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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA - BAKERSFIELD

DAYMON JOHNSON,

Plaintiff,

v.

JERRY FLIGER, in his official capacity
as President, Bakersfield College; et al.,

Defendants.

Case No.: 1:23-cv-00848 KES-CDB

Complaint Filed: June 1, 2023
FAC Filed: July 6, 2023

**DISTRICT DEFENDANTS' REPLY IN
SUPPORT OF DISTRICT DEFENDANTS'
SUPPLEMENTAL BRIEF ON MOTION TO
DISMISS FIRST AMENDED COMPLAINT**

Date: November 17, 2025
Time: 1:30 p.m.
Courtroom: Courtroom 6

Pursuant to this Court's September 4, 2025 order (ECF No. 108), the remaining defendants in this action, members of the Board of Trustees of the Kern Community College District ("District") and officials of the District and Bakersfield College (collectively "District Defendants"), respectfully submit this reply supplemental brief to Johnson's Supplemental Brief in Opposition to District Defendants' Supplemental Brief on its pending motion to dismiss. ECF Nos. 46, 109, 112.

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1 **I. INTRODUCTION**

2 Johnson's opposition confuses the District Defendants' previous standing arguments with
 3 its current arguments on the merits. A dismissal under Federal Rule of Civil Procedure 12(b)(6)
 4 is a merits decision and the District Defendants made no arguments in their supplemental brief
 5 regarding Johnson's Article III standing. Johnson's mandate and law of the case arguments are
 6 simply misplaced. Moreover, Johnson's attempt to fuse the State Board of Governors and the
 7 District Defendants conflates Eleventh Amendment immunity constraints with liability on the
 8 merits and ignores relevant state law treating community college districts as distinct legal entities
 9 from the State. Johnson further restates his previous arguments that draw the District Defendants'
 10 authority to enforce Cal. Code Regs. tit. 5, §§ 53602(b) and 53605(a)¹ too broadly and fails to
 11 identify a District policy or custom that goes beyond the minimum requirements of state law.
 12 Finally, the Ninth Circuit's dismissal of the State for lack of Article III standing requires
 13 dismissal under FRCP Rule 19 because the State is now an indispensable party that cannot be
 14 joined.

15 **II. LEGAL ARGUMENT**

16 **A. DISMISSING JOHNSON'S COMPLAINT UNDER FEDERAL RULE OF**
 17 **CIVIL PROCEDURE 12(B)(6) COMPLIES WITH THE MANDATE**

18 Johnson misreads the Ninth Circuit's mandate. Johnson claims the Ninth Circuit gave "a
 19 very specific instruction" to "consider Johnson's motion for a preliminary injunction in the first
 20 instance." ECF No. 112, p. 5:6-8. He argues dismissing the case is incompatible with the
 21 mandate because dismissing the case does not "resolve Johnson's preliminary injunction motion."
 22 *Id.* at 5:8-9. But dismissing the case for failure to state a claim will both "consider" (in the Ninth
 23 Circuit's phrasing) and "resolve" (in Johnson's) the outstanding preliminary injunction motion.
 24 *Id.* at 5:6-9. Finding Johnson failed to adequately meet the standards to maintain a claim in
 25 federal court and is therefore not entitled to a preliminary injunction *is* considering Johnson's
 26 motion. All of this complies with the Ninth Circuit's mandate.

27 _____
 28 ¹ Except where otherwise noted, all future references are to title 5 of the California Code of Regulations.

Johnson ignores the second half of the mandate rule: “While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues.” *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 168 (1939). Mandate is a flexible rule; one that does not require district courts to “woodenly follow a mandate’s strict terms where patent injustice or absurdity would result.” *United States v. Kellington*, 217 F.3d 1084, 1095 n.12 (9th Cir. 2000). “Courts are still free as to anything not foreclosed by the mandate.” *Montana v. Talen Mont., LLC*, 130 F.4th 675, 691-92 (9th Cir. 2025) (internal quotes and citations omitted). Thus, on remand, the task of carrying out the mandate requires courts to “distinguish matters that have been decided . . . from matters that have not.” *Kellington*, 217 F.3d at 1093. This calls for a holistic reading of both the mandate and the “full text” of the higher court’s opinion to determine if the higher court imposed “clear limits on the scope of remand.” *Stacy v. Colvin*, 825 F.3d 563, 568-69 (9th Cir. 2016); *Hall v. City of L.A.*, 697 F.3d 1059, 1067 (9th Cir. 2012).

