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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAYMON JOHNSON,

Plaintiff,

v.

JERRY FLIGER, et al.,

Defendants.

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

PLAINTIFF DAYMON JOHNSON'S BRIEF IN REPLY TO DEFENDANTS' OPPOSITION TO SUPPLEMENTAL BRIEF RE: MOTION FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Defendants' latest brief makes one thing clear: the parties' dispute is one of law. Given the absence of evidence beyond Johnson's declaration of his beliefs and intended speech, this Court should consider its option of entering not a preliminary injunction, but a permanent one.

Defendants would have this Court erroneously apply *Pickering*'s retaliation standard to all of Johnson's claims. *Pickering* may have governed Defendants' feared reaction to Johnson's speech as "unprofessional conduct" or "unsatisfactory performance" under Cal. Educ. Code § 87732(f), which would have been a form of retaliation. But those claims are gone. What remain are Johnson's challenges to categorical rules. These require *NTEU*'s modification of *Pickering*, and to the extent Johnson challenges the compulsion of speech, strict scrutiny. Contrary to Defendants' arguments, *NTEU* is not limited to its facts.

Ultimately, however, the standards of review do not determine the outcome of Johnson's claims. To be sure, the question of which standards apply is important, because the Court must first decide how to evaluate the First Amendment claims. But all the standards require something Defendants lack: an interest in requiring Johnson to obey the challenged DEIA and anti-racism mandates.

Defendants' denial of the fact that the challenged regulations impact Johnson's speech is frivolous not merely on its own lack of merit, and not merely because it contradicts their earlier position. The law of the case precludes it, as the Ninth Circuit has already decided that the regulations impact Johnson's speech—the basis for his standing. And just as Johnson is at least likely to prevail on his First Amendment claims, it follows that an injunction against these regulations on their face and as applied to Johnson is warranted.

ARGUMENT

I. THIS COURT SHOULD ENTER A PERMANENT INJUNCTION.

"[A] court may, in its discretion, advance a trial on the merits and consolidate it with a hearing on a motion for a preliminary injunction." *Thomas v. Zachry*, No. 3:17-cv-0219-LRH-WGC, 2017 U.S. Dist. LEXIS 75389 at *3 (D. Nev. May 17, 2017) (citing Fed. R. Civ. P. 65(a)(2)).

> Consolidation is generally appropriate when it would (1) result in an expedited resolution of the case; (2) conserve judicial resources and avoid duplicative proceedings; (3) involves only legal issues based on uncontested evidence and public records; and (4) would not be prejudicial to any of the parties.

Id. (citations omitted).

Each of these grounds support the granting of a permanent rather than a preliminary injunction upon notice.[1] The case has suffered extensive delays already, and there is no need to later re-do the motions practice on the case's merits, which can be decided based on the uncontested evidence of Johnson's desired speech and the plain facts of the challenged regulations already before the Court. All parties, the Court, and the public share an interest in a final determination of the merits.[2] "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Flexible Lifeline Sys. v. Precision Lift, Inc.*, 654 F.3d 989, 996 (9th Cir. 2011) (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987)). And as a matter of law, Johnson's remaining claims indeed succeed.

II. *PICKERING* APPLIES IN RETALIATION CASES, *PICKERING/NTEU* APPLIES WHEN EMPLOYEES CHALLENGE RULES.

Defendants begin by arguing that because *Pickering* applied in various government employee speech cases, it must apply here. Supp. Opp. at 7 (citing *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014); *City of San Diego v. Roe*, 543 U.S. 77 (2004); *Moser v. Las Vegas Metro. Police Dep't*, 984 F.3d 900 (9th Cir. 2021); and *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454 (3d Cir. 2015)).

This is too simplistic. By the same token, Johnson could argue that *NTEU/Pickering* must apply just because it applied in a host of *other* government employee speech cases, including in *NTEU* itself, *U.S. v. Nat'l Treasury Emps. Union (NTEU)*, 513 U.S. 454 (1995).

Tallying up lists of cases proves only that sometimes *Pickering* "classic" applies, and sometimes *Pickering* must be modified by *NTEU*. But the rule of decision is not mysterious. As Johnson explained, *Pickering* applies in cases involving "one employee's speech," but *NTEU* modifies

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[1] "A district court must give clear and unambiguous notice" of its intent to consolidate, "either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective case." *Slidewaters LLC v. Wash. State Dep't of Labor & Indus.*, 4 F.4th 747, 759 (9th Cir. 2021) (internal quotation marks omitted).

