Jesse J. Maddox, Bar No. 219091
jmaddox@lcwlegal.com
David A. Urban, Bar No. 159633
durban@lcwlegal.com
Olga Y. Bryan, Bar No. 298969
obryan@lcwlegal.com
Morgan J. Johnson, Bar No. 345620
mjohnson@lcwlegal.com
LIEBERT CASSIDY WHITMORE
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704
Telephone: 559.256.7800
Facsimile: 559.449.4535

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

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA - BAKERSFIELD

DAYMON JOHNSON,

Plaintiff,

v.

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

Defendants.

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

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

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

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

Pursuant to this Court's September 4, 2025 order (ECF No. 108), the remaining defendants in this action, members of the Board of Trustees of the Kern Community College District ("District") and officials of the District and Bakersfield College (collectively "District Defendants"),[1] respectfully submit this supplemental brief on the arguments in the Motion to Dismiss (ECF No. 46) that have not already been addressed by the Ninth Circuit in its amended Memorandum Decision issued on August 22, 2025.

[1] Dr. Stacy Pfluger has replaced Jerry Fliger as President of Bakersfield College, and District Defendants will file a Notice of Substitution of Defendants to reflect this change.

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704

TABLE OF CONTENTS

Page

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

State Statutes

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704

State Regulations

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704

I. INTRODUCTION

The Court should grant the District Defendants' motion to dismiss the remaining claims for relief in the First Amended Complaint because Johnson fails to properly plead a District policy or custom is the "moving force" and proximate cause of the alleged violation of Johnson's First Amendment rights. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). The only policies Johnson identifies are several California regulations related to the evaluation of college faculty based on "demonstrated, or progress toward, proficiency in [] locally-developed [diversity, equity, inclusion, and accessibility ("DEIA")] competencies." *See* Cal. Code Regs. tit. 5, §§ 53602(b), 53605(a). These regulations were promulgated by the State; they are not District policies. Moreover, the District lacks discretion to refuse to comply with or not enforce the State's regulations, and Johnson does not adequately allege that the District has engaged or will engage in any enforcement action beyond the minimum DEIA evaluation requirements set by the State. *Aliser v. SEIU Cal.*, 419 F. Supp. 3d 1161, 1165 (N.D. Cal. 2019). The Ninth Circuit's Amended Memorandum Disposition does not address this argument from the District's motion to dismiss, and the District Court may decide this issue in the first instance. A local governmental entity like the District cannot be liable under these circumstances. *See id.*; *Quezambra v. United Domestic Workers of Am.*, 445 F. Supp. 3d 695, 706 (C.D. Cal. 2020); *see also Sandoval v. Cty. of Sonoma*, 912 F.3d 509, 518 (9th Cir. 2018). Finally, with the Ninth Circuit's dismissal of the State Chancellor of the California Community Colleges, the Board of Governors of the California Community Colleges is a necessary party because no other nonconflicted party remains in the litigation to adequately represent the Board of Governors' interests. *See* ECF No. 46, 24:23-25:7; ECF No. 70, 42:17-43:9.

II. BACKGROUND

This case has a long history, and the District Defendants provide an abbreviated discussion of the relevant background here. Johnson sought pre-enforcement declaratory and injunctive relief against the District Defendants and the State Chancellor of the California Community Colleges ("State Chancellor") in their official capacities. Johnson's First Amended Complaint ("FAC") alleged various causes of action based on the California Code of Regulations,

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704

Education Code, and District Board policies as violating his First Amendment rights. Both the State Chancellor and District Defendants moved to dismiss Johnson's FAC for a lack of standing and failure to state a claim. ECF Nos. 44, 46.

The matter was referred to Magistrate Judge Christopher D. Baker, who made findings and recommendations that Johnson had standing and was likely to prevail on the merits of his preliminary injunction motion. ECF No. 70. This Court declined to adopt the Magistrate Judge's findings, holding Johnson lacked standing to pursue his claims. ECF No. 89.

Johnson appealed to the Ninth Circuit, which affirmed in part and reversed in part. The Ninth Circuit held Johnson lacked standing to challenge most of the identified provisions of the California Code of Regulations ("DEIA Regulations"), California Education Code, and District Board Policy because those provisions do not "arguably proscribe" Johnson's intended conduct. Amended Memorandum Decision, ECF No. 56.1, *4-6. To the extent Johnson relied on the District's discipline and termination of fellow faculty member, Matthew Garrett, to try to establish standing, the Ninth Circuit found Garrett was terminated for "acts that Johnson does not intend to undertake." *Id.* at *5. The Ninth Circuit also dismissed the State Chancellor because the State Chancellor "lacks authority to enforce the challenged statutes, regulations, and policies against Johnson." *Id.* at *6.

