No. 24-6008

In the United States Court of Appeals for the Ninth Circuit

DAYMON JOHNSON,

Plaintiff-Appellant,

v.

STEVE WATKIN, et al.,

Defendants-Appellees.

Appeal from an order of the United States District Court for the Eastern District of California, The Hon. Kirk E. Sheriff (Dist. Ct. No. 1:23-cv-00848-KES-CDB)

APPELLANT'S REPLY BRIEF

Alan Gura
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., N.W.
Suite 801
Washington, DC 20036
202.301.3300
agura@ifs.org

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Counsel for Appellant

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INTRODUCTION

If there were any serious question about Professor Johnson's entitlement to a preliminary injunction, Defendants have not raised it.

Instead, Defendant Chancellor Christian offers a novel argument: that district courts can deprive this Court of jurisdiction to review their preliminary injunction denials, merely by dismissing the underlying claims in non-final orders. Because the claim is dismissed, reasons Defendant, this Court has no basis upon which to find a likelihood of success, but the dismissal's non-final nature renders it unreviewable.

Jurisdiction doesn't work like this. This Court does, in fact, review—and reverse—orders denying preliminary injunctions on claims that "stand dismissed" in an interlocutory posture. The absence of a final judgment does not stand in the way, because appellate courts must exercise pendent jurisdiction over otherwise unappealable orders to the extent that these are inextricably intertwined with those that are appealable, and necessary to ensure meaningful review of an appealable order. And nobody here disputes that the denial of a preliminary injunction is appealable under 28 U.S.C. § 1292(a)(1). Were it otherwise, this Court might never hear interlocutory appeals from the

denial of a preliminary injunction, because district courts could simply hold on to the cases indefinitely. But Title 28 tolerates no such loophole.

The record, including the plain regulatory text, belies Defendant Christian's other claim, denying her role in Johnson's injury. Christian may not be the one who will directly evaluate and fire Johnson, but she controls those who will, and more importantly, she sets their unlawful evaluation standards. Moreover, Johnson's injury is not merely that he will be fired, later, when his teaching is found inadequate; he is injured in being compelled, today, to speak the state's official ideology for fear of the consequences if he is later found not to have complied.

For their part, KCCD Defendants' numerous inconsistent claims remain largely in denial of the record as well, including even the most basic fact that they are state officials being sued for their application of state law. Notwithstanding their brief's maximization of Circuit Rule 32-2(b)'s generosity, the basic determinative facts remain unrebutted:

- Defendant Bakersfield College officials discipline and fire professors for writing newspaper editorials, speaking on talk shows, and posting on Facebook in ways that offend their political sensibilities. They consider the expression of

conservative political viewpoints to be unprofessional conduct meriting termination under the California Education Code.

- Defendants have already investigated Johnson for his private political speech online and threatened to do so again.
- State regulations now charge these officials with enforcing Johnson's adherence to an ideology he rejects, by conditioning his employment on the extent to which he teaches, espouses, and even lives according to its tenets.
- Chancellor Christian sets the ideological agenda.
- Johnson fears for his job not only if he speaks out, but also if he does not speak as required. Absent injunctive relief, Defendants *will* evaluate his performance based on the degree to which his teaching and other academic functions advance their ideology.

The magistrate judge's carefully reasoned 44-page opinion explaining why Johnson is entitled to relief from this severe violation of his First Amendment rights is largely correct, falling short only as to Johnson's need for protection while serving on school committees. The district court, however, abused its discretion in multiple ways. First, it abused its discretion by sitting on this motion for as long as it did. That abuse

may not be redressable (though it warrants comment), but in finally deciding the motion, the district court abused its discretion in claiming the absence of matters plainly set forth in the record. And ultimately, the district court abused its discretion in requiring Johnson to plead an impossible level of specificity that Johnson not only met, but which no plaintiff is required to meet.

The time for delays is over. Preliminary injunction motions seeking to protect fundamental First Amendment rights must be decided much faster than this. This Court should remand the case with instructions to enjoin the violations of Johnson's fundamental First Amendment rights.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THIS APPEAL.

A. As Christian concedes, the district court's order is appealable under 28 U.S.C. § 1292(a)(1).

Interlocutory appeals of orders refusing to enter preliminary injunctions are a basic feature of this Court's jurisdiction. 28 U.S.C. § 1292(a)(1). "If an interlocutory injunction is improperly . . . denied, much harm can occur before the final decision in the district court. Lawful and important conduct may be barred, and unlawful and

harmful conduct may be allowed to continue." *Abbott v. Perez*, 585 U.S. 579, 595 (2018).

"Chancellor Christian agrees that this Court has jurisdiction over the appeal of the ruling on the preliminary injunction motion under 28 U.S.C. § 1292(a)(1)." Christian Br. at 2. But as parties cannot consent to jurisdiction if none exists, and this Court has an obligation to assure itself of its own jurisdiction, Johnson is constrained to note that this appeal satisfies all three of Section 1292(a)(1)'s requirements. First, "the order has the practical effect of . . . refusing to enter an injunction." *Or. Natural Res. Council v. Kantor*, 99 F.3d 334, 337 (9th Cir. 1996) (citations omitted). Second, "the order has serious, perhaps irreparable, consequences." *Id.* (citations and internal quotation marks omitted); *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 third, "immediate appeal is the only way to challenge the order." *Id.* (citations omitted).

Satisfaction of Section 1292(a)(1)'s three requirements strongly signals the end of the jurisdictional inquiry. "[A] federal court's obligation to hear and decide cases within its jurisdiction is virtually

unflagging." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (internal quotation marks omitted). Christian nonetheless claims there is no way to challenge the denial of Johnson's preliminary injunction motion. Supposedly, because the district court dismissed the complaint, "there is no possibility that Johnson can succeed on the merits." Christian Br. at 15. The preliminary injunction is therefore moot (an argument in some tension with Christian's concession that jurisdiction exists under Section 1292(a)(1)). And because the order of dismissal is not a final judgment, the Chancellor further posits, it is not appealable either. *Id.* at 19. The dismissal for alleged lack of standing defeats Johnson's likelihood of success, and in turn, bars this Court from considering this matter.