1. The Ninth Circuit Decided Johnson’s Pre-Enforcement Article III Standing Only

a. Standing Determinations Are Not Determinations on the Merits

It appears Johnson confuses the District Defendants’ argument that he failed to state a claim with whether Johnson had pre-enforcement First Amendment Article III standing to assert his claims. *See* ECF No. 112 at 6:1-7:17 (arguing “Defendants directly attack elements of Johnson’s standing”). “But whether a party has standing to bring a facial challenge and whether that challenge succeeds on the merits are different questions.” *Ariz. Attys. for Criminal Just. v. Mayes*, 127 F.4th 105, 111 n.1 (9th Cir. 2025); *see also Iten v. Cty. of L.A.*, 81 F.4th 979, 985 (9th Cir. 2023) (“Whether the party [with standing] can ultimately prevail in the suit is an entirely different question.”). Johnson’s confusion incorrectly “conflate[s] standing with the merits” simply because “a merits question may look similar to the standing question of whether there is an injury in fact traceable to the relevant law under which the plaintiff has brought suit.” *Iten*, 81 F.4th at 985 (quoting *Lazar v. Kroncke*, 862 F.3d 1186, 1198-99 (9th Cir. 2017)).

The District Defendants do not challenge by their currently pending motion to dismiss Johnson’s pre-enforcement First Amendment Article III standing to challenge sections 53602(b),

53605(a) and Education Code section 87732(f) to the extent it incorporates sections 53602(b) and 53605(a). That *is* what the Ninth Circuit decided and *is* binding on the District Court and the parties. *See* Amended Memorandum Opinion, *2-6. Rather, the District Defendants argue Johnson’s complaint fails to adequately state a claim and should therefore be dismissed under Federal Rule of Civil Procedure 12(b)(6). *See* ECF No. 46, District Defendants’ Motion to Dismiss, pp. 12:23-13:8; ECF No. 109, pp. 7:22-17:6. A Rule 12(b)(6) dismissal for failure to state a claim is a ruling on the merits. *O’Handley v. Weber*, 62 F.4th 1145, 1162 (9th Cir. 2023) (“Turning to the merits, we affirm the district court’s dismissal . . . under Rule 12(b)(6) because [plaintiff] has failed to state a claim on which relief can be granted.”).

The two modes of analysis – Article III standing on one hand and Rule 12(b)(6) failure to state a claim on the other – are “not the same” and the distinction is “not merely academic.” *Carpenters Pension Fund of Ill. v. MiMedx Grp., Inc. (In re MacPhee)*, 73 F.4th 1220, 1240 (11th Cir. 2023); *Iten*, 81 F.4th at 985. Article III standing is a *threshold jurisdictional* question necessary for a “case of controversy” and both precedes, and is distinct from, the merits of a claim. *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011). However, the failure to adequately allege an element of a cause of action, and therefore the failure to state a claim upon which relief can be granted, is a *totally different analysis*. *Iten*, 81 F.4th at 985 (distinguishing between standing analysis and Rule 12(b)(6) analysis); *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 734 (1st Cir. 2016) (noting standing determinations and Rule 12(b)(6) determinations are “fundamentally distinct”). A plaintiff “can meet the requirements of constitutional standing but nonetheless fail to state a claim.” *In re MacPhee*, 73 F.4th at 1240; *Hochendoner*, 823 F.3d at 734 (“An individual’s plausible allegations of a personal injury will generally suffice to plead an injury in fact, even if the claim is ultimately lacking on the merits. . . . It follows that, in conducting our inquiry into standing, we have not considered the validity of any of plaintiffs’ claims as a matter of law *or the adequacy of their pleading to state a claim under Rule 12(b)(6).*”) (emphasis added).

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b. The Ninth Circuit Declined to Decide the Merits

The only matter the Ninth Circuit decided was the extent to which Johnson adequately alleged “an intention to engage in a course of conduct arguably affected with a constitutional interest under the First Amendment” with regard to the various statutes, regulations, and policies he challenges as required for pre-enforcement Article III standing. Amended Memorandum Opinion, *3-6 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)) (internal quotation marks omitted). The Ninth Circuit’s Amended Memorandum Opinion stated “[w]e decline to decide whether Johnson is entitled to a preliminary injunction,” which then informs the subsequent statement that the matter is “remand[ed] for the district court to consider Johnson’s motion for a preliminary injunction in the first instance.” *id.* at *6-7.

