INSTITUTE FOR FREE SPEECH
Alan Gura, SBN 178221
agura@ifs.org
Courtney Corbello, admitted pro hac vice
ccorbello@ifs.org
Del Kolde, admitted pro hac vice
dkolde@ifs.org
1150 Connecticut Avenue, N.W., Suite 801
Washington, DC 20036
Phone: 202.967.0007
Fax: 202.301.3399

Attorneys for Plaintiff Daymon Johnson

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAYMON JOHNSON, *Plaintiff*, v. STEVE WATKIN, et al., *Defendants*.	Case No. 1:23-cv-00848-NODJ-CDB Date: N/A Time: N/A Dept: N/A Judge: NODJ Trial Date: Not Scheduled Action filed: June 1, 2023

PLAINTIFF'S RESPONSE TO KCCD DEFENDANTS' OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS RE: PRELIMINARY INJUNCTION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 304(d) to the Local Rules, Plaintiff Daymon Johnson respectfully responds to the KCCD Defendants' objections to the Magistrate Judge's Findings and Recommendations that Johnson's preliminary injunction motion be granted.

I. KCCD DEFENDANTS' GENERAL OBJECTIONS SHOULD BE OVERRULED.

KCCD Defendants misunderstand the purpose of the magistrate referral process. The idea is to *reduce* the Court's workload, not to double it by relitigating every single molecule of their losing arguments, no matter how specious—and many of these arguments would be found behind the proverbial kitchen sink. "[O]bjections to a R&R are not a vehicle to relitigate the same arguments carefully considered and rejected by the Magistrate Judge." *Eredina J. v. Kijakazi*, 2:21-cv-07041-FWS-DFM, 2023 U.S. Dist. LEXIS 15644, at *4 (C.D. Cal. Jan. 30, 2023) (internal quotation marks omitted). "[R]ecycl[ing] . . . previous arguments in an attempt to relitgate [the] case . . . is not the

purpose of 28 U.S.C. § 636." *Fix v. Hartford Life & Accident Ins. Co*., CV 16-41-M-DLC-JC, 2017 U.S. Dist. LEXIS 97643, at *3 (D. Mont. June 23, 2017) (citation omitted); *Camardo v. General Motors Hourly—Rate Employees Pension Plan*, 806 F.Supp. 380, 382 (W.D.N.Y.1992) ("There is no increase in efficiency, and much extra work, when a party attempts to relitigate every argument which it presented to the Magistrate Judge.").

Accordingly, courts generally overrule "[o]bjections [that] largely reassert mostly the same arguments [a party] previously raised, and which the Report and Recommendation properly concludes have no merit[.]" *Chacon v. Casas*, No. CV 17-6573 JAK(JC), 2019 U.S. Dist. LEXIS 37005, at *1-2 (C.D. Cal. Mar. 6, 2019). After all, "parties are not to be afforded a 'second bite at the apple' when they file objections to a Report and Recommendation, as the goal of the federal statute providing for the assignment of cases to magistrates is to increase the overall efficiency of the federal judiciary." *Kenniston v. McDonald*, No. 15-cv-2724-AJB-BGS, 2019 U.S. Dist. LEXIS 105426, at *23 (S.D. Cal. June 24, 2019) (quoting *Camardo*, 806 F. Supp. at 382; *see also United States v. Reyna-Tapia*, 328 F.3d 1114, 1122 (9th Cir. 2003) ("Finally, it merits re-emphasis that the underlying purpose of the Federal Magistrates Act is to improve the effective administration of justice.").

As KCCD's "objections" read much like their pleadings, Johnson is constrained to reply in kind. But these are general objections, and the Court is not obligated to consider them.

II. THE MAGISTRATE JUDGE CORRECTLY ANALYZED THE *WINTER* FACTORS

Defendants take issue with the fact that, out of the four *Winter* factors for preliminary injunction, the Recommendations focus heavily on the likelihood of success factor. Doc. 72 at 9. But while Defendants object that the Magistrate Judge did not do any "articulated analysis of the factors[,]" they also acknowledge that the Magistrate Judge stated the "remaining factors are thoroughly intertwined with considerations already addressed above regarding the merits of Plaintiff's claims." *Id.* (quoting Doc. 70 at 39).