This reasoning ignores a significant amount of directly contrary controlling precedent. Christian's brief does not contain the words "pendent jurisdiction," a well-developed doctrine that addresses precisely this situation. Unsurprisingly, Christian misreads the cases she does invoke. And her argument would assign the district courts a power that the Supreme Court has repeatedly condemned. Christian's effort to craft a jurisdictional exception fails.

B. Jurisdiction does not turn on Johnson's likelihood of success.

Before addressing the controlling jurisdictional precedent, Johnson notes that Christian "confuses the jurisdictional inquiry. . . with the merits inquiry." *Sanchez v. L.A. Dep't of Transp.*, 39 F.4th 548, 554 (9th Cir. 2022) (internal quotation marks omitted); *cf. Love v. Villacana*, 73 F.4th 751, 755 (9th Cir. 2023) ("a decision that confuses Article III standing with the merits of the plaintiff's claim is merely an erroneous standing decision, not an ambiguous merits decision") (citation omitted). Indeed, this is one error that the district court did not make. It did not style its erroneous standing decision as one made under the preliminary injunction likelihood of success prong.

Johnson's likelihood of success on the merits is essential to his request for preliminary injunctive relief. But the *jurisdictional* question is not whether Johnson is likely to prevail on the merits. The immediate jurisdictional question is whether the dismissal of Johnson's claim bars this Court's review of the preliminary injunction denial.

The answer is "No." As discussed below, this Court does, in fact, review injunction denials based on claims that are simultaneously dismissed in non-final orders. This case is no different.

C. This Court has pendent jurisdiction over non-final dismissals that are either "inextricably intertwined" with an appealable order, or whose review is "necessary to ensure meaningful review" of an appealable order.

An otherwise non-appealable order of dismissal "is reviewable by an appellate court if necessary to determine a matter which is properly under appeal." *Al-Kim, Inc. v. United States*, 650 F.2d 944, 945 n.7 (9th Cir. 1979) (citing 9 Moore's Federal Practice P110.25[1] (2 Ed. 1974)).

"Under 28 U.S.C. § 1292(a)(1), we may exercise interlocutory appellate jurisdiction over the district court's preliminary injunction [order] and pendent jurisdiction over any otherwise non-appealable ruling [that] is 'inextricably intertwined' with or 'necessary to ensure meaningful review of' the order properly before us on interlocutory appeal." *Hendricks v. Bank of Am., N.A.*, 408 F.3d 1127, 1134 (9th Cir. 2005) (internal quotation marks omitted).

1. "Inextricably intertwined"

An "additional issue" decided in a non-appealable ruling is "inextricably intertwined" with the appeal if this Court "must decide the pendent issue in order to review the claims properly raised on interlocutory appeal ... [or] resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue." *Dominguez*

v. Better Mortg. Corp., 88 F.4th 782, 794 (9th Cir. 2023) (internal quotation marks omitted). "[A] pendent order that concerns the same legal issue and relies on the selfsame reasoning as the order over which this Court exercises primary appellate jurisdiction usually qualifies as 'inextricably intertwined.'" *Arc of California v. Douglas*, 757 F.3d 975, 993 (9th Cir. 2014) (footnote omitted).

2. "Necessary to ensure meaningful review."

Reviewing an issue determined in a non-appealable order "is 'necessary to ensure meaningful review' where the issue 'calls into question the district court's 'authority to rule on a party's motion for a preliminary injunction.'" *Melendres v. Arpaio*, 695 F.3d 990, 996-97 (9th Cir. 2012) (quoting *Hendricks*, 408 F.3d at 1134). Whether a plaintiff has standing "plainly bears on the authority of the district court to enter injunctive relief." *Id.* (citation omitted). Reviewing a non-appealable standing determination is thus "necessary to ensure meaningful review" of an appealable order relating to an injunction. *Id.*[1]

[1] Notably, the very existence of a test for jurisdiction "necessary to ensure meaningful review" of an appealable injunction order precludes Christian's argument that meaningful review can be denied.

D. The interlocutory dismissal of Johnson's complaint cannot defeat this Court's jurisdiction to review the denial of injunctive relief.

This Court has pendent jurisdiction over the district court's determination that Johnson lacks standing, on both of that doctrine's available grounds: that determination is "inextricably intertwined" with the denial of injunctive relief, and reviewing it is "necessary to ensure meaningful review" of the preliminary injunction order that is properly here under Section 1292(a)(1). *Melendres*, 695 F.3d at 996-97; *Hendricks*, 408 F.3d at 1134.

As noted *supra*, an interlocutory issue is "necessary to ensure meaningful review" of the order before the Court, when it "calls into question the district court's 'authority to rule on a party's motion for a preliminary injunction.'" *Melendres*, 695 F.3d at 996-97 (quoting *Hendricks*, 408 F.3d at 1134). Standing decisions fit this definition *per se*. *Id.* This Court cannot meaningfully review the denial of injunctive relief without addressing the dismissal.

And because this Court "must decide the pendent issue" of Johnson's standing "in order to review the claims properly raised on interlocutory

appeal," that issue is "inextricably intertwined" with the appeal. *Dominguez*, 88 F.4th at 794.