These paired statements undermine Johnson’s claim that the mandate should be read restrictively such that the District Court cannot dismiss the motion for failure to state a claim. The Ninth Circuit made no substantive ruling, explicitly declined to make such a ruling, and indicated the District Court should analyze the motion in the first instance. Amended Memorandum Opinion, *6-7. There is no restriction on how the District Court conducts that analysis nor any limitation on the District Court’s final conclusion *on the merits*.

c. Johnson Fails to State a Claim on the Merits

As noted in the District Defendants’ Supplemental Brief on the Motion to Dismiss, Johnson has failed to establish a required element under 42 U.S.C. § 1983 to show that a *District* policy or custom is the proximate cause of his alleged injury. *See* ECF No. 109 at 13:18-17:6. This is a merits argument under Rule 12(b)(6); not an Article III standing argument. The fact that a Court must understand the elements of an alleged cause of action is deciding standing, does not mean it passes on those merits in making the standing decision. “Although standing in no way depends on the merits of the plaintiff’s [case] . . . , it often turns on the nature and source of the claim asserted.” *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

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**B. PRE-ENFORCEMENT FIRST AMENDMENT ARTICLE III STANDING
IS THE ONLY LAW OF THE CASE**

“The doctrine of law of the case comes into play only with respect to issues previously determined.” *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (citing *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895)). The doctrine is narrower than the rule of mandate. *United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995). Law of the case generally precludes a court “from reconsidering an issue decided previously by the same court or by a higher court in the identical case.” *Hall*, 697 F.3d at 1067. “The issue in question must have been decided explicitly or by necessary implication in the previous disposition.” *Id.*

Johnson’s law of the case argument fails for the same reasons Johnson’s mandate argument fails. There is no law of the case here outside of the Ninth Circuit’s decision on Article III pre-enforcement standing. The District Court’s original Order dismissing the case and the Ninth Circuit’s Amended Memorandum Opinion only reached the jurisdictional issue of Johnson’s Article III standing. Neither court reached the merits, either explicitly or implicitly.

Johnson’s attempt to substitute the standing analysis for merits analysis does not create an issue for law of the case. The fact that, in the Ninth Circuit’s analysis, the District Defendants is the entity with the authority to enforce sections 53602(b) and 53605(a) for the purpose of standing traceability does not actually establish the District Defendants are the proximate cause of his alleged injury on the merits. *See O’Handley*, 62 F.4th at 1161 (distinguishing between traceability for standing analysis and proximate causation for merits analysis). Nor does Johnson’s failure to state a claim, and the subsequent dismissal under Rule 12(b)(6), affect the “redressability” of his injury. *Iten*, 81 F.4th at 985 (noting that a dismissal for failure to state a claim does not mean a plaintiff was not “injured” for the purpose of redressability standing analysis). *Leslie Salt*, relied on by Johnson, is therefore inapposite because dismissal under Rule 12(b)(6) requires no reconsideration of the Ninth Circuit’s decision. *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392-93 (9th Cir. 1995).

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C. CALIFORNIA COMMUNITY COLLEGE DISTRICTS ARE SEPARATE ENTITIES FROM THE STATE FOR LIABILITY ANALYSIS

Johnson’s attempt to portray the District Defendants as purely state actors fails to acknowledge or engage with relevant state law regarding the construction, organization, and distribution of statutory authority within the California Community College system. The District possesses Eleventh Amendment immunity, which can be bypassed if officials are sued in their official capacities and have “some connection with the enforcement of the act.” *See* ECF No. 112, p. 8:6-12 (citing *Woolard v. Thurmond*, No. 24-4291 2025 U.S. App. LEXIS 23475, at *8 n. 2 (9th Cir. Sept. 11, 2025)). The District Defendants do not contest the *Ex Parte Young* exception as applied to the District Defendants’ Eleventh Amendment immunity. But that only gets Johnson in the door and defines the constraints placed on his suit. *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 254 (9th Cir. 1992). Whether an entity has Eleventh Amendment immunity does not, in turn, establish prospective injunctive liability under 42 U.S.C. § 1983, which depends on the specific actions of each individually named defendant. *Ashcroft v. Iqbal*, 556 U.S. 662, 676-77 (2009).