However, the Ninth Circuit found Johnson has standing to challenge Cal. Code Regs., tit. 5, §§ 53602(b), 53605(a), and California Education Code § 87732(f) to the extent it incorporates those regulations,[2] against the District Defendants. The District Court is now considering whether Johnson is entitled to a preliminary injunction with regard to these provisions. *Id.* at *4.

III. LEGAL ARGUMENT

A. THE DISTRICT CANNOT BE LIABLE FOR ACTS REQUIRED BY STATE LAW

Johnson oversimplifies the nature of whether a community college district is a "state" or

[2] California Education Code section 87732(f) states in full: "No regular employee or academic employee shall be dismissed except for one or more of the following causes: . . . (f) Persistent violation of, or refusal to obey, the school laws of the state or reasonable regulations prescribed for the government of the community colleges by the board of governors or by the governing board of the community college district employing him or her."

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704

"local" entity, treating the District Defendants as the functional equivalent of the State. *See* Plaintiff's Response to KCCD Defendants' Objections, ECF No. 80, 2:22-3:3. However, liability under 42 U.S.C. § 1983 turns on the responsibility for the conduct of *each entity*, and the District is a separate and distinct legal and political entity from the State. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) ("Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."); *First Interstate Bank v. California*, 197 Cal. App. 3d 627, 632-34 (1987) (describing the political and legal distinctions as an entity between community college districts and the State).

The District possesses Eleventh Amendment immunity as an arm of the State under current Ninth Circuit precedent. *Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201-02 (9th Cir. 1988).[3] But that is not the end of the analysis for prospective relief under the *Ex Parte Young* exception to 11th Amendment immunity. *Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 865 (9th Cir. 2016); *Kentucky v. Graham*, 473 U.S. 159, 169, fn. 18 (1985). Once immunity is overcome, plaintiffs like Johnson must still establish § 1983 liability on the merits by identifying "a practice, policy, or procedure that animates the constitutional violation at issue." *Students' Ass'n,* 824 F.3d at 865.

A plaintiff must plead "facial plausibility," such that "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. This plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* "[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. United States Secret*

[3] The Ninth Circuit, sitting en banc and acting sua sponte, overruled *Mitchell*'s factor-based analysis as to whether a governmental entity possesses Eleventh Amendment immunity. *Kohn v. State Bar of Cal.*, 87 F.4th 1021, 1025, 1027, 1031-32 (9th Cir. 2023). However, *Kohn* noted "we have no reason to believe that our decision today will substantially destabilize past decisions granting sovereign immunity to state entities within the Ninth Circuit." *Id.* at 1032.

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704

Serv., 572 F.3d 962, 969 (9th Cir. 2009).

Applied to the injunctive relief Johnson seeks, he must plead that the *District's* "policy or custom" played a part in the alleged violation of his First Amendment rights, otherwise the District Defendants cannot be liable under § 1983. *Graham*, 473 U.S. at 166 (in an official-capacity action, "a governmental entity is liable under § 1983 only when *the entity itself* is the 'moving force' behind the deprivation" and the plaintiff shows "the entity's 'policy or custom' . . . played a part in the violation of federal law.") (emphasis added); *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (same). The showing of the specific entity's policy or custom applies to state and local defendants in a § 1983 official capacity action. *See Graham*, 473 U.S. at 165-167, 170 (applying policy or custom requirement to state official defendants); *Gomez v. Vernon*, 255 F.3d 1118, 1126-27 (9th Cir. 2001) (same); *L.A. Cty. v. Humphries*, 562 U.S. 29, 31 (2010) (applying policy or custom requirement to local official defendants); *see also Iqbal*, 556 U.S. at 677 ("[E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct.")

Johnson fails to show this required pleading element to state a claim against the District Defendants, warranting dismissal. The allegations in the operative complaint fail to identify a *District* policy as the "moving force" behind his alleged constitutional harms; therefore, his case against the District Defendants must be dismissed. *Snyder v. King*, 745 F.3d 242, 247 (7th Cir. 2014) ("The operative complaint in this case is devoid of any remotely specific allegation that a county-level policy or custom caused Snyder's harm. That alone is grounds for dismissal.").