Defendants fail to explain why it is objectionable to intertwine consideration of the other three *Winter* factors with the first. After all, likelihood of success "is the most important factor," which is "especially true" when a plaintiff alleges a constitutional violation. *Baird v. Bonta*, 81

F.4th 1036, 1042 (9th Cir. 2023). In fact, "[w]hen an alleged deprivation of a constitutional right is involved . . . most courts hold that no further showing of irreparable injury is necessary." *Id.* (quoting 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2948.1 (3d ed. 1998)); *see also Hernandez v. Sessions,* 872 F.3d 976, 995 (9th Cir. 2017) (holding that irreparable harm finding "follows inexorably" from a "conclusion that the government's current policies are likely unconstitutional"). It "also tips the merged third and fourth factors decisively in [a plaintiff's] favor." *Id.* Thus, "establishing a likelihood that [d]efendants' policy violates the U.S. Constitution . . . also establishe[s] that both the public interest and the balance of the equities favor a preliminary injunction." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014).

Therefore, the Magistrate Judge's analysis is not flawed, as Defendants suggest, because he "overwhelmingly focuse[d]" on the likelihood of success factor. Doing so directly informed the result of the other three factors. *See, e.g., Klein v. City of San Clemente*, 584 F.3d 1196, 1207 (9th Cir. 2009) (providing minimal analysis on three other *Winter* factors because "[g]iven the free speech protections at issue in this case, . . . it is clear that these requirements are satisfied."). But Defendants do not merely – and incorrectly – argue the Recommendations lack the proper analysis. Defendants go one step further by claiming that, had the Magistrate Judge engaged in the "proper" analysis, the result of each would be different. They err, again.

A. Neither "delay" nor Defendants' measurement of "likeliness" negates Johnson's irreparable harm.

KCCD Defendants assert that the Magistrate Judge failed to consider Johnson's alleged "delay" in bringing a preliminary injunction motion. But Johnson did not delay in bringing his case, nor would any delay matter if he had. As Plaintiff explained in his reply brief, "tardiness is not particularly probative in the context of ongoing, worsening injuries," and "courts are loath to withhold relief solely on [delay] ground[s]." *Cuviello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019) (internal quotation marks omitted). Moreover, Johnson did not delay. He filed suit less than two months after Defendants announced Garrett's termination based on Sections 87732 and 87735 and BP 3050 (April 14). He amended his complaint to cover the new DEIA regulations less than two months after the competencies and criteria were distributed to the Bakersfield College

community (May 18) and noticed this motion for argument before the start of the first school year in which he would be evaluated under the DEIA regime. Some "delay."

Second, Defendants cherry-pick two isolated words from the extensive findings and recommendations that reference how Defendants would react to Johnson's speech, "could" and "may," to argue that the Magistrate Judge only found that harm to Johnson is only a "possibility" and not "likely." Doc. 72 at 10. This is not a good faith reading of the Findings and Recommendations, which detail at great length the risk that Johnson runs in speaking freely, and in refusing to speak as directed. *See, e.g.,* Doc. 70 at 20 ("Plaintiff's 'fear [of prosecution] is reasonable,' based on his own experience and that of his fellow professor") (citation omitted).

Indeed, having reviewed Defendants' long and detailed history of punishing dissenting speech, the Magistrate Judge found that "[a]bsent an injunction, Plaintiff *will* suffer irreparable injury from an *ongoing* First Amendment violation." Doc. 70 at 39 (emphasis added). If the rest of the report somehow did not communicate that message, Defendants should have acknowledged the Magistrate Judge's conclusion that Johnson suffers an "ongoing" injury and "will" continue to suffer it absent an injunction, before claiming that such a conclusion is absent.

B. Neither the payment of attorneys' fees, nor the fact of being enjoined, outweigh Johnson's hardship in being denied his First Amendment rights.