[2] The Court should withhold final judgment only if it would grant the motion to dismiss on issues outside those raised by Johnson's motion, in which case leave to amend may be appropriate.

Pickering where the issue is "a blanket requirement" applied to all employees. *Janus v. AFSCME, Council 31*, 585 U.S. 878, 907 (2018) (quoting *NTEU*, 513 U.S. at 467). *Pickering* applies to "a single supervisory decision," *NTEU* modifies it where the plaintiff challenges "[a] speech-restrictive law with 'widespread impact.'" *Id.* (quoting *NTEU*, 513 U.S. at 468). *Pickering* applies to "'an adverse action taken in response to actual speech,'" while *NTEU* modifies it if "a prospective restriction 'chills potential speech before it happens.'" *Moonin v. Tice*, 868 F.3d 853, 861 (9th Cir. 2017) (quoting *NTEU*, 513 U.S. at 468). *Pickering* applies to "an isolated disciplinary action," while *NTEU* modifies it where the government "seeks to justify an ex ante speech restriction." *Id.* (internal quotation marks omitted).

Because *Pickering* classic is a retaliation standard, the Ninth Circuit adjudicates such claims using a five-factor balancing test that looks back at how the plaintiff "spoke," whether that speech "was a substantial or motivating factor in the adverse employment action," and whether the government "had an adequate justification" or "would have taken the adverse employment action even absent the protected speech." *Moser*, 984 F.3d at 904-05 (internal quotation marks omitted).

Unsurprisingly, all of the *Pickering* cases Defendants cite have one thing in common: they were all retaliation cases. They challenged punishment handed down for speech that had occurred. Johnson, however, seeks to enjoin two generally applicable speech restrictions. Indeed, he challenges these regulations not only as-applied to himself, but facially. It's hard to see how the Ninth Circuit's *Pickering* classic test, with its retrospective focus, could apply considering Johnson is still employed and the rules he challenges do not single out a specific statement. To the extent that any form of *Pickering* applies, that form of *Pickering* contains the *NTEU* modification.

III. *NTEU* IS NOT LIMITED TO ITS FACTS, OR TO THE FACTS OF ANY OTHER CASE.

Ignoring the fact that *Pickering/NTEU* applies where rules, rather than retaliation, are challenged, Defendants seek to limit *NTEU* to its facts. In *NTEU*, they point out, the rule governed "expression outside [the workers'] employment." Supp. Opp. at 7 (citation omitted). Next, forgetting that Johnson is also concerned with his extracurricular speech, Defendants claim that Johnson is focused "on his teaching and academic speech pursuant to his position as a faculty member and on 'what is taught in public college classrooms.'" *Id.* (quoting Johnson's discussion of

§ 53605(a)). Defendants then reason that because *NTEU* concerned a challenge on extracurricular speech, and Johnson is (allegedly) concerned only with on-duty speech, *NTEU* doesn't apply.

This is akin to arguing that *Marbury v. Madison* applies only to cases concerning the delivery of judicial commissions. The rule for applying *NTEU* is clear. Even if Johnson were exclusively concerned with classroom speech, what matters is that Johnson challenges rules, not retaliation. The fact that *NTEU* addressed extracurricular speech is irrelevant. Indeed, courts have applied *NTEU* to protect on-the-job speech. For example, in *Amalgamated Transit Union Local 85 v. Port Auth. of Allegheny Cty.*, 39 F.4th 95 (3d Cir. 2022), the Third Circuit applied *NTEU* to strike down a rule forbidding government employees from wearing political facemasks while on duty. *Id.* at 105. There is no reason to suppose that *NTEU* does not apply to the rules governing professors' speech in as well as outside the classroom.[3]

Defendants repeat a version of this argument, offering that *NTEU* must only apply in some types of prior restraint cases because the Ninth Circuit applied *NTEU* in *Moonin*, a case that concerned a prior restraint. In *Moonin,* the panel found that an email prohibiting the discussion of certain topics was unlawful. It then inquired whether the defendant enjoyed qualified immunity. Reviewing potentially analogous precedent, the court observed that "[e]mployer prior restraint cases address a spectrum of workplace regulations falling, *generally,* into three categories." *Moonin*, 868 F.3d at 869 (emphasis added). Omitting the word "generally" and the fact this all took place in a qualified immunity context, and not reading the case further, Defendants declare that Johnson's claims fall outside of *Moonin* categories and therefore can't implicate *NTEU*.