Several of this Court's precedents stand directly on-point. In *Baldwin v. Sebelius*, 654 F.3d 877 (9th Cir. 2011), the district court dismissed the complaint with leave to amend and simultaneously denied the plaintiffs' preliminary injunction motion. "Lack of standing was the common ground for both rulings." *Id.* at 878. The plaintiffs appealed from the order without amending their complaint, implicating the rule barring appeals from non-final judgments even in cases where a plaintiff "elects to stand on an unamended pleading." *Id.* (citing *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc)). But because plaintiffs "appeal[ed] the order denying the preliminary injunction as well," this Court exercised its jurisdiction under Section 1292(a)(1), *id.* (citation omitted), and proceeded to decide the standing issue.

Baldwin is indistinguishable. And it is not alone. In *St. Hilaire v. Arizona*, plaintiff appealed the denial of his preliminary injunction as moot "pursuant to the court's simultaneous dismissal of the cause of action upon which the request was based." 76 F.3d 388, U.S. App. LEXIS 7336, at *2 (9th Cir. 1996). The dismissal did not completely

dispose of the complaint. But "[w]hile this court generally does not have jurisdiction to review the dismissal of one claim until the entry of final judgment, such an order may be reviewed in the context of an appeal from the denial of injunctive relief." *Id.* (citations omitted). "In order to determine whether the request for preliminary injunction was properly denied as moot, this court must examine whether the claim against the State was properly dismissed on [Eleventh Amendment grounds]." *Id.*

More recently, in *Arc of California*, *supra*, 757 F.3d 975, the district court issued two orders, one denying plaintiff's preliminary injunction motion, another dismissing the claim underlying that motion. But the dismissal produced no final, appealable judgment, as plaintiff's other claims survived dismissal. On appeal of the preliminary injunction denial, this Court first reversed that order, and then exercised pendent jurisdiction to reverse the non-final dismissal "which relied on exactly the same reasoning." *Id.* at 979. "The dismissal order . . . does not appear before us on its own. It arises in connection with the district court's denial of Arc's motion for preliminary injunctive relief, an interlocutory order over which we do have jurisdiction." *Id.* at 992

(citing 28 U.S.C. § 1292(a)(1)). That the claim on which plaintiff sought an injunction had been dismissed was no impediment to the appeal.

The rule is clear: Because jurisdiction over preliminary injunction orders is not optional, this Court exercises pendent jurisdiction over otherwise non-appealable dismissal orders to the extent required to decide the appeal.

Christian's claim that this Court must somehow decline to exercise its indisputable jurisdiction, so as to avoid reviewing otherwise unappealable issues, fails to mention, never mind address, the pendent jurisdiction doctrine that her argument contradicts, and the various cases applying pendent jurisdiction in identical or similar circumstances. Instead, Christian offers various cases that are inapposite or misread.

Christian first cites to *Silvas v. G.E. Money Bank*, 449 Fed. Appx. 641, 645 (9th Cir. 2011), where this Court "dismissed this interlocutory appeal as moot" because "the operative complaint has been dismissed." But *Silvas*, which does not discuss the pendent jurisdiction doctrine, relied only upon *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1450 (9th Cir. 1992), a case that Christian separately invokes. *Mt.*

Graham stands only for the proposition that a denial of preliminary injunctive relief cannot be appealed after a *final* judgment. This Court could not review the preliminary injunction denial in *Mt. Graham* because the district court had entered a *final* summary judgment, which this Court affirmed.

To be sure, a final judgment would have precluded this interlocutory appeal. The order denying a preliminary injunction would have merged into that final judgment, which Johnson could have appealed under 28 U.S.C. § 1291. *See Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 730 (9th Cir. 2017). But as Defendant Christian strenuously points out, there is no final judgment here. The merger doctrine is inapposite.

Christian also cites *Pacific Radiation Oncology, LLC v. Queen's Medical Center* for the proposition that "[a] court's equitable power lies only over the merits of the case or controversy before it." 810 F.3d 631, 633 (9th Cir. 2015). That much is true, as far as it goes. But in *Pacific Radiation*, plaintiff's problem was "seek[ing] injunctive relief based on claims not pled in the complaint." *Id.* There is no such issue here.

The only authority for Christian's position comes from *Cuviello v. City of Belmont*, No. 23-16135, 2024 U.S. App. LEXIS 12075 (9th Cir.

May 20, 2024), where the panel affirmed the denial of preliminary injunctive relief on claims that survived dismissal, but dismissed the appeal with respect to the denial of injunctive relief on claims that had been dismissed in a non-final order. *Id.* at *2 n.1. But this footnote from an unpublished disposition of a *pro se* appeal did not mention pendent jurisdiction, and is plainly at odds with decades of this Court's published precedent on the topic, as discussed *supra.* In support of its idiosyncratic decision, *Cuviello* cited only *LA All. For Human Rights v. Cty. of Los Angeles*, 14 F.4th 947, 956 (9th Cir. 2021), which merely states that this Court must assure itself of jurisdiction.

That much is correct. And precedent confirms that this Court has jurisdiction here, as much as it did in *Baldwin*, *Arc of California*, and *St. Hilaire*.

E. The district court lacks power to bar litigants from appealing its appealable decisions.

Christian's jurisdictional exception argument would assign the district courts the power to determine appellate jurisdiction on a case-by-case basis. In emphasizing the importance of Section 1292(a)(1)'s first prong, the "practical effect" inquiry, the Supreme Court explained that "the 'practical effect' inquiry prevents [jurisdictional]

manipulation" by district courts, who might "shield [their] orders from appellate review" by assigning them a particular label. *Abbott*, 585 U.S. at 595 (quoting *Sampson v. Murray*, 415 U.S. 61, 87 (1974)). If a district court could do that, it "would have virtually unlimited authority over the parties in an injunctive proceeding." *Sampson*, 415 U.S. at 87.

This is exactly what Christian proposes: that the preliminary injunction denial is unappealable because the district court chose to label its reasoning as a non-final dismissal. Had the district court not ruled on the motion to dismiss, or dismissed with prejudice, Christian could not attempt to forestall this Court's review.

