INSTITUTE FOR FREE SPEECH

September 10, 2025

The Hon. Diane Gujarati
U.S. District Judge
225 Cadman Plaza East
Brooklyn, NY 11201

Via ECF

Re: *Alexander v. Sutton*, No. 1:22-cv-2224-DG-JRC

Dear Judge Gujarati:

Plaintiffs respectfully request that this Court schedule a pre-motion conference, in anticipation of Plaintiffs moving for summary judgment on the entirety of the case or, if the Court determines such a conference is unnecessary, set a briefing schedule without holding a conference. The bases of this anticipated motion are below.

Attached to this letter is a Local Civil Rule 56.1 statement of material facts as well as the declarations and evidentiary exhibits cited in that statement. Because some of the exhibits used in this Rule 56.1 statement have been marked confidential or AEO by Defendants, Plaintiffs will file the Rule 56.1 statement and all confidential or AEO exhibits under seal.

For six months, parties have attempted to settle this case. *See* Dkt. 71 at 2. In May 2025, Plaintiffs successfully resolved their dispute with the individual-capacity Defendants (Tajh Sutton and Marissa Manzanares), Dkt. 100, and on June 17, all parties stipulated to the dismissal of Ms. Sutton and Manzanares, Dkt. 102.

Plaintiffs also engaged in meaningful settlement discussions with the City Defendants and were optimistic that the remaining parties could resolve their disagreements at a June settlement conference that the parties jointly requested. *See* Dkt. 101. The City's own internal delays, however, forced the City Defendants to request the Court to reschedule this settlement conference until September and again until October. *See* Dkt. 103; Dkt. 104. The repeated delays indicate that the City Defendants internally disagree about the long-expected revisions to Regulation D-210. While the City is always free to legislate in the first instance, and Plaintiffs reserve their right to challenge future unconstitutional enactments (by amending their complaint or filing a new one), a motion for summary judgment appears to be the quickest and most straightforward process for resolving the case with respect to the current regulations which remain on the books, in addition to satisfying Plaintiffs' request for retrospective relief. Plaintiffs ask this Court to set a briefing schedule on summary judgment.

Plaintiffs' basic arguments for summary judgment are substantially similar to the arguments that Plaintiffs made in their motion for preliminary injunction. *See* Dkt. 37; Dkt. 36; Dkt. 13-2. Plaintiffs' prior motion set forth the legal authorities for these arguments, and these

legal authorities are incorporated into this letter. *See generally* Dkt. 13-2.

This Court already held that Plaintiffs have shown a clear and substantial likelihood of establishing that the three challenged portions of Regulation D-210—the prohibitions against "frequent verbal abuse and unnecessary aggressive speech that serves to intimidate and causes others to have concern for their personal safety," see Regulation D-210 § II(C); against "derogatory or offensive comments about any DOE student," see Regulation D-210 § II(D); and against "conduct that would publicly reveal, share or expose private or personally identifiable information about a DOE student or a member of such student's family without their consent," see Regulation D-210 § II(E)—violate freedom of speech, facially and as applied. Dkt. 67 at 37.

These three sections of D-210 discriminate based on viewpoint and are unconstitutionally vague and overbroad judged in relation to their plainly legitimate sweep. Dkt. 37 at 3-8; Dkt. 13-2 at 17-21; *see also* Dkt. 67 at 38-41. "Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995); *see also Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 31 (2d Cir. 2018). Moreover, a regulation is impermissibly vague "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S.703, 732 (2000) (citation omitted). It is overbroad when "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Adams v. Zelotes*, 606 F.3d 34, 37-38 (2d Cir. 2010) (citations and quotation marks omitted).

Although on August 28, 2024, Defendant Banks suspended enforcement of Sections II(C) and II(D) of Regulation D-210, in light of the DOE's anticipated revision of these sections, the DOE has not made public what specific revisions of Regulation D-210 it is seeking. *See* Stipulations, ¶¶ 7-10, 15-20; Dkt. 64 at 3; Dkt. 67 at 9, 30. The promised revisions have not been published; they have not undergone the mandatory 45-day public notice and comment period; and the Panel for Education Policy has not voted to approve revisions—all requirements under state law before Regulation D-210 can be changed. Stipulations, ¶¶ 7-10, 15-20; Dkt. 66; Dkt. 64 at 3. Additionally, Defendant Banks has resigned as chancellor, and his eventual successor can reverse the present enforcement waiver as quickly as it was given. *See* Stipulations, ¶¶ 7-8. Plaintiffs, therefore, require a permanent injunction to remove the chill that remains on their speech, as well as nominal damages for the injury they have already suffered.

This Court also held that Plaintiffs showed a clear and substantial likelihood of establishing that that CEC 14's Community Guidelines, its Community Commitments, a portion of Article IV § 2 of its Bylaws, and its practices regarding its X account all violate the First Amendment because they were either viewpoint discriminatory or insufficiently tailored. Dkt. 67 at 42-46; *see also* Dkt. 36 at 2-6; Dkt. 13-2 at 9-14, 17-18. Even if some of these restrictions are content based, rather than viewpoint based, they are not narrowly tailored, let alone the least restrictive means of achieving a compelling state interest. *See Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 607 (2021); *Hotel Emps. & Rest. Emps. Union, Loc. 100 v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 545 (2d Cir. 2002).

In its prior ruling, the Court did not reach several parts of Plaintiffs' argument—

including the arguments involving prior restraint, the right to assemble, and the right to petition, and the as-applied challenge to CEC 14's expulsion practices at public meetings. *See* Dkt. 13-2 at 14-17; *see also, e.g.*, *Lusk v. Vill. of Cold Spring*, 475 F.3d 480, 493, 495 (2d Cir. 2007); *De Jonge v. Oregon*, 299 U.S. 353, 364-65 (1937). The Court, however, indicated that at least some of those arguments were persuasive. *See* Dkt. 67 at 44 n. 33, 46 n. 35, 46 n. 36. Indeed, the City Defendants do not even defend the CEC's actions, which they admit were indefensible. *See* Dkt. 67 at 29-30. And they do not contest that former Defendants Sutton and Manzanares excluded Plaintiffs from CEC 14 meetings and from CEC's X account—as evidence that the City itself produced demonstrates. *See* Statement of Material Fact, ¶¶ 39-47. The City has not indicated that any of the CEC 14 provisions are facing potential repeal or modification.

Thus, despite repeated talks, Plaintiffs and the City Defendants have not been able to reach a settlement on any claim. Plaintiffs' relief remains preliminary and limited to the pendency of this action. *See* Dkt. 67 at 50, 52. Plaintiffs need permanent prospective relief as well as retrospective relief for their past injuries.

Respectfully, the Court should hold a pre-motion conference in anticipation of Plaintiffs' motion for summary judgment or set a briefing schedule without holding a conference.

Sincerely

/s/ Alan Gura
Alan Gura
Counsel for Plaintiffs