This is meritless. The Supreme Court did not limit *NTEU* to any category of prior restraint cases. Indeed, the term "prior restraint" doesn't appear in *NTEU.* Nor could *Moonin* limit the

[3] Indeed, it is especially illogical to exclude *NTEU* from cases that concern academic speech. Because "teaching and [academic] writing are a special concern of the First Amendment," *Demers*, 746 F.3d at 411 (internal quotation marks omitted), professors have greater First Amendment rights than other public employees, in the form of an exemption from *Garcetti*'s denial of First Amendment protection for official duty speech. It would make no sense to offer academic speech less protection precisely in those circumstances that need it the most—where the government does not merely retaliate against one employee, but regulates the speech of many employees.

application of Supreme Court precedent. To the contrary, as quoted above, *Moonin* correctly spells out the rule for applying *NTEU,* distinguishing retaliation claims from categorical challenges.

A closer reading of *Moonin* does not save Defendants' theory. The Ninth Circuit employed the term "prior restraint" somewhat loosely to distinguish the plaintiff's claim "from the retaliation claims that more commonly raise questions regarding the scope of public employees' First Amendment rights, and because cases considering similar challenges have done so." *Moonin*, 868 F.3d at 858 n.1 (citations omitted).[4] Johnson's case, like *Moonin*'s, is not among the more-common retaliation cases. And a qualified immunity analysis of the kind Defendants grasp at does not limit the constitutional rule; it only asks whether the defendant was on notice of it.

Section 53605(a) is hard to categorize as a pure prior restraint. In one sense it prohibits non-conforming, non-DEIA and non-anti-racist speech, but it acts by compelling rather than restraining speech. Section 53602(b), however, fits more neatly into the third *Moonin* category: "regimes prohibiting any and all discussion of certain topics with the public." *Moonin*, 868 F.3d at 869. The panel viewed *NTEU* as this type of case, even though *NTEU*'s "restriction banned only an incentive for the creation of speech, rather than speech itself." *Id.* at 872. Likewise, the DEIA regulations at least disincentivize, if not prohibit, Johnson's ideologically non-compliant speech. Indeed, they do not merely restrict his ability to earn money from outside speech, as was the case in *NTEU*; they threaten to end his career.

NTEU is not limited to the facts of any case. It plainly governs this non-retaliation case.

IV. STRICT SCRUTINY GOVERNS JOHNSON'S COMPELLED SPEECH CLAIM.

Defendants err in claiming that "Johnson provides no authority that a compelled speech or viewpoint discrimination claim *by a government employee* requires the application of strict scrutiny . . . rather than *Pickering* balancing." Supp. Opp. at 10. Johnson opens his compelled speech argument with *Janus*, which directly addressed the issue. Johnson Supp. at 6-7. Defendants have no real response, other than complaining that *Janus*'s discussion is dicta, but they neither question that

[4] "In First Amendment law, a prior restraint is an order 'forbidding certain communications when issued in advance of the time that such communications are to occur.'" *Twitter, Inc. v. Garland*, 61 F.4th 686, 702 (9th Cir. 2023) (quoting *Alexander v. United States*, 509 U.S. 544, 550 (1993)).

strict scrutiny governs compelled speech claims generally, nor explain why the Supreme Court erred in declaring that "the *Pickering* framework fits much less well where the government compels speech." *Janus*, 585 U.S. at 908. And as the Supreme Court also explained, "we have never applied *Pickering* in [a compelled speech] case." *Id.*

Janus signaled that government employees would rarely raise compelled speech claims, because under *Garcetti*, "if the speech in question is part of an employee's official duties, the employer may insist that the employee deliver any lawful message." *Id.* Only academics are exempt from *Garcetti*, and at least until now, state colleges had enough respect for basic academic freedom to refrain from imposing a political orthodoxy on all faculty. So this is an unusual case (of Defendants' making), but it is what it is: a public employee compelled speech case that falls outside *Garcetti*. While the standard of review ultimately makes no difference (*see infra*), that standard is strict scrutiny.

V. THE DEIA REGULATIONS REGULATE JOHNSON'S SPEECH.

Johnson need not respond to Defendants' new argument, denying that the DEIA regulations regulate or prohibit speech, and asserting instead that they "focus on the teaching and learning *practices* Johnson employs in his classrooms and Johnson's demonstrated, or progress toward, *proficiency* in the District's DEIA competencies," Supp. Opp. at 8 (citations omitted). The claim's falsity is, in the first instance, beside the point, because this Court is unable to adopt it.

