) was fatal to Plaintiff's preliminary injunction request, because the academic year was already well under way by the time the Magistrate F&R was issued, and the parties had submitted their respective Objections to it. By 2024, the DEIA Regulations had already been in effect for months.

With implementation of the DEIA Regulations taking place statewide, issuance of a preliminary injunction now would not maintain the status quo – it would instead completely upend it. "Mandatory preliminary relief, which goes well beyond simply maintaining the status quo Pendente lite, is particularly disfavored, and should not be issued unless the facts and law clearly favor the

moving party." *Anderson v. U.S.*, 612 F.2d 1112, 1114 (9th Cir. 1979) (quoting *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976)). Courts acknowledge that the passage of time can require denial of a pending preliminary injunction request. *See Josephine Cty. v. Watt*, 539 F. Supp. 696, 707 (N.D. Cal. 1982); *CFTC v. Monex Credit Co.*, 2020 U.S. Dist. LEXIS 221777, *9-10 (C.D. Cal. 2020).

4. Johnson's Constitutional Claims Fail on the Merits

If this Court reaches the merits (and it need not for this appeal), it should reject each of Plaintiff's claims for relief and confirm not only that a preliminary injunction is unwarranted, but also that Plaintiff has failed to state any claim for relief. By way of background, faculty in public higher education institutions have diminished constitutional speech rights in the context of their employment. A public employee's speech is protected when (1) it touches on a matter of "public concern" (2) it is outside the scope of their "official duties," and (3) the importance of the employee's speech interest outweighs the administrative interest of the government employer. *See Eng v. Cooley*, 552 F.3d 1062, 1070-72 (9th Cir. 2009). In this Circuit, the "official duties" element is relaxed for higher education faculty. It does not reach "speech related to scholarship and teaching." *Demers*, 746 F.3d at 406. Such speech, however must still be on a matter of public concern and prevail in a balancing of interests to have constitutional protection. *Id.*

a. The Claims as to Education Code Sections 87732 and 87735 Fail

Johnson brings a pre-enforcement "as applied" challenge to California Education Code sections 87732 and 87735, and seeks a preliminary injunction against the Defendants enforcing them against him. ER-235–236, ¶¶ 157-64.

Johnson's claim fails, first, for the fundamental reason that not all speech by a teacher or faculty member addresses a matter of public concern. If Johnson's speech amounted to personal attacks and "complaints over internal office affairs" against his peers to further "personal employment disputes," that speech will not be on matters of public concern. *Hernandez v. City of Phoenix*, 43 F.4th 966, 977 (2022). If a faculty member "speaks or writes about what is properly viewed as essentially a private grievance, the First Amendment does not protect him or her from any adverse reaction." *Demers*, 746 F.3d at 416 (cleaned up); *Hernandez*, 43 F.4th at 977. Because much of the speech that can be challenged under sections 87732 and 87735 has no constitutional protection, the proposed injunctive relief Johnson requests would be unwarranted as a matter of law.

Second, the claim for relief lacks merit under the second step of the First Amendment analysis, *Pickering* balancing. *Hernandez*, 43 F.4th at 976. As the Ninth Circuit cautioned in *Demers*, cases "involving academic speech" are usually "particularly subtle and difficult." *Demers*, 746 F.3d at 413. The "nature and

strength" of the public interest in academic speech and the interest of an employing academic institution will be difficult to assess, and may involve "a [content-based] judgment by the employing university about the quality of what [the faculty member] has written." *Id.* at 413.[14]

Here, assuming Johnson's speech is on matters of public concern, the District Defendants have a legitimate interest in regulating disruptive speech. Such conduct can interfere with faculty members' ability to carry out their duties and harm the ability of faculty members to work closely with each other in educating the District's students. An injunction prohibiting the District from disciplining Johnson under the Education Code sections would interfere with District's ability and obligation to protect its employees and students should Johnson's conduct cause disruption on campus. *Bauer v. Sampson*, 261 F.3d 775, 785 (9th Cir. 2001). No one, not the District nor the Court, can evaluate this disruption until Johnson actually engages in conduct that violates District rules; accordingly, Johnson does not show the Education Code sections violate the First Amendment, and the preliminary injunction Johnson requests is overly broad.

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[14] The *amici curiae* professors argue that the appropriate standard is strict scrutiny, a position that no party to this litigation asserts is correct in light of the controlling language in *Demers*. *See* professors' *amici* brief at *22-24; *see also* AOB at 60; *Demers*, 746 F.3d at 412.

b. The Claims as to Board Policy 3050 Fail

Johnson brings a pre-enforcement "as applied" challenge to BP 3050 on both viewpoint discrimination and vagueness grounds (Counts II and III to the First Amended Complaint). BP 3050 addresses civility standards at the District, and Johnson targets in particular the language addressing "verbal forms of aggression, threat, harassment, ridicule, or intimidation." ER-8 & n.5. As the District Court observed: "[I]t is unclear that Policy 3050 can be enforced against anyone – it appears to be an aspirational policy without any enforcement or disciplinary mechanism." ER-37, lines 9-10. The full text of BP 3050 supports this. SER-26–28.