Intentional or not, the district court's lack of diligence underscores the effect that this argument would have in providing it "virtually unlimited authority over the parties in an injunctive proceeding." *Sampson*, 415 U.S. at 87. Johnson would be required to amend his complaint, probably unnecessarily, and litigate the standing issue for another year or two before getting to the merits of his request for injunctive relief. But that, too, would have the practical effect of denying injunctive relief. That's not how Section 1292(a)(1) works.

This Court has jurisdiction over this appeal.

II. THIS COURT SHOULD DECIDE THE PRELIMINARY INJUNCTION MOTION.

Defendants assert that it would be "improper" for this Court to rule on the preliminary injunction motion because "the District Court did not consider the merits." KCCD Br. at 55. To the contrary: the "improper" course would be to constructively deny Johnson relief by kicking this can down the road for another two years or more.

Defendants correctly note that "[a] district court is usually best positioned to apply the law to the record." *Id.* (quoting *Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of Health & Hum. Servs.*, 946 F.3d 1100, 1111 (9th Cir. 2020) (citations omitted)). But that is not what happened in *Planned Parenthood*. "The general rule, however, is flexible—an appellate court can exercise its equitable discretion to reach an issue in the first instance." *Planned Parenthood*, 946 F.3d at 1110 (citations omitted). "When proper resolution is beyond any doubt, when injustice might otherwise result, and when an issue is purely legal, are exceptions to the general rule." *Id.* (internal quotation marks omitted). This Court also considers "the effect a delay would have, and whether significant questions of general impact are raised." *Id.* at 1110-11 (citations and internal quotation marks omitted).

All of these factors are plainly present on this record.

"An appellate court need not wait when a question could not possibly be affected by deference to a trial court's factfinding or fact application, or a litigant's further development of the factual record." *Id.* at 1111 (citations omitted). That is the case here. The relevant facts are not subject to dispute. They are drawn entirely from the challenged regulations, defendants' statements and documents, and Johnson's declaration of his beliefs and intent. This Court also has the benefit of the magistrate judge's opinion. And there is no mystery as to what the district court will do on remand.

Viewpoint discrimination and compelling speech against one's conscience plainly inflict irreparable harm. Had the district court believed that Johnson has even a plausible case, it would not have allowed his preliminary injunction motion to languish, ignoring Johnson's motion to expedite its decision and finally rule—as it did—only when faced with a mandamus petition. *See, e.g., X Corp. v. Bonta*, No. 2:23-cv-1939, 2023 U.S. Dist. LEXIS 230575 (E.D. Cal. Dec. 28, 2023) (denying First Amendment preliminary injunction motion within three months), *reversed*, 116 F.4th 888 (9th Cir. 2024). The district

court had sufficient opportunity to pass on and weigh the elements of a preliminary injunction motion. Its handling of this case implicitly expressed its views on the merits.

The only way to address this abuse of discretion, and avoid another multi-year cycle of delay, eventual denial, and appeal, is to resolve the matter now. Granting Johnson's July 20, 2023 preliminary injunction motion sometime in 2027, after the next appeal, will not do him—or the public—much good.

III. THE TIME TO ENJOIN DEFENDANTS IS NOW.

KCCD Defendants claim that Johnson's challenge to the DEIA regime is simultaneously unripe *and* mooted by the passage of time. It's too early to issue relief, but also too late.

Too early: "[T]he democratic processes are slowly refining the proper scope and place of DEIA initiatives." KCCD Br. at 50. There is "ongoing dialogue." *Id.* at 51. Granting Johnson injunctive relief today would "artificially freeze these democratic processes." *Id.* at 52. And besides, KCCD Defendants have not yet finalized their policies. *Id.* at 48-49.

Too late: "It is 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." KCCD Br. at 58. An injunction now "would not maintain the status quo." *Id.*

These arguments all lack merit. It is not too early to protect Johnson. *All* injunctions against the government operate to cabin the "democratic process." The First Amendment stands for the proposition that some things are beyond our democracy's power. If courts could not enjoin a law that is subject to democratic change, they would have no injunction power at all. That is especially true where the regulations contemplate constantly changing standards. *See* Cal. Code Regs., tit. 5 § 53601(a) (ongoing maintenance of DEIA guidance to account for "emerging" practices and scholarship).[2]

Moreover, the official ideology is known and defined—DEIA, including anti-racism. Cal. Code Regs., tit. 5, §§ 51200, 510201. Johnson

[2] Defendants' related argument, that "the faculty as a collective body" has a right of academic freedom that an injunction would violate, and that "academic freedom rights rest on the collective decision making of faculty," KCCD Br. at 54, is positively Orwellian. The First Amendment secures "the right of the people" to academic freedom. U.S. Const. amend. I. "Nowhere . . . in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right." *Dist. of Columbia v. Heller*, 554 U.S. 570, 580 (2008) (footnote omitted). *Professor Johnson* has a right to academic freedom. Defendants, state actors all, have no First Amendment right to deny him that freedom.

must advance "DEIA and anti-racist principles." *Id.* § 53605(a). In the absence of local guidelines, Johnson must be evaluated per the Chancellor's guidance, which is itself a template for the KCCD Defendants to follow in crafting their local version. *Id.* § 53602(a).

It simply does not matter when or whether KCCD Defendants will issue their local DEIA guidelines, nor do the precise contours of their take on the ideology matter. Johnson rejects the basic concept, however packaged, but he is required to implement it today. If Defendants declared that they would evaluate Johnson based on his adherence to and promotion of Christianity, defined as the belief that all people are sinners and should seek redemption through Jesus Christ, Johnson would have a valid First Amendment claim on Establishment, Free Exercise, *and* compelled speech/academic freedom grounds. It would not matter if the Defendants hadn't yet decided whether to be Presbyterians or Methodists. And they could hardly protest the case's ripeness in the face of a regulation clarifying that until they make that decision, the Pope's guidance governs, even if he updates Church doctrine from time to time.