It is law of the case that "Johnson has established a concrete plan to violate the law based on his allegations regarding his desired speech and his refusal to express support for diversity, equity, inclusion, and accessibility (DEIA) principles." Dkt. 104 at 3 (internal quotation marks omitted). In other words, his speech violates the law. In reaching this decision, the Ninth Circuit "ask[ed] whether the plaintiff would have the intention to engage in the proscribed conduct, were it not proscribed." *Id.* (internal quotation marks omitted). His conduct is "proscribed." It mattered ("importantly") that "the District Defendants have not disavowed enforcement." *Id.* at 4 (citation omitted). The Ninth Circuit believed that the regulations could be enforced over Johnson's speech.

This Court cannot overrule the Ninth Circuit's holding that Johnson is at risk of enforcement because his intended speech will violate the challenged laws, a conclusion bolstered by Defendants' refusal to disavow enforcement. *United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007).

While Defendants' dismissal arguments fail by necessary implication of the Ninth Circuit's decision, *see* Dkt. 112, that opinion *explicitly* forecloses the notion that the DEIA regulations don't cover Johnson's speech. They do, and this has been litigated conclusively to the Ninth Circuit.

Johnson could rest here, but it bears mentioning why the Ninth Circuit held that the challenged regulations implicate Johnson's speech. For one thing, Defendants' vision of the DEIA regulations as requiring no more than dry, values-free technocratic performance measures is a recent development. Earlier, Defendants admitted that the DEIA mandates are "simultaneously sensitive, urgent, politically charged, and potentially polarizing," and that they "stir powerful emotions and create impressions in the student community and with the public that that can last a lifetime." Defendants Opp., Dkt. 43, at 20. That is, that they are controversial speech regulations.

At oral argument before Judge Baker, Defendants confirmed that the DEIA regulations restrict what Johnson may or must say. They offered that Johnson asked "this Court . . . to intervene and say that the judiciary knows better than the Board of Governors of California what professors are supposed to teach." T. at 25/24-26/2. They sought to describe the case as speculative, but conceded the possibility of "someone being disciplined for violating these regulations about what should be taught." T. at 26/3-6. They compared Section 53605(a) to a regulation mandating that "you have to talk about [climate change] in class." T. at 26/12. Even in arguing that the DEIA regulations do not require Johnson's personal belief in the ideology, Defendants admitted, "what they're saying is you have to teach this and it's not saying you have to say like in an oath case, that you personally believe this. They're saying that this has to be taught, and [how] is up to the discretion of the instructor." T. at 58/17-20. Unsurprisingly, Magistrate Judge Baker found that "[i]t is unclear how Plaintiff could demonstrate proficiency in DEIA principles, for purposes of tenure review, if he is not required to advocate and promote these concepts in his classroom." Dkt. 70 at 35 (footnote omitted).

Defendants offer no citation to support their new interpretation of the DEIA mandate as relating to "grading anonymously, creating opportunities to discuss feedback with students, and using low-cost or zero-cost course materials." Supp. Opp. at 8. Defendants have refrained from putting anything in writing as far as DEIA policies, preferring instead to complain that they cannot be enjoined because no such policies are as yet formally adopted. *See, e.g.,* Appellees' Br. at 12-13, 17,

18 ("in this case. . . the local community college district ha[s] not even implemented the regulation at issue"), 45-47. But that argument has now failed on appeal, at least with respect to Johnson's remaining challenges.

And for good reason. The state cannot require faculty to follow a political ideology, then avoid First Amendment accountability because it hasn't fully defined it. DEIA and anti-racism encompass a set of political beliefs and outlooks, many of which are codified, *see* Cal. Code Regs., tit. 5, §§ 51201(b), (c). The State Chancellor has adopted Competencies and Criteria that flesh out these understandings, which are relevant to the meaning of DEIA even if they are not themselves directly challenged, as well as a glossary. And of course, there is Johnson's declaration, which explores the myriad ways that this ideology is defined and applied, and gives his reasons for objecting.

A full examination of DEIA and anti-racism's tenets is beyond this brief's scope, and not necessarily relevant except to establish that the regulations are, in fact, an ideological project.[5] Defendants' efforts to paint it as something disconnected from speech or viewpoint will not wash. Suffice it to say, DEIA and anti-racism do not reflect traditional ideals such as equal opportunity and colorblindness. For example: Defendants offer a dictionary definition of "equity" as "[t]he situation in which everyone is treated fairly according to their needs and no group of people is given special treatment." Supp. Opp. at 9 n.2 (citation omitted). Johnson might argue that "according to their needs" makes the treatment unfair and special. The Chancellor's original DEI glossary offers a more stark take, defining "equity" as "[t]he condition under which individuals are provided the resources they need to have access to the same opportunities, as the general population. Equity accounts for systematic inequalities, meaning the distribution of resources provides more for those who need it most." CCC Glossary, https://perma.cc/T22V-V866 at 4 (last visited Oct. 24, 2025). The Chancellor has since softened this definition, adding relatively uncontroversial supposed examples of "equity" such as SNAP and the ADA. *See* CCC Glossary, https://perma.cc/N57N-DJRK at 4 (last visited Oct. 24, 2025). But the basic idea remains redistribution to achieve supposedly more equal outcomes, a distinct political philosophy that Johnson opposes.