The District Defendants’ position is consistent *Kohn*’s “entity-based” approach to determining whether an entity possesses Eleventh Amendment immunity. *Kohn v. State Bar of Cal.*, 87 F.4th 1021, 1029-1031 (9th Cir. 2023). The need for an “entity-based” approach at all inherently recognizes that the State’s Eleventh Amendment immunity can nonetheless extend to entities that appear otherwise distinct from the State. *See Kohn*, 87 F.4th at 1029 n.8 (comparing cases assessing where entities could sue and be sued and take property in their own names, but coming to different conclusions as to whether those entities possessed Eleventh Amendment immunity). Moreover, *Kohn* says nothing as to liability standards after a plaintiff satisfies one of the narrow exceptions to Eleventh Amendment immunity.

The way California state law structures the California Community College system recognizes that the State Board of Governors is a separate entity from the individual community college districts they oversee. The structure of the entire system is bilateral and hierarchical, with the Board of Governors at the top establishing regulations – including the specific regulations

Johnson challenges – and maintaining oversight of local community college districts. *Compare* Cal. Ed. Code, § 70901 *with id.* § 70902; *see also* *Coast Cmty. Coll. Dist. v. Comm'n on State Mandates*, 13 Cal. 5th 800, 809 (2022) (noting the California Legislature has “cabined the authority of district boards” by, in part, “assign[ing] general oversight authority of the districts to the Board of Governors of the California Community Colleges . . . which enacts regulations” governing community college districts).

Indeed, the California Legislature has at times taken steps to actively restructure the California Community College system to give the State, through the Board of Governors, more authority and oversight over local community college districts. *See id.* at 810; *Diablo Valley Coll. Faculty Senate v. Contra Costa Cmty. Coll. Dist.*, 148 Cal. App. 4th 1023, 1032 (2007) (explaining the California Legislature in 1988 made “substantial changes in the administration and governance of the state’s community colleges” by establishing a “statewide board of governors and charg[ing] this body with establishing minimum standards to govern academic matters, hiring, administration and governance”). Increasing the State’s direct statutory authority and oversight over local community college districts would be illogical if the districts were not distinct entities from the State. Moreover, sections 53602(b) and 53605(a) were promulgated by the State in furtherance of State’s statutory authority to adopt regulations establishing “minimum standards as required by law” for “employment of academic staff in community colleges” – one of the areas where the District Defendants’ authority is “cabined.” *See* Ed. Code, § 70901(b)(1)(B); Cal. Code Regs. tit. 5, § 53400; *Coast Cmty. Coll. Dist.*, 13 Cal. 5th at 809-810.

California law also regularly distinguishes between the State and local community college districts as distinct entities for a multitude of purposes, including tort liability. *See e.g.*, Cal. Gov. Code, §§ 900.4, 900.6, 940.4, 940.6 (distinguishing “the State” and “any office, officer, . . . board, . . . or agency of the State” from “local public entity,” which includes public districts for the purpose of tort liability against public entities); *id.* § 53263 (distinguishing between a “community college district” and “public agency of the state” for the purpose of employment contracts); *id.* § 53850 (a) (defining “local agency” to include a “community college district” for the purpose of temporary financial borrowing); *id.* § 53859 (distinguishing between a “local

agency” such as a “community college district” from the state or federal government for the purpose of grants, loans, or a combination of both”); *id.* § 54951 (defining “local agency” as including a “school district” for public meeting requirements that do not apply to the State); Cal. Ed. Code, § 7051 (defining “officers and employees of a local agency” as including a “community college district” for the purpose of political activities); *id.* § 72205 (authorizing the governing board of a community college district to accept a gift, donation, bequest, or devise without the “approval of any state agency”); *id.* § 81310 (authorizing the governing board of a community college district to “dedicate or convey *to the state*” any real property belonging to the district) (emphasis added); *id.* § 81800(b) (stating “the education of community college students is a *joint obligation* and function of *both* the state and community college districts”) (emphasis added). Additionally, administrative officers of the District are local employees of the governing board; not state employees. *See* Cal. Ed. Code, § 72411; *Gonzales v. State*, 29 Cal. App. 3d 585, 590-91 (1972); *see also* Cal. Const., Art. VII §§ 1, 4 (exempting “[o]fficers and employees of . . . the California State Colleges,” but not the Board of Governors or its officers and employees, from state civil service).