KCCD Defendants argue that the Magistrate Judge failed to properly consider their argument that their prospect of paying attorneys' fees as a consequence of being enjoined, as well as the mere fact of being enjoined, are a much greater hardship than Johnson suffers by being censored and compelled to speak against his conscience. But this argument is no more valid in the context of an objection than it was in Defendants' original opposition brief. Defendants still cite no authority, and Johnson is aware of none, for the proposition that a potential attorneys' fees award should outweigh the harm of a violation to a plaintiff's free speech rights. *But see Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). And that harm to First Amendment rights—Defendants' compulsion of Johnson's self-censorship—is the only reason Johnson is allegedly "in good standing at the District." Doc. 72 at 11. Defendants cannot bootstrap their unlawful coercion

of Johnson's cooperation with their demands into a claim that Johnson has no reason to fear punishment.

Indeed, these arguments are frivolous. This Court does not and will not require Defendants "to pay attorneys' fees despite doing absolutely nothing wrong." Doc. 72 at 12. When Defendants pay attorney fees, it will be because they did at least one very wrong thing: they have violated Johnson's rights. *See* 42 U.S.C. § 1988.

C. It is not in the public interest to enforce unconstitutional state law.

Defendants object to the Recommendations' finding in favor of Johnson on the balance of the equities factor by re-asserting a prior argument that Johnson has less First Amendment rights as a "public employee." Doc. 72 at 12 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006); *Demers v. Austin*, 746 F.3d 402, 413 (9th Cir. 2014)). First, Johnson already addressed this argument in his briefing, and it was agreed to by the Magistrate Judge: Johnson's First Amendment rights have been violated, even after applying *Garcetti* and *Demers*. Docs. 49, 56, 70. Second, Defendants have, yet again, failed to explain how this argument overcomes what the Ninth Circuit has "consistently recognized [as] the 'significant public interest' in upholding free speech principles." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (quoting *Sammartano v. First Judicial District Court*, 303 F.3d 959, 974 (9th Cir. 2002)) (collecting cases). The Magistrate Judge properly found that Johnson still maintained his First Amendment rights under *Demers*[1] and that he was unconstitutionally being compelled to speak or be silent. Doc. 70 at 30-31. Defendants' disagreement with that conclusion is not a sustainable objection. Because the public interest favors "prevent[ing] the violation of a party's constitutional rights," the factor properly falls in Johnson's favor and the objection should be overruled. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

III. THE MAGISTRATE JUDGE'S FINDINGS THAT JOHNSON HAS STANDING SURVIVE DEFENDANTS' GENERAL OBJECTIONS

Defendants make a second attempt at their arguments challenging Johnson's standing to bring suit. Indeed, they assert that their Opposition and Motion to Dismiss "established that all three

[1] With the exception of committee speech, which Johnson has objected to. *See* Doc. 74.

factors weigh against standing." Doc. 72 at 13. Defendants based their objections to the Magistrate Judge's ruling on the assertion that Johnson's Declaration, Johnson's investigation paperwork and Garrett's disciplinary and termination paperwork do not demonstrate Johnson has a concrete plan to violate the challenged provisions or that Defendants pose any threat to his exercise of First Amendment rights. Doc. 72 at 14-20. Johnson responded to each of these arguments when Defendants raised them in opposition to his motion for preliminary injunction. *See* Docs. 43, 49. The Magistrate Judge noted as such and expressly considered each of the parties' arguments in turn. Doc. 70 at 3-8, 13-14, 18-20, 22-24. Ultimately, the Magistrate Judge found that Johnson demonstrated he had standing to seek injunctive relief against Defendants. Doc. 70 at 17-26. For the same reasons Johnson previously argued, and that were agreed to by the Magistrate Judge, Defendants objections as to standing should be overruled. *See* Docs. 49, 56.

Defendants' objections are neither proper nor sustainable in their attempt to re-hash the same arguments considered and rejected by the Magistrate Judge. As noted *supra*, the Magistrate Judge referral process is not intended to relitigate the entire matter. Defendants may not believe that Johnson's 29-page, 107-paragraph declaration sufficiently details the speech he feels compelled to engage in or silence, or that their investigation into Johnson's Facebook speech is relevant or ominous. They may claim that, particularly given his own pending litigation against them, Garrett was not terminated for speech, much less the speech Johnson wants to engage in. But each of these positions has been argued, responded to in detail and rejected.