It is also not too late to protect Johnson. The 2023-2024 academic year may be over, but Johnson will be evaluated in 2026. There is time to tell him how he must teach, time to stop the promulgation of unlawful local DEIA mandates, and time to enjoin a fundamentally unconstitutional performance review. "[M]aintaining the status quo is not a talisman." *Golden Gate Rest. Ass'n v. City of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008). "The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Id.* (quotation omitted). And allowing Defendants to evaluate Johnson based on his DEIA compliance in 2026 would also change the status quo.

IV. KCCD DEFENDANTS LACK A "MIXED MOTIVE" DEFENSE TO STANDING, BECAUSE THEY DEFINED PROTECTED FIRST AMENDMENT SPEECH AS GROUNDS FOR TERMINATION.

KCCD Defendants eagerly detailed their understanding of what warrants termination as "unprofessional conduct" and "unsatisfactory performance" under Cal. Educ. Code §§ 87732(a) and (c), as well what they believe may violate BP 3050, the violation of which is grounds for termination under Cal. Educ. Code § 87732(f). They issued Professor Garrett a nine page, single-spaced proclamation of everything he had

done, as they saw it, to violate these rules. ER-158—166. And not stopping there, Defendants followed through and terminated Garrett upon another dense document, "Recommendation for Statement of Decision to Terminate," ER-170—190, which cited every section of Section 87732 and added another 15 single-spaced pages detailing Garrett's alleged violation of the Education Code's standards.

But now that Johnson has sued them—because their applications of state law chill his speech in violation of the First Amendment—Defendants wish to reconsider. Defendants claim they fired Garrett only for the (few) *other*, supposedly non-speech-related reasons that they offered. As Johnson doesn't refrain from engaging in *those* activities, in which he supposedly has no interest, he has nothing to fear from their application of the challenged provisions.

These arguments are unavailing.

First, to state the obvious: Most of the allegedly bad behavior for which Defendants terminated Garrett was plainly First Amendment protected speech, *e.g.*, writing a newspaper editorial, ER-158, ¶ 1; speaking to the media, ER-162, ¶ 12; and editing, as well as posting on, a social media page, ER-163, ¶¶ 13-14. Whatever else may also be

grounds for termination, protected speech plainly falls within Defendants' understanding of "unprofessional conduct" and "unsatisfactory performance." Of course Johnson does not agree with their interpretation, but this as-applied challenge challenges *Defendants'* application.

The same is true of BP 3050's civility requirement. Defendants make much of the fact that they did not cite BP 3050 in *firing* Garrett, KCCD Br. at 41, but they do not deny that they threatened him under it, *id.* at 6, nor do they deny that their termination of Garrett mentioned "incivility" seven times, *id.* at 41. Johnson reasonably concludes that political expression of the kind for which Defendants condemned Garrett falls within BOP 3050's vague ambit.[3]

Professor Johnson read these documents. He knows the events they reference. ER-106, ¶ 26. And especially when combined with KCCD Defendants' other behavior, Johnson reasonably undersands that he is not free to express himself as his RIFL colleague did, lest Defendants

[3] Defendants repeat basically identical arguments with respect to the Education Code and BP 3050, because "standing is not dispensed in gross," KCCD Br. at 42, but they lumped the provisions together in charging and, by referencing "incivility," terminating Garrett for the same political speech.

issue similar documents naming *him* as "unprofessional" or "unsatisfactory" under the Education Code. A person of "ordinary firmness," reviewing Defendants' litany of reasons for declaring Garrett "unsatisfactory" and "unprofessional," would refrain from following in *all* of Garrett's footsteps, not just some of them. *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2020).

Indeed, many of the alleged speech-neutral reasons for terminating Garrett were, in fact, viewpoint-based. For example, Defendants claim that they sanctioned Garrett's radio appearance because he made "demonstrably false and misleading claims . . . including that Bakersfield College pays students to write propaganda pieces and funds 'fake news' websites." KCCD Br. at 28. But what counts as "propaganda" and "fake news" is obviously a matter of political opinion. Likewise, Defendants assert that they fired Garrett for making "'knowingly false' complaints." *Id.* at 22 (citing ER-174). But the complaint cited was for viewpoint discrimination in speaker approval—and Johnson would have filed the same complaint were he in Garrett's place. *See* ER-110-11, ¶ 45. Moreover, contrary to Defendants' claims, few if any of these incidents concerned "complaints over internal office

affairs," "personal employment disputes," or "private grievance[s]." KCCD Br. at 60 (citations omitted). Allegations of political bias and discrimination—plainly matters of public concern—formed the central overriding theme of Garrett's dispute with KCCD, just as it forms Johnson's.

Defendants also selectively quote their documents to hide similarities between the two professors' speech. Both professors wrote to the curriculum committee to criticize proposed courses, but Defendants deny that they "punished Garrett simply for criticizing the courses, as opposed to the disruptive manner in which he did so." *Id.* at 27 (citing ER-175—176). Unlike Johnson, Garrett called on people to email committee members their objections. ER-175—176, ¶ 3.vi. But Defendants *also* punished Garrett for emailing the curriculum committee his opposition, ER-175, ¶ 3.v, which Johnson also did, and would do again, ER-111, ¶ 46.

Defendants also spill much ink divining nuanced differences between Johnson's and Garrett's speech. They terminated Garrett for editing and posting on RIFL's Facebook page, and for attacking cultural Marxism, but not for attacking cultural Marxism *on Facebook*. They

also allowed Garrett to bring in speakers about *other* conservative topics. And so, even though some of Garrett's Facebook behavior was really Johnson's, and even though they've investigated and threatened Johnson over his Facebook posts, Johnson is imagining the threat if he mixes the forbidden cultural Marxism topic, either with the already-sensitive Facebook page or the otherwise-relatively safe hosting of speakers.