[5] Defendants would also violate the First Amendment if they imposed other ideological projects on faculty in this fashion.

And so, there is no divorcing Defendants' "equity" (to use just one strand of the DEIA/anti-racism enterprise) from political speech. "Requiring me to 'employ teaching, learning, and professional practices that reflect DEIA and anti-racist principles' violates my right to academic freedom, which includes the freedom to reject these principles in considering how I function as an academic." Johnson Decl. ¶ 69; *see also id.* ¶ 79 (opposing DEI and race-conscious pedagogy and/or curriculum as reflecting the views of eight "self-proclaimed neo-Marxists"). Ordering faculty to conduct themselves according to a political ideology is not a mere regulation of conduct. And of course, the DEIA provisions require much more than following certain teaching methods.

VI. THE DEIA REGULATIONS FAIL ANY LEVEL OF SCRUTINY.

For all the discussion of which standards govern which claims, it remains the fact that the First Amendment simply does not tolerate the imposition of political orthodoxy on a college faculty. All analytical frameworks—*Pickering*, *Pickering/NTEU*, strict scrutiny—lead to the same result. Of course, on these non-retaliation facts, the Court cannot apply the Ninth Circuit's retrospective five-factor *Pickering* test, *Moser*, 984 F.3d at 904-05, and notwithstanding their persistent demands to apply *Pickering*, Defendants make no attempt to do so.

At *Pickering*'s first step, Defendants do not question that Johnson's speech addresses matters of public concern. They argue only at *Pickering*'s second step, where they carry the burden, *Demers*, 746 F.3d at 413, that their interests outweigh Johnson's interests in his speech. Defendants posit the state's interest as that "in efficiently carrying out its educational mission, ensuring teaching excellence, and in securing equal education opportunities for students." Supp. Opp. at 12. Accordingly, Defendants argue they have an interest in "assess[ing] teaching performance," "review[ing] the content of faculty scholarship and teaching," setting curriculum, preferring areas of scholarship, "establishing academic standards for the quality and method of delivering instruction to students," and "require[ing] faculty to deliver instruction in particular ways." *Id.* at 12-13. All of this is fine, as far as it goes.

But Johnson is not challenging the requirement that he submit to evaluations, or perform some task a certain way. He is challenging a requirement that he adhere to a political ideology. And Defendants make no connection between their legitimate interests, and the imposition on Johnson's

speech. They make zero effort to carry their burden, under *Pickering* let alone any other standard, of showing that the challenged regulations are necessary to advance their asserted interests. They merely posit their interests, and assert, *ipse dixit*, that these are more important than Johnson's speech rights, without even connecting let alone balancing the allegedly competing interests. This is not *Pickering*, or any other kind of analytical framework.[6] They do not carry their burden.

VII. JOHNSON SATISFIES THE REMAINING WINTER FACTORS.

Johnson is harmed today because he refrains from speech that would naturally impact his upcoming review for DEIA compliance. The lack of an enforcement threat is irrelevant in pre-enforcement cases. *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 129 (2007). Defendants' arguments along these lines is also yet another precluded attack on standing. And it is simply not possible that the state's interest in enforcing an unconstitutional law could serve the public interest. Finally, Defendants' argument against so-called mandatory injunctions is inapposite. Johnson seeks a prohibitive injunction. In any event, the distinction is unimportant. "The purpose of a preliminary injunction is always to prevent irreparable injury." *Doe v. Trump*, 957 F.3d 1050, 1068 (9th Cir. 2020) (internal quotation marks omitted). The time to do that is now.

CONCLUSION

The Court should enjoin Defendants from enforcing the challenged provisions.

Dated: October 24, 2025

Respectfully submitted,

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[6] Defendants also argue that hiring committee training is not compelled speech, but Johnson's main objection to hiring through a DEIA lens is to Section 53602(b). Supp. Br. at 7. As for *Sullivan v. Univ. of Wash*., 60 F.4th 574 (9th Cir. 2023), it remains inapposite. *See* Objections, Dkt. 74, at 5-6.