1. <u>Johnson Challenges A State Policy, Rather Than A District Policy</u>

a. The District Is Not The State For The Purpose of § 1983 Liability on the Merits

Under California State law and the California Constitution, the State itself is responsible for public education in California and the State may form local school districts, including community college districts. *See* Cal Const., Art. IX, § 14; *Butt v. State of Cal.*, 4 Cal. 4th 668, 680-81 (1992). These local school districts are separate and local political entities depending on

what responsibilities the State has statutorily assigned its local districts.[4] *Butt*, 4 Cal. 4th at 681 ("It is true that the Legislature has assigned much of the governance of the public schools to the local districts, . . . which operate under officials who are locally elected and appointed. The districts are separate political entities for some purposes.") (internal citation omitted); *First Interstate Bank*, 197 Cal.App.3d at 633-34 ("The authority of an agency like a school district to act is measured by the authority statutorily conferred upon its governing board."); *Gonzales v. State*, 29 Cal. App. 3d 585, 590 (1972) ("School districts, by statutory provision, act through school boards and the authority of the districts is measured by the authority statutorily conferred upon the boards."); *Slivkoff v. Bd. of Trs.*, 69 Cal. App. 3d 394, 401 (1977) ("[Community College Districts] have only such autonomy as the Legislature has seen fit to bestow."). "State agencies, even though exercising a portion of the state's power of government, are not the state or a part of the state and may not act on behalf of the state unless authorized to do so by statute." *Gonzales*, 29 Cal. App. 3d at 590; *First Interstate Bank*, 197 Cal. App. 3d at 633-34 ("However, the fact that a state agency is created by statute to discharge a duty constitutionally imposed on the state does not transmute the agency into 'the state,' nor render the state liable for its acts under a general theory of respondeat superior.").

The Board of Governors of the California Community Colleges "provide[s] leadership and direction] to local community college districts, but "at all times [the Board is] directed to maintain[] and continue[], to the maximum degree permissible, local authority and control in the administration of the California Community Colleges." Cal. Ed. Code, §§ 70900, 70901.[5] The Board of Governors is responsible for, among other things, the "[m]inimum standards for employment of academic and administrative staff at community colleges." *Id.* § 70901(b)(1)(B).

[4] Local community college districts are also separate political and legal entities from other California educational institutions, such as local K-12 school districts, the California State University system, and the University of California system. *Compare* Cal. Ed. Code, §§ 33000-65001 (elementary and secondary education) *with id.* §§ 70900-88933 (community colleges) *with id.* Cal. Ed. Code, §§ 89000-90520 (California State University) *with id.* Cal. Ed. Code, §§ 92000-93000 (University of California).

[5] The State Chancellor of the Community Colleges is the Board of Governor's chief executive officer responsible for carrying out the policies of the Board of Governors as delegated by the Board. *See* Cal. Ed. Code, § 71090(b).

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704

Community college districts, through their locally elected governing boards, must "maintain, operate, and govern" community colleges under this jurisdiction, which includes, among other things, "employment practices, salaries, and benefits for all employees not inconsistent with the laws of this state." Cal. Ed. Code, § 70902(a)(1), (b)(4).

This distribution of authority clarifies why the DEIA Regulations, especially those still at issue in Cal. Code Regs. tit. 5, §§ 53602(b) a 53605(a), are structured the way they are. The Board of Governors can establish standards that apply to all community college districts across the state, including "minimum standards" for faculty, but the administrative day-to-day operations and decisions fall to the local community college districts. Cal. Ed. Code, §§ 70901, 70902. The fact that the District has control over Johnson's employment does not "transmute" the District *into* the State. *First Interstate Bank*, 197 Cal. App. 3d at 633-34. Here, the State fulfilled its California constitutional obligation to set "minimum standards" for faculty by establishing the requirement that community college districts must evaluate their employees on DEIA competencies (Cal. Code Regs. tit. 5, §§53400, 53425, 53602(b)), but it delegated the remaining operational, district-specific employment decisions to the districts in Cal. Code Regs. tit 5, § 53602(a) to determine the implementation of that requirement. The District, while responsible for daily employment decisions, lacks the statutory authority to act on behalf of the State to promulgate state-wide authority like the DEIA Regulations' evaluation component. Cal. Code Regs. tit 5, §§ 53602(b), 53605 (a); *Gonzales*, 29 Cal.App.3d at 590.