This is not reassuring.

If Defendants did not intend to make protected speech a fireable offense, they should not have disciplined and fired Garrett for his speech. Moreover, the district court could not construe this evidence, on a motion to dismiss, in a light so artificially favorable to the defendants. Any inferences should have favored Johnson. Opening Br. at 49.

And if Defendants did not intend to offer all the speech-related grounds for firing Garrett—they only secretly meant to fire him for the (few, allegedly) non-protected speech-related reasons—why resist the injunction? Johnson does not assert a facial challenge to the Education Code—he accepts that faculty can be fired for "unprofessional conduct" and "unsatisfactory performance," as those concepts are fairly

understood. But as Defendants argue, they wish to preserve a power to fire faculty for, without more, "disruptive" (meaning, offensive) speech.

V. JOHNSON REASONABLY FEARS PUNISHMENT FOR HIS SPEECH.

Responding to claims that he has not sufficiently detailed his intended speech, Johnson pointed out his examples of specific past conduct that is indistinguishable from that which Defendants now proscribe. Combined with Defendants' investigation of Johnson's speech and their ominous statements, he fears expressing himself in myriad, detailed ways.[4]

Defendants respond by insisting that Johnson "failed to allege what the content of his speech would be or when he would make it," KCCD Br. at 27, but they also claim that the fact that Johnson got away with his behavior before means that he can keep doing it without fear. Separately, they claim that they have disavowed enforcement against Johnson's allegedly unspecified behavior, and that Johnson cannot challenge their disavowal. Yet later in their brief, Defendants also disavow their disavowal.

[4] And this is not a case of a plaintiff's generalized fear of wrongful prosecution on speculative facts. KCCD Br. at 32. Defendants have done much to prompt this litigation.

There is neither room nor need to reargue the opening brief. This Court has the record, on which it reviews standing de novo. *Isaacson v. Mayes*, 84 F.4th 1089, 1095 (9th Cir. 2023). But a few observations on these points. All law enforcement is at least somewhat arbitrary, in the sense that the most consistently enforced laws are never enforced 100%. Yesterday, Defendants set their sights on the previous RIFL Lead; tomorrow, they might move on to Johnson. Their investigation of his Facebook post is ominous enough. The question is not whether Johnson faces a "specific [enforcement] threat," but a "general specter of liability," *Ariz. All. for Retired Ams. v. Mayes*, 117 F.4th 1165, 1182 (9th Cir. 2024) (internal quotation marks omitted), "a 'realistic danger," *id.* at 1181 (internal quotation marks omitted). That Johnson escaped Defendants' attention before is no guarantee that he will do so again.

The disavowal theory is more tenuous still. Johnson noted Defendants' failure to disavow enforcement against him below. Dist. Ct. Dkt. 49, at 5. Objecting to the report and recommendation with respect to the motion to dismiss, Defendants asserted that, apart from Johnson's planned teaching, he did not identify any speech or conduct that they "could conclude is inconsistent with" the Education Code and

BP 3050. Dist. Ct. Dkt. 73, at 8. The district court took this to be a disavowal of enforcement, rather than another claim that Johnson's allegations are too vague. But in objecting to the preliminary injunction recommendation, Defendants declared that they cannot decide whether Johnson's speech is punishable until he expresses it. Dist. Ct. Dkt. 72, at 23.

It would have been for this Court to determine whether the "could conclude" statement is a disavowal and, if so, what weight to assign it. But even if those words disavowed enforcement, this Court need not consider them now, because Defendants reiterate their other position of withholding judgment about whether to punish Johnson's speech until they hear it in context. KCCD Br. at 61. As discussed below, that position itself violates the First Amendment.[5]

[5] Defendants misunderstand Johnson's claims relating to anti-racism training as a condition of serving on screening committees. KCCD Br. at 39-40. Unlike his fear of punishment should he express himself on the EODAC committee, ER-101, ¶ 4; ER-114, ¶ 58, Johnson avoids screening committee service because it would compel him to approve an objectionable ideology. ER-115—116, ¶ 61.

VI. ABSTRACT CLAIMS OF POTENTIAL DISRUPTION DO NOT ERASE THE FIRST AMENDMENT'S PROTECTION OF JOHNSON'S SPEECH.

Only in a perfunctory, check-the-box sense do KCCD Defendants dispute that Johnson's speech at issue is either made in his personal capacity (as they admitted in concluding their investigation of his Facebook posts) or relates to matters of public concern. But the record is clear.

To the extent that Johnson's speech satisfies *Pickering*'s first prong, though, Defendants argue that their "legitimate interest in regulating disruptive speech" categorically defeats Johnson's First Amendment rights. KCCD Br. at 61. Because addressing matters of public concern can cause unspecified "disruption," the school can silence any political expression under the guise of "unprofessional conduct" or "unsatisfactory performance." Some people are sensitive; expressing one's political views "can interfere with faculty members' ability to carry out their duties." *Id.*

Thus, "[a]n 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," meaning, his expression of views Defendants

dislike, "cause disruption on campus." *Id.* (citing *Bauer v. Sampson*, 261 F.3d 775, 785 (9th Cir. 2001)). And this censorship power must be broad and vague: "No one, not the District nor the Court, can evaluate this disruption until Johnson actually engages in conduct that violates District rules." *Id.* Until then, Johnson must worry about posting on Facebook, appearing on talk radio, and speaking to the press.

In other words, the challenged provisions of California's Education Code and BP 3050 are "laws that cast a pall of orthodoxy over the classroom." *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). And there's nothing that this Court can do about it.

So much for academic freedom. Or for pre-enforcement challenges. But the *Pickering* test's second prong does not override these doctrines.