Indeed, Defendants' arguments amount to no more than a request that this Court ignore the Magistrate Judge's assessment of the record. Defendants do not like that "the Recommendations f[ound] Johnson presented 'ample' evidence of a concrete plan to violate [the law]," Doc 72 at 14 (quoting Doc. 70 at 19), or that "it 'appears' Johnson intends to criticize the [DEIA] regulations in the classroom." *Id.* at 19 (quoting Doc. 70 at 22-23). And Defendants complain that the Magistrate Judge failed to identify unspecified evidence that supports a plan to speak or an intent to threat – despite the Recommendations' detailed, individualized sections on Johnson's Declaration, Johnson's investigation paperwork and Garrett's termination. Doc. 72 at 14 -19; Doc. 70 at 3-8, 13-14. These are not valid objections; they are merely demands to ignore the evidence.

Additionally, Defendants err when they claim the Magistrate Judge reached the wrong conclusion by failing to "reconcile how 'informal measures' could suffice as 'a specific warning or threat to initiate proceedings' in the context of Johnson's pre-enforcement challenge." Doc. 72 at 18 (quoting *United Data Servs., LLC v. FTC*, 39 F.4th 1200, 1210 (9th Cir. 2022)). In doing so, they misleadingly suggest that the Ninth Circuit has held "informal measures" are insufficient to show a threat of enforcement. Not so. *United Data Servs., LLC* not only makes no mention of whether "informal measures" are a credible threat, it barely gets to the question of what suffices as a credible threat at all. 39 F.4th at 1211 (stating plaintiffs' claim of a credible threat on the basis that they face "serious civil penalties" – absent any further detail – was "conclusory").

Defendants misstate the law. The Ninth Circuit has explicitly "recognize[d] that '[i]nformal measures, such as the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation, can violate the First Amendment also.'" *Mulligan v. Nichols*, 835 F.3d 983, 989 n.5 (9th Cir. 2016) (quoting *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (internal quotations omitted).

There is no reason to revisit the Magistrate Judge's thorough consideration of the record and of the parties' claims. Defendants' objections as to standing should be overruled.

IV. THE MAGISTRATE JUDGE CORRECTLY RECOGNIZED THAT JOHNSON WILL LIKELY SUCCEED AGAINST DEFENDANTS.

A. The Magistrate Judge properly applied *Pickering* in weighing Johnson's challenges to Defendants' applications of the Education Code and Board Policy 3050.

Defendants take issue with the Magistrate Judge's application of the *Pickering* balancing test to Johnson's challenges to Cal. Educ. Code §§ 87732 and 87735 and KCCD BP 3050. Doc. 72 at 20-23. But the Magistrate Judge properly applied both parts of the *Pickering* test when finding Johnson's claims against Defendants will likely succeed.

The *Pickering* test first asks whether the speech at issue is speech that addresses a matter of public concern. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Defendants take issue with Johnson's speech in his personal capacity, "Facebook posts, editorials, media appearances, event organization," claiming such speech does not "necessarily" qualify as a matter of public concern. Doc. 72 at 21. But rather than explain how the Magistrate Judge applied *Pickering* incorrectly,

Defendants appear to merely take issue with the scope of the proposed injunction, stating it "would permit Johnson to engage in unprotected speech on matters of private concern." *Id*.

This argument fails for multiple reasons. First, Defendants never disputed the first *Pickering* factor. *See* Doc. 70 at 32 ("Neither Plaintiff nor Defendants dispute that Plaintiff's proposed speech regarding DEIA pertains to matters of public concern."). Indeed, their opposition to the preliminary injunction motion does not contain the word "Pickering." "Absent exceptional circumstances, a district court need not entertain arguments raised for the first time in a request for reconsideration of a magistrate judge's order or recommendation." *Sarkizi v. Graham Packaging Co*., No. 1:13-CV-1435 AWI SKO, 2014 U.S. Dist. LEXIS 159972, at *3 (E.D. Cal. Nov. 13, 2014) (citations omitted). Exceptional circumstances are neither offered nor obvious. What is obvious is that everything Professor Johnson fears saying pertains to matters of public concern.