i. *Board Policy 3050 Does Not Violate the First Amendment*

Johnson's proposed speech does not automatically qualify as a matter of public concern under the first step of *Pickering* balancing, and the Court should refrain from issuing an overly broad injunction that restricts the District's ability to respond to Johnson's disruptive speech on matters of private concern. Under the second step of *Pickering* as applied to BP 3050, Johnson's interest in his proposed speech is outweighed by the District's legitimate interest in restricting employee speech "that undermines, interferes with, or is detrimental to the [District's] goals and mission and its relationship with the public." *Hernandez*, 43 F.4th at 982. As

with Johnson's challenge to sections 87732 and 87735, the District has a substantial and legitimate interest in addressing disruptions on its campuses. BP 3050 directly advances the District's interest as it imposes a Code of Ethics upon all District employees, including faculty, to treat each other within professional standards, regardless of their beliefs or political ideology.

ii. *Board Policy 3050 is Not Vague Under the Fourteenth Amendment*

Constitutional vagueness doctrine derives from the Due Process Clauses of the Fifth and Fourteenth Amendment, requiring statutes provide adequate notice of what behavior the statute proscribes. *United States v. Williams*, 553 U.S. 285, 304 (2008). The statute must "provide a person of ordinary intelligence fair notice of what is prohibited," and must not "authorize[] or encourage[] seriously discriminatory enforcement" through subjective standards. *Id*. Even when regulations restrict expressive activity protected by the First Amendment, vagueness standards will not apply so strictly that the challenged provision must provide "perfect clarity and precise guidance." *Id.*; *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1984). A plaintiff cannot succeed on a facial vagueness challenge if it is clear what the challenged statute proscribes "in the vast majority of its intended applications." *Hill v. Colorado*, 530 U.S. 703, 733 (2000). Furthermore, courts grant public employers more leeway in regulating public

employee speech such that restrictions of speech in another context that may be impermissibly vague could otherwise be a constitutional restriction on public employee speech. *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (noting policies governing public employee speech may be framed in language that might be deemed impermissibly vague if applied to the public at large); *Hernandez*, 43 F.4th at 982-83 (same).

In situations where "legitimate uncertainty" exists, the statute's chilling effect on legitimate speech must chill "a *substantial* amount of legitimate speech," not merely "*some* amount of legitimate speech." *Cal. Teachers Ass'n v. Bd. Of Educ.*, 271 F.3d 1141, 1152 (9th Cir. 2001) (emphasis in original). In evaluating whether the chilling effect is substantial, courts will evaluate the plain language of the statute and the context in which the statute operates. *Id*. at 1151, 1154.

Here, BP 3050 does not have a substantially chilling effect on protected speech, and the term "verbal forms of aggression" is a readily discernable compound term. First, BP 3050 covers unprotected or minimally protected speech, such as true threats (*see Fogel v. Collins*, 531 F.3d 824, 830 (9th Cir. 2008)), fighting words (*see Chaplinsky v. New Hampshire*, 315 U.S. 568, 573-74 (1942)), and matters of private concern (*see Hernandez*, 43 F.4th at 977). BP 3050 is a conduct policy and Code of Ethics, designed to guide District employees as to what constitutes professional and collegial conduct. To the extent BP 3050

implicates protected speech at all, it is minimal, not substantial. *Cal. Teachers Ass'n*, 271 F.3d at 1152.

Furthermore, "verbal forms of aggression" must be read in the appropriate context. The use of "verbal" is immediately preceded by the use of "physical," which informs ordinary readers that the word "verbal" modifies "aggression, threats, ridicule, and intimidation" in the same way that the word "physical" modifies those words. Additionally, each modified term has a readily discernable dictionary definition.[15] The terms also convey objective standards that evaluate whether a reasonable person would interpret physical or verbal conduct as aggressive, threatening, ridiculing, or intimidating based on the factual context, surrounding events, and reaction of listeners. *Cf. Fogel*, 531 F.3d at 831 (noting an

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[15] *See e.g.*, Cambridge English Dictionary, https://dictionary.cambridge.org/us/dictionary/english/ (last retrieved Nov. 26, 2024) (defining "aggression" as "spoken or physical behavior that is threatening or involves harm to someone or something" (https://dictionary.cambridge.org/us/dictionary/english/aggression (last retrieved Nov. 26, 2024)); "threat" as "a suggestion that something unpleasant or violent will happen, especially if a particular action or order is not followed" (https://dictionary.cambridge.org/us/dictionary/english/threat (last retrieved November 26, 2024)); "ridicule" as "unkind words or actions that make someone or something look stupid" (https://dictionary.cambridge.org/us/dictionary/english/ridicule (last retrieved on November 26, 2024)); and "intimidation" as "the action of frightening or threatening someone, usually in order to persuade them to do something that you want them to do" (https://dictionary.cambridge.org/us/dictionary/english/intimidation (last retrieved on Nov. 26, 2024)).