Of course, there is no reason to suppose that any of the speech that Johnson seeks to express would disrupt the campus—and in such a way as to justify Defendants' punishment of the speaker, rather than the would-be disruptors. To be sure, none of Johnson's Facebook posts, when misattributed to Garrett, caused any campus disruption. And if Garrett's editorializing about "cultural Marxism" in the *Bakersfield*

Californian sparked a violent backlash, the First Amendment solution would not have been to silence Garrett. *Cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

Defendants may have an interest in regulating speech for the avoidance of disruption, but the "burden in justifying a particular [discipline]" under the *Pickering* test is "the State's." *Demers*, 746 F.3d at 411. Should Defendants wish to discipline Johnson for specific instances of his speech, they would have to balance five non-dispositive factors, of which disruption is only one. *See Bauer*, 261 F.3d at 785. To the extent this analysis applies in a pre-enforcement context, what is disruptive about Johnson recommending books about "cultural Marxism," or appearing on talk radio?

"[G]iven the nature of academic life, especially at the college level, it [is] not necessary that" the parties "enjoy a close working relationship requiring trust and respect." *Id.* "[A]nyone who has spent time on college campuses knows that the vigorous exchange of ideas and resulting tension between an administration and its faculty is as much a part of college life as homecoming and final exams." *Id.* Johnson's proposed speech would not impact his academic performance, and it

consists largely of opinion, or factual assertions that are subject to academic disputes.

More to the point, the injunction Johnson seeks is narrow. It would not preclude *all* potential disciplinary proceedings against him, just those "based on the content or viewpoint of his social or political speech." ER-242. That is the minimum that the First Amendment requires of public college authorities: to refrain from punishing their faculty for the crime of controversial political expression.

KCCD Defendants, however, want to punish political speech. For example, they claim that they were required to investigate Professor Bond's "harassment" complaint against Johnson for disagreeing with his politics on Facebook, because not doing so "would violate an employer's remedial obligations upon learning of a harassment complaint." KCCD Br. at 30 (citing *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 876 (9th Cir. 2001)). "KCCD was obligated by law to investigate these allegations." *Id.* (citing *Swenson v. Potter*, 271 F.3d 1184, 1192 (9th Cir. 2001)).

Nichols and *Swenson* were *Title VII sexual harassment* cases. Nothing in Title VII required Defendants to investigate Professor

Bond's hurt feelings over Professor Johnson's non-sexual political commentary on Facebook. And nothing in Johnson's requested injunction would immunize him from Title VII complaints.[6]

Any law that would authorize, let alone require, an investigation into Johnson's private political expression because it offends someone would be unconstitutional. Defendants' equation of conservative political expression with sexual harassment demonstrates the necessity of an injunction securing the most basic right to dissent.

VII. BP 3050 IS UNCONSTITUTIONAL.

Defendants' cursory defense of their civility regulation is meritless. With respect to the First Amendment, they assert only that Johnson's speech does not "automatically qualify" for protection under *Pickering*, and declare that BP 3050 advances their "interest in addressing disruptions." KCCD Br. at 62-63. As far as due process, Defendants

[6] Defendants' justification of their continuing threats to investigate Johnson's Facebook posts if they offend his colleagues, because "failing to threaten more serious discipline if *harassment continued* violates an employer's *remedial* obligations." KCCD Br. at 36 (emphasis added) (citing *Nichols*, 256 F.3d at 876), belie their claims that Johnson should be happy with the investigation's "favorable outcome." KCCD Br. at 35.

claim in conclusory fashion that "[t]o the extent BP 3050 implicates protected speech at all, it is minimal, not substantial." *Id.* at 64.

But as the magistrate judge found, "'verbal forms of aggression . . . harassment, ridicule or intimidation' . . . lacks a commonly understood meaning," and is broader than what this Court has upheld. ER-91. "What may be considered 'verbal forms of aggression' can [vary] from speaker to speaker, and listener to listener." *Id.* (internal quotation marks omitted). Perhaps if BP 3050 were clearer, Defendants would not have initially charged Garrett with violating it, but then declined to cite it specifically in terminating him.

VIII. THE DEIA REGULATIONS INJURE JOHNSON.

Defendants assert that the state has invested countless hours in promoting a very important concept, and enacted reams of regulations, interpretative guidance, and the like ensuring the concept's adoption throughout every function of the community college system, and yet, all this somehow has *no impact* on faculty. Professor Johnson "must have or establish proficiency in DEIA-related performance to teach, work, or lead within California community colleges," Section 53602(b), but the moment he challenges the DEIA regime, it is of no consequence to him.

Whatever the DEIA regime's merits, this argument is specious. The whole point of the DEIA regime is to have professors implement it. KCCD "must intentionally practice . . . anti-racism," "act deliberately to create a safe, inclusive, and anti-racist environment," and "develop and implement policies and procedures" that demonstrate a "commit[ment] to fostering an anti-racist environment." Cal. Code Regs., tit. 5, § 51201(b)-(d). The requirements found in Section 51201 must be the "guide [for] the administration of all programs in the California Community Colleges." Cal. Code of Regs. § 51200. KCCD Defendants have made clear that the DEIA regulations, including Sections 51200 and 51201, are directives meant to be implemented and followed by faculty. ER-102, ¶ 8; ER-107—108, ¶¶ 35-36; ER-144.

Defendants persist in claiming that Sections 53601 and 53602, which require them to adopt DEIA guidelines and evaluate Johnson under those guidelines or those offered by Christian, "[do] not reach Johnson, much less restrict or compel his speech," KCCD Br. at 46, but as the state declares, "[t]hese regulations impact all the employees of the educational ecosystem." ER-141. That they operate against the college districts in the first instance is irrelevant. Defendants fail to address

the fact that what matters for standing is whether the challenged regulations impact the plaintiff, not whether the plaintiff is directly regulated. Opening Br. at 53.