These nuances and distinctions matter for establishing section 1983 liability as they show that the State Board of Governors and the local community colleges are distinct entities even if both entities possess Eleventh Amendment immunity. The fact that State’s Eleventh Amendment immunity extends to the District Defendants does not transmute the District into the State or render the District’s characteristics as a separate entity irrelevant for section 1983 constitutional tort liability purposes based on actions the District is forced to take. *First Interstate Bank v. California*, 197 Cal. App. 3d 627, 633-34 (1987); *Iqbal*, 556 U.S. at 676-77. Johnson cannot bypass a showing of proximate cause on the merits by pointing to a State policy the District Defendants did not develop or promulgate, that was placed upon the District Defendants by force of law rather than through their own decision making, and that dictates the District must evaluate Johnson on DEIA competencies and teaching practices simply because the District Defendants are assigned to enforce that policy. *Snyder v. King*, 745 F.3d 242, 246-47 (7th Cir. 2014). That minimal allegation may suffice for standing, but it is insufficient for the merits.

D. DISTRICT DEFENDANTS MUST IMPLEMENT DEIA EVALUATIONS

Johnson continues to define the District Defendants’ discretion in enforcing sections 53602(b) and 53605(a) too broadly. As explained more fully in the District Defendants’ motion to dismiss and corresponding supplemental brief, Johnson challenges the minimum faculty DEIA evaluation requirements in sections 53602(b) and 53605(a). The District’s discretion to *not* implement these sections is necessarily eliminated by these minimum requirements and Johnson makes no allegation the District goes beyond them. *See* ECF No. 46, pp. 23:6-24:13; ECF No. 109, pp. 13:3-17:6.

E. THE DISMISSAL OF THE BOARD OF GOVERNORS REQUIRES THE ENTIRE CASE BE DISMISSED

The District Defendants do not challenge the Ninth Circuit’s decision that Johnson lacks standing to sue the State Chancellor of the California Community Colleges. Amended Memorandum Opinion, *6. But the Ninth Circuit’s dismissal of the State carries consequences under Federal Rule of Civil Procedure 19 and requires dismissal of the entire action.

The State is a necessary party because it has a legally protected interest in the subject of the suit – the constitutionality of sections 53602(b) and 53605(a). *See* Fed. R. Civ. P. 19(a)(1)(B). Granting Johnson a preliminary injunction barring the District from evaluating him on the requirements of sections 53602(b) and 53605(a) would give Johnson all the relief for which he prayed, but would also “impair or impede” the State’s ability to protect its interest in the constitutionality of these sections. *See Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 2017). The *Shermoen* Court explicitly rejected appellants’ argument that the “legality” of the challenged law determines whether a party is necessary. *Id.* Rather, the Court held Rule 19 requires only that the party have “a *claim* to an interest.” *Id.* (emphasis in original). The dismissal of the State on Article III jurisdictional grounds does not lower or eliminate the State’s claim to an interest in the constitutionality of its own title 5 regulations, which are the sole responsibility of the Board of Governors. *See* Cal. Ed. Code, § 70901(c).

Additionally, while the District Defendants and the State “share the same ultimate goal” in defending the constitutionality of their respective actions from a preliminary injunction, the

1 mandatory nature of the DEIA Regulations on the District Defendants “presents a potential
 2 conflict of interest.” *Shermoen*, 982 F.2d at 1318. Because the District Defendants did not draft
 3 and promulgate the DEIA Regulations, they cannot adequately represent the State’s interest in
 4 enforcement. The District Defendants have no choice but to implement sections 53602(b) and
 5 53605(a). *See* Cal. Ed. Code, § 70902(a), (c). Therefore there is no longer a nonconflicted
 6 named party because the District Defendants cannot concede or agree to not enforce those
 7 sections against Johnson without compromising its competing interest in avoiding enforcement
 8 action by the Board of Governors. *See Shermon*, 982 F.2d at 1318.

9 Finally, the State is indispensable to this case because the effect of a preliminary
 10 injunction in favor of Johnson would be “to restrain the Government from acting, or compel it to
 11 act.” *Id.* at 1320 (citing *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 704 (1949)). But
 12 the State, “while necessary, cannot be joined” due to Johnson’s lack of Article III standing against
 13 it. *Id.* at 1318. Therefore, the entire matter must be dismissed. *Id.* at 1319-21.

14 **III. CONCLUSION**

15 For the foregoing reasons, the Court should grant the District Defendants’ motion to
 16 dismiss.

17 Dated: October 24, 2025

LIEBERT CASSIDY WHITMORE

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