Johnson ignores this distinction in authority by asserting that the State and the District are functionally equivalent for the purposes of § 1983 liability. Johnson has argued that community college districts "are *state entities*," and the District Defendants, "as district board members, are *always* state officials. They do not work for any municipality." *See* Plaintiff's Response to KCCD Defendants' Objections, ECF No. 80, 3:1-5 (emphasis in original). Johnson's position appears to be that "[a]ll public corporations exercising governmental functions within a limited portion of the state -- counties, cities, towns, reclamation districts, irrigation districts -- are agencies of the state" and therefore *are* the State. *Union Tr. Co. v. State*, 154 Cal. 716, 729, 99 P. 183, 189 (1908) (distinguishing between governmental powers derived from the state and the

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704

authority to act in the name of or on behalf of the state); *but see First Interstate Bank*, 197 Cal.App.3d at 633-34; *Gonzales*, 29 Cal.App.3d at 590; *Johnson v. San Diego Unified Sch. Dist.*, 217 Cal. App. 3d 692, 699 (1990). However, such a position would logically indicate that Johnson must also be a *State* employee if District Defendants are *always* state officials – a position soundly rejected by many California courts. *See, e.g.*, *Gonzales,* 29 Cal. App. 3d at 590-91 (holding a local school district bus driver is an employee of the local school district, not the state, despite district being a "state agenc[y]").

Indeed, it is this very distinction between the statutory authority of the State and the District Defendants that led the Ninth Circuit to conclude Johnson lacked standing against the State Chancellor in its amended Memorandum Decision. The Ninth Circuit reasoned "Chancellor Christian lacks authority to enforce the challenged statutes, regulations, and policies against Johnson." Amended Memorandum at *6. This conclusion recognizes that the State is *not* the same entity as the District given the respective authority and responsibilities of each entity as governed by the California Constitution and state statutes. The State Chancellor can establish system-wide policies and regulations (which it did through the promulgation of the DEIA Regulations), but it cannot make specific employment decisions for individual faculty members, which is statutorily delegated to local community college districts. *See* Cal. Educ. Code, §§ 70901, 70902.

This distinction between the State and the District requires Johnson to show the District Defendants' liability under the standards established in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). *See* ECF No. 46, 21:20-23:5; ECF No. 64, 7:17-9:8. *Monell* provides the analytical vehicle for determining whether the *District's* policy, as a local governmental entity, is the "moving force" behind the alleged constitutional violation. *Graham*, 473 U.S. at 166 (citing *Monell*, 436 U.S. at 694). The Ninth Circuit has on several occasions applied *Monell* to California school districts to assess § 1983 liability. *See Mohamed Sabra v. Maricopa Cty. Cmty. Coll. Dist.*, 44 F.4th 867, 883-86 (9th Cir. 2022), overruling on other grounds recognized by *Ariz. All. for Retired Ams. v. Mayes*, 117 F.4th 1165, 1173 (9th Cir. 2024); *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 730-32 (9th Cir. 2022); *Wilkins v. Herron*,

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704

No. 24-80, 2024 U.S. App. LEXIS 32644, at *3-5 (9th Cir. Dec. 23, 2024); *Wilson v. Maricopa Cmty. Coll. Dist.,* 699 F. App'x 771, 772 (9th Cir. 2017).

2. The District Defendants Must Comply With The State DEIA Regulations' Evaluation Component

The District Defendants, as members of the governing board of a local community college and officials of the District respectively, must comply with the laws and regulations established by the State and the Board of Governors. Cal. Educ. Code, § 70902(c) ("In carrying out the powers and duties specified in subdivision (b) or other provisions of statute, the governing board of each community college district shall have full authority to adopt rules and regulations, *not inconsistent with the regulations of the board of governors and the laws of this state*, that are necessary and proper to executing these prescribed functions.") (emphasis added). The extent of their statutory authority to act is therefore restricted to the extent such actions comply with State regulations – such as the DEIA Regulations. *Slivkoff,* 69 Cal. App. 3d at 401. The District Defendants cannot adopt or modify these DEIA Regulations on behalf of the State, nor do they have discretion to ignore them. Any locally-developed DEIA competencies and criteria, or the form of the faculty DEIA evaluation component, would not be a "state" policy, but rather a local District policy applicable only to the Kern Community College District.

3. Johnson Fails To Identify A District Policy That Constitutes The "Moving Force" Behind His Alleged Constitutional Injury

Johnson has failed to identify or allege any District policy regarding his eventual evaluation based on DEIA competencies and criteria. He has not submitted any locally-developed DEIA competencies and criteria of the District nor the related faculty evaluation procedures. This warrants dismissal by itself.