While Defendants concede that Sections 53425 and 53605 "arguably apply to Johnson as a faculty member," it is unclear how they would do so, as local regulations have not been issued, and Johnson is allegedly not required "to advance, promote, speak, or teach any particular content." KCCD Br. at 46.

First, these provisions do not only "arguably" apply to Johnson. He is a Professor of History at Bakersfield College. Full stop.

Second, it does not matter that KCCD has not yet published its local DEIA competencies. Johnson seeks to enjoin KCCD from producing those policies under Section 53601(b), and he seeks to enjoin being reviewed under *any* DEIA policies under 53602.

And there is nothing conclusory about Johnson's objections to DEIA ideology. It is not a fair reading to ignore pages and pages of Johnson's DEIA critiques and merely quote Johnson's *summary paragraph*, "Almost everything I teach violates the new DEIA requirements," KCCD Br. at 47 (quoting ER-125, ¶ 100), for the proposition that his

objections are generalized and insubstantial. As a committed DEIA critic, Johnson probably knows at least as much if not more about the ideology than KCCD's most enthusiastic DEIA adherents. In just one paragraph explaining his objection to DEI and race-conscious pedagogy and curricula, Johnson cites the works of seven DEI scholars. ER-120, ¶ 79. There is nothing speculative about what Section 53605(a) requires of him: he "shall employ teaching, learning, and professional practices that reflect DEIA and anti-racist principles." If the regulation required Johnson to "employ teaching, learning, and professional practices that reflect Christian principles," it would not be beyond challenge for not specifying *which* Christian principles it required.

The notion that Johnson's claims are speculative, because he has not yet been evaluated for DEIA compliance, KCCD Br. at 47-50, is specious. The point of seeking pre-enforcement relief is to avoid the unconstitutional harm. And again, Johnson needs to know *now* what and how he can teach, so he doesn't find out the hard way, later, that he was supposed to be anti-racist all along. For the same reason, Defendants' arguments lack merit when repackaged as the denial of an enforcement threat. KCCD Br. at 47-48. At a minimum, everything will

be enforced when Johnson is next evaluated, which is why the regulations impact Johnson's functions until that time.

IX. DEFENDANTS ARE STATE OFFICIALS, WHO CAN BE ENJOINED FROM ENFORCING STATE LAWS.

KCCD Defendants persist in arguing that they cannot be sued for enforcing state laws, only for enforcing their own policies pursuant to *Monell v. Dep't of Soc. Servs. Of City of New York*, 436 U.S. 658 (1978).

The argument is frivolous. But since it keeps coming up, this Court should address it.

First, California community college districts are arms of the state. *Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988). This Court recently updated the *Mitchell* factors for determining what qualifies as a state entity, *Kohn v. State Bar of Cal.*, 87 F.4th 1021, 1030-31 (9th Cir. 2023) (en banc), but the outcome would remain the same for state community college districts.

Defendants are thus *state officials enforcing state law*. They are not municipal actors. They are liable in suits seeking prospective relief under Section 1983, per *Ex Parte Young*, 209 U.S. 123 (1908). When sued in their official capacity to enjoin their enforcement of state law, it is not a defense for state officials to claim, as Defendants have, that

they have no choice in the matter. They are not required to defend the lawsuit.

Monell stands for the simple proposition that "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690 (footnote omitted). Since KCCD is not a municipality, *Monell* is irrelevant. The notion that *Monell* somehow authorizes suits only against informal customs or practices is false. "[I]t is when execution of a [local] government's policy or custom, *whether made by its lawmakers* or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 695 (emphasis added).

The other cases Defendants offer for the notion that state officials can only be enjoined from enforcing their own customs and policies, but not those that are officially adopted, such as statutes and regulations, do not support that remarkable outcome. In *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001), this Court found the existence of a state official's

policy or custom, but also explained that policies and customs can be found in "an official proclamation." *Id.* at 1127. The decision in *Norsworthy v. Beard*, 87 F. Supp. 3d 1104 (N.D. Cal. 2015) followed the same pattern. And *Aliser v. SEIU California*, 419 F. Supp. 3d 1161, 1165 (N.D. Cal. 2019), declined to find *county* officials responsible for a *state* law.[7]

At bottom, official capacity suits typically need to have some basis in the official policies of the relevant government, be it state or municipal. Sometimes, customs and practices are not formally codified. That does not mean that state officials cannot be enjoined from enforcing state laws and regulations.

X. CHRISTIAN IS RESPONSIBLE FOR JOHNSON'S INJURIES UNDER THE DEIA REGULATIONS AND HER "COMPETENCIES AND CRITERIA."

In his opening brief, Johnson explained why the district court erred in absolving Christian of responsibility for his injuries. Opening Br. at 56-57. Rather than address Johnson's argument, Christian merely

[7] Even if the Defendants were somehow municipal officers who find themselves in the position of enforcing state law, they would *still* be subject to injunctive relief under Section 1983 as they exercise discretion in employment decisions, and in crafting local DEIA policies. *Evers v. Cnty. of Custer*, 745 F.2d 1196, 1203 (9th Cir. 1984).

quotes the district court's argument, and states, "That ruling is legally sound, and there are no grounds for this Court to disturb it." Christian Br. at 21. That is not a response to Johnson's argument, and no reply on that point is warranted.

CONCLUSION

The district court's order should be vacated, and the case should be remanded with instructions to grant Johnson's preliminary injunction motion.

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Respectfully submitted,

/s/ Alan Gura

Alan Gura
INSTITUTE FOR FREE SPEECH
1150 Conn. Ave. N.W., Ste. 801
Washington, D.C. 20036
202.301.3300
agura@ifs.org

Counsel for Appellant

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