Even if this Court wished to consider these arguments for the first time on review of the Findings and Recommendations, Defendants err in arguing that the Magistrate Judge recommends an injunction that is "too broad" for what is an "intensely fact-based inquiry." Doc. 72 at 21. As the Magistrate Judge noted, "[w]hether speech involves a matter of public concern is purely a question of law." Doc. 70 at 31 (quoting *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009)). "This determination is made in light of 'content, form, and context' of the expressive conduct 'as revealed by the whole record.'" *Id.* (quoting *Alpha Energy Savers. Inc. v. Hansen*, 381 F.3d 917, 924 (9th Cir. 2004)). Johnson provided a full record of the speech he would engage in but for Defendants' demands of ideological fealty. Doc. 26-1. That speech is what the Magistrate Judge analyzed as pertaining to matters of public concern. Doc. 70 at 31-32. To argue that the preliminary injunction would include protection for other, unspecified speech that Johnson never litigated and the Court did not consider, is simply irrational. Defendants could raise this hypothetical concern in response to *any* injunction ordering them not to censor or punish protected speech.

As to the second *Pickering* factor, which considers whether the government has satisfied its burden of showing that its interests outweigh those of the speaker, Defendants' objections fare no better. Defendants contention that the Magistrate Judge "d[id] not consider the second step of the *Pickering* analysis," is patently false. Doc. 72 at 22. The Magistrate Judge surveyed KCCD

Defendants' pleadings and correctly determined that they "offered no argument that their interest in regulating Plaintiff's speech through Cal. Educ. Code §§ 87732, 87735, and BP 3050 outweighs Plaintiff's First Amendment rights." Doc. 70 at 33. Again, they never mentioned *Pickering*.

Yet for the first time, in objecting to the Findings and Recommendations, KCCD Defendants assert that all of Johnson's speech might be disruptive, offer a five-factor test for making that determination, and then claim that such an analysis was not even possible, because Johnson's speech hadn't yet occurred: "[n]o one . . . can evaluate these [*Pickering*] factors until Johnson actually engages in conduct that violates District rules." Doc. 72 at 23. In other words, no pre-enforcement First Amendment cases are possible. That is clearly not the law. *See, e.g., Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)) ("it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights."). Defendants' objections would have been frivolous even had they been preserved.

B. The Magistrate Judge correctly found that BP 3050 is unconstitutionally vague.

Defendants make little effort to challenge the Magistrate Judge's ruling that BP 3050 is vague in violation of the First and Fourteenth Amendments. After repackaging their new *Pickering* arguments against the Magistrate Judge's vagueness determinations, Defendants cite the findings that the term "verbal forms of aggression" can vary by speaker and that BP 3050 "invites the District to engage in viewpoint discrimination," Doc. 72 at 24 (quoting Doc. 70 at 38), but they fail to adequately explain why these findings are objectionable. At bottom, Defendants simply re-assert their arguments that BP 3050 is not vague because it only chills *some* "legitimate speech." *Compare* Doc. 43 at 15 ("the language from Board Policy 3050 is going to be clear in the vast majority of its intended applications.") (omitted citations) *with* Doc. 72 at 24 ("To the extent BP 3050 implicates protected speech at all, it is minimal, not substantial."). And they assert, in conclusory fashion, that the policy is sufficiently clear, because everyone knows what physical aggression looks like. Doc. 72 at 25.

Again, it is "improper [to] attempt to rehash [one's] entire argument and have this Court conduct a duplicative review where nearly every issue presented to the Magistrate Judge was raised

for a second time on objection." *Kenniston*, 2019 U.S. Dist. LEXIS 105426, at *23. Because Defendants cannot explain why the Magistrate Judge's analysis and conclusion regarding BP 3050 should not be adopted, their objections should be overruled.

C. The Magistrate Judge's finding that the DEIA Regulations restrict and compel speech is supported by fact and law.

Defendants' final objection does not stray far from the others. Defendants broadly disagree with the Magistrate Judge's Recommendations concerning the DEIA regulations and ask this Court to do so as well. However, Defendants' various arguments in support of this request fall short.