objective, reasonable person standard frames First Amendment true threat analysis). These facts together convey to the District's employees that verbal conduct similar in kind to physical conduct that displays aggression, threats, ridicule, and intimidation is within the scope of BP 3050. Even if these terms may be "otherwise imprecise," BP 3050 avoids unconstitutional vagueness by combining these terms to provide "sufficient clarity" to a person of ordinary intelligence. *Williams*, 553 U.S. at 304. Indeed, the Ninth Circuit has recently found that fairly broad language in a social media policy survived a facial vagueness challenge. *See Hernandez*, 43 F.4th at 981-83 (rejecting vagueness challenges to policy prohibiting speech "detrimental to the mission and functions of the Department").

c. The Claims as to California Code of Regulations, Tit. 5, §§ 51200, 51201, 53425, 53601, and 53605 Fail

Finally, Johnson demands preliminary injunctive relief based on what is apparently a pre-enforcement "as applied" challenge to the DEIA Regulations, Cal. Code Regs., tit. 5 §§ 51200, 51201, 53425, 53601, 53602, 53605, and 53601. These are Counts IV and V of his FAC, for which the State Chancellor of the Community College is also an official duties defendant. ER- 238–41, ¶¶ 178-85.

As a threshold matter, the District Defendants cannot be liable under Section 1983 based on the DEIA regulations, because Johnson can point to no custom or

policy of the District that applies or interprets them. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001); *see also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). Johnson cannot show this for any District official on this record. Even if he could, those officials would simply be complying with state law, and cannot be liable under Section 1983 for doing so. *Aliser v. SEIU California*, 419 F. Supp. 3d 1161, 1165 (N.D. Cal. 2019) (applying *Monell* standards); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1113 (N.D. Cal. 2015) (indicating that plaintiffs suing officials of arms of the state need to satisfy the "policy or custom" standard from *Monell*).

Johnson's First Amendment challenges to the DEIA Regulations in any event fail on the merits. First, the Regulations, like sections 51200 and 51201, and even others that apply various standards, amount to government speech. *See Shurtleff*, 596 U.S. at 251. The Regulations express the Board of Governors' "commitment to diversity and equity in fulfilling the [community college] system's educational mission." Cal. Code Regs. tit. 5, § 51200. The Regulations do not reach Johnson's speech in his personal capacity nor do they restrict Johnson's ability to express his personal views in that capacity through media appearances, editorials, or social media posts. Nor can Johnson rely on non-binding guidance documents, such as the Chancellor's "Diversity, Equity and Inclusion Competencies and Criteria" (ER-130-135), to support his claim that the DEIA

Regulations themselves somehow compel him to "advocate particular messages." ER-228–32, ¶¶ 120-147.

The furthest the DEIA Regulations reach Johnson's speech is in his "teaching and scholarship," but Johnson overstates what the Regulations require. The Regulations simply require faculty members, like Johnson, be evaluated on "demonstrated, or progress toward, proficiency in the locally-developed DEIA competencies." Cal. Code Regs. tit. 5, § 52510(l). "Proficiency" is not speech, learning is not speech, and knowledge is not speech. Johnson can achieve proficiency for purposes of his evaluation without uttering a single word – or he can show "proficiency" through the quality of his future criticisms and opposition to DEIA ideals and concepts in the classroom. Indeed, Johnson's proposed teaching and scholarship involves presenting ideas that purport to criticize DEIA ideologies. ER-125–27, ¶¶ 100-105. To the extent the DEIA Regulations may require Johnson to modify his classroom practices, they are focused on "respect for, and acknowledgement of the diverse backgrounds of students and colleagues," and do not force any particular pedagogy or viewpoint. Cal. Code Regs. tit. 5, § 53605 (a). The District's evaluation of the quality of Johnson's criticisms in the classroom fall within the established and permissible bounds for educational institutions to make content-based judgments in faculty evaluations. *Demers,* 746 F.3d at 413 ("[T]he evaluation of a professor's writing for purposes of tenure or

promotion involves a judgment by the employing university about the quality of what he or she has written[, and] . . . is both necessary and appropriate.").[16]

VI. CONCLUSION

Appellees respectfully request that this Court affirm the District Court's order dismissing Johnson's First Amended Complaint.

Dated: November 27, 2024

Respectfully submitted,

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[16] The *amici curiae* professors argue the DEIA Regulations are vague because they fail to define purported "[i]deologically loaded terms" like "a race-conscious and intersectional lens" or "curricular trauma," and the lack of these definitions invite arbitrary enforcement. *See* professors' *amici* brief at *27-29. But again, the terms that concern *amici* are nowhere to be found in the text of the DEIA Regulations. Instead, *amici* restrict themselves to non-binding, non-enforceable guidance that "may never be applied to [them.]" ER-045. The DEIA Regulations cannot be unconstitutionally vague because *amici* are concerned about the definitions of terms the DEIA Regulations do not use. Also, Johnson, who is the plaintiff in this case, has not himself made any vagueness challenge to the DEIA Regulations, so the issue is not before the Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rules 32-1 and 32-2(b) because this brief contains 15,218 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font.

Dated: November 27, 2024 LIEBERT CASSIDY WHITMORE

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