The only "policy" he has identified is the evaluation component of the DEIA Regulations, Cal. Code Regs. tit. 5, §§ 53602(b) and 53605(a) – promulgated by the State Board of Governors. But as described above, the District is *not* the State under California law, nor does the District have the statutory authority to act on behalf of the State to adopt these regulations. If it had that level of authority, the District could create DEIA evaluation requirements for *every* community

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704

college district in California – a power it does not possess and that is specifically reserved for the Board of Governors. *See* Cal. Educ. Code, §§ 70901, 70902.

Johnson's avenue for establishing District liability requires a local District policy or practice that goes beyond the State's minimum DEIA evaluation requirements to cause the alleged constitutional harm. *See Evers v. Cty. of Custer*, 745 F.2d 1196, 1203 (9th Cir. 1984) (finding a county liable under § 1983 because of "an official decision of the Commissioners, the County's governing body, and the [violating] action was instigated at their direction"); *Sandoval*, 912 F.3d 509, 517-18 (finding a county liable under § 1983 because it exercised available discretion to go beyond the mandatory requirements of the state law it enforced). He has identified no such policy.

Moreover, the State's DEIA Regulations, and specifically the DEIA evaluation component, deprives the District from making the "deliberate choice" to evaluate faculty on DEIA-related competencies and skills. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). The Board of Governors in making the DEIA evaluation component mandatory has effectively made that choice for the District Defendants. *See* Cal. Code Regs. tit. 5, § 53602(a) ("District governing boards *shall* . . .") (emphasis added); *id.* § 53602(b) ("The evaluation of district employees *must* . . .") (emphasis added); *id.* § 53605(a) ("Faculty *shall* . . .") (emphasis added). The District has no more discretion, under the terms of the State's DEIA regulations, to refuse to evaluate faculty on DEIA competencies and criteria than it has discretion to refuse to adopt a district budget (Cal. Code Regs. tit. 5, § 58306) or to refuse to submit an annual audit report to the Chancellor's Office. Cal. Code Regs. tit. 5, § 59106. It is the very fact that the District is required to evaluate Johnson on DEIA-related competencies and skills *at all* that is the proximate cause of his alleged harm.

Federal circuits have declined to find § 1983 liability under these circumstances. *See Vives v. City of N.Y.*, 524 F.3d 346, 354-57 (2d Cir. 2008) (imposing § 1983 liability when local governmental entities have a "meaningful choice" to choose to not enforce a state law and make a "conscious choice" to enforce a mandatory state law in an unconstitutional manner); *Snyder*, 745 F.3d at 246-50 (citing *Bethesda Lutheran Homes & Servs. v. Leean*, 154 F.3d 716, 718 (7th Cir.

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704

1998), to hold there is no § 1983 liability for local governmental entities for "acts that it did under the command of state or federal law"); *Whitesel v. Sengenberger*, 222 F.3d 861, 872 (10th Cir. 2000) ("[W]e emphasize that the Board cannot be liable for merely implementing a policy created by the state judiciary. In order to prevail on his claim against the [county, the plaintiff] must demonstrate that the [county] was 'the moving force' behind the [constitutional violation]."); *Echols v. Parker*, 909 F.2d 795, 800-01 (5th Cir. 1990) (holding county officials cannot be liable under § 1983 when their actions are "directed by State statute"). The conclusion by these circuits follows the Supreme Court's holdings that § 1983 liability turns on the actions of the individual governmental entity, and that § 1983 liability attaches "where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *See Pembaur*, 475 U.S. at 483; *Graham*, 473 U.S. at 166; *Iqbal*, 556 U.S. at 676.

Like these circuits, courts in the Ninth Circuit have focused on the level of discretion and choice available to a local government entity in enforcing a state law to assess liability. In *Sandoval v. County of Sonoma*, the Ninth Circuit found a county liable under § 1983 because its conduct was discretionary under the state statute it enforced. *Sandoval*, 912 F.3d at 517-18. Conversely, in *Aliser v. SEIU Cal.*, a county was not found liable under § 1983 because the "state statute uses mandatory language, and the plaintiffs have not suggested that the counties had discretion under state law to act contrary to the statute's instructions." *Aliser*, 419 F. Supp. 3d at 1165. Both cases focus on the choice – or lack of choice – available to local governmental entities when assessing § 1983 liability and consider whether the state law or local policy was the proximate cause of the alleged constitutional injury, mirroring the analysis of other federal circuits. *See, e.g.*, *Snyder*, 745 F.3d at 246-50 ("To say that any such direct causal link exists when the only local government 'policy' at issue is general compliance with the dictates of state law is a bridge too far; under those circumstances, the state law is the proximate cause of the plaintiff's injury.").