First, Defendants claim the DEIA Regulations do not reach Johnson's speech in his "personal capacity," such as speech made "through media appearances, editorials, or social media posts." *Id*. But Defendants make no attempt to cite the record or DEIA Regulations for such a claim. Moreover, Defendants' argument ignores that they have already used state law to reach Garrett for the same speech through those same mediums. *See* Docs. 26-9, 26-10. There is no reason, based on the record, to find that what Johnson says once he steps foot outside of his classroom is out of Defendants' reach.

Second, Defendants fail in their argument that the Chancellor's Competencies and Criteria are "non-binding guidance documents" that Johnson cannot rely on to claim his speech is being compelled by "*the DEIA Regulations themselves*." Doc. 72 at 26 (emphasis in original). As an initial matter, Defendants never raised an argument concerning the "non-binding" nature of the Chancellor's Competencies and Criteria prior to this objection, and have thus waived the argument. *Sarkizi*, 2014 U.S. Dist. LEXIS 159972, at *3. But, even if the Court considers this claim for the first time, Defendants provide no basis for this conclusory statement. *See* Doc. 72 at 26. In doing so, they ignore the clear statutory language in the DEIA Regulations that dictates not only the creation of the Competencies and Criteria but also their use as the "minimum standard for evaluating the performance of all employees." Cal. Code Regs. tit. 5 § 53602(c)(1).

Finally, ignoring the numerous ways in which the DEIA Regulations' implementing Competencies and Criteria demand that faculty be good anti-racists and DEIA adherents, Defendants deny that the regulations force faculty to teach or say anything. As they see it, Johnson is required only to "demonstrate[ ], or progress toward, proficiency," and "[p]roficiency is not

speech." Doc. 72 at 27. Except, Defendants then state that Johnson will have to demonstrate "proficiency . . . through the quality of *his future criticisms and opposition to DEIA ideals and concepts* in the classroom." *Id*. Thus, despite claiming "[p]roficiency" is not speech," it is clear Defendants *do* expect that Johnson will speak on "DEIA ideals." Not only that, but Defendants go on to assert that any "criticisms and opposition" to those DEIA ideals are then subject to Defendants' "content-based judgments" about their "quality." *Id*. (citing *Demers v. Austin*, 746 F.3d 402, 413 (9th Cir. 2014)).[2] This admission that Johnson's speech while teaching – particularly any criticism towards Defendants' preferred ideologies – will not only be reviewed under the DEIA regulatory-lens but judged by its content is precisely why Johnson is entitled to an injunction. Neither *Demers* nor any other legal authority permit Defendants to arbitrarily judge the "quality" of a professor's criticisms to ensure the professor's fealty to the State's preferred ideological viewpoints.

CONCLUSION

This Court should overrule Defendants' Objections and adopt the Magistrate Judge's Findings and Recommendations, except as objected to by Johnson.

Dated: December 12, 2023

Respectfully submitted.

By: /s/ Alan Gura

Alan Gura, SBN 178221
agura@ifs.org
Courtney Corbello, admitted pro hac vice
Del Kolde, admitted pro hac vice
1150 Connecticut Avenue, N.W., Suite 801
Washington, DC 20036
Phone: 202.967.0007 / Fax: 202.301.3399

Attorneys for Plaintiff Daymon Johnson

[2] As Johnson explained in his reply to KCCD's opposition, this is a gross misrepresentation of *Demers*. Doc. 49 at 6 ("the message of *Demers* . . . is decidedly *not* that academic institutions are free to 'make content-based decisions' about professors' speech, and that courts cannot 'interven[e] in that decision-making"). "[T]eaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor" are protected by the First Amendment, under the *Pickering* test for off-duty speech. *Demers*, 746 F.3d at 412.

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2023, I electronically filed the foregoing with the Clerk using the Court's CM/ECF system, and that all participants in this case are registered CM/ECF users who have thereby been electronically served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 12, 2023.

/s/ Alan Gura
Alan Gura