Furthermore, Johnson agreed with Magistrate Judge Baker's conclusion that "[t]here does not exist a single valid application of [the DEIA Regulations], let alone a plainly legitimate

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704

'sweep' in their enforcement." *See* Plaintiff's Objections to Findings and Recommendations, ECF No. 74, 7:10-15. In other words, Johnson concedes there is no situation in which the District can implement a locally-developed DEIA evaluation policy and procedure without allegedly violating his First Amendment rights as a faculty member.

That concession cuts toward a finding that the District lacks discretion to do anything but comply with the DEIA Evaluation Component's core requirements, and confirms that a *District* policy is not the source of his alleged harm. The State's DEIA Regulations establish that (1) the District *shall* adopt policies for the evaluation of employee performance, including tenure review, that requires demonstrated, or progress toward, proficiency in the locally-developed DEIA competencies (Cal. Code Regs. tit. 5, § 53602 (a)); and (2) the evaluation of district employees *must* include consideration of an employee's demonstrated, or progress toward, proficiency in diversity, equity, inclusion, and accessibility DEIA-related competencies" (Cal. Code Regs. tit. 5, § 53602(b)). Under the regulations, the District lacks the discretion to disregard, ignore, or otherwise refuse to develop and implement the State-required DEIA evaluation component in faculty evaluations. Cal. Educ. Code, § 70902(c).

Under Johnson's view, there is "not a single valid" way to comply with these provisions without violating his First Amendment rights. *See* Plaintiff's Objections to Findings and Recommendations. ECF No. 74, 7:11. While the District Defendants do not concede these requirements violate Johnson's First Amendment rights, it agrees with Johnson to the extent he highlights the rock-and-a-hard-place dilemma the District faces as a result of the State-created DEIA Regulations. On the one hand, the District is required to develop and implement a policy containing a DEIA evaluation component for faculty, but could ignore the policy, violate state law, and draw an enforcement action against it by the State. On the other hand, accepting Johnson's argument as true that there is no valid way to create and enforce a policy under the First Amendment, the District could comply with the DEIA Regulations and face a court order enjoining the District from enforcing its policy. This is a Hobson's Choice.

Accepting Johnson's argument as true that there is no version of the locally-developed DEIA competencies and criteria that survives scrutiny reinforces the proposition that the District

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704

is not the source of the alleged constitutional harm. Rather, "[i]t is the statutory directive, not the follow-through, which causes the harm of which the plaintiff complains." *Snyder*, 745 F.3d at 249. Nor are there any non-conclusory allegations that plausibly demonstrate the District will go beyond the minimum requirements of the DEIA Regulations to use the DEIA evaluation component to discipline or terminate Johnson. Therefore, no *District* policy is the "moving force" behind Johnson's alleged constitutional deprivation. *Graham*, 473 U.S. 166.

B. THE BOARD OF GOVERNORS IS A NECESSARY PARTY

The District Defendants' motion to dismiss contains another unaddressed argument that has increased importance with the Ninth Circuit's dismissal of the State Chancellor. ECF No. 46 at 24:14-25:7. The District Defendants argued the Board of Governors of the California Community Colleges is a necessary party because an injunction rendered against the District Defendants from complying with state law in the Board's absence would prejudice the District Defendants, and the Board of Governors is a real party in interest because it promulgated the DEIA Regulations. *Id.* Magistrate Judge Baker in his findings and recommendations rejected the District Defendants' argument because the State Chancellor could adequately represent the Board's interests. ECF No 70 at 42:17-42:9 (citing *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir.1992)). No party objected to the Magistrate Judge's recommendation on this point, but neither the District Court nor the Ninth Circuit reached this argument as both courts issued decisions based on standing alone.

Now that the State Chancellor has been dismissed, there is no longer another nonconflicted named party that can "adequately represent[] in the suit" the interests of the State Board of Governors. *See Shermoen*, 982 F.2d at 1318. The DEIA Regulations, and their faculty evaluation component described in Cal. Code Regs. tit. 5, § 53602(b), 53605(a), were not promulgated by the District Defendants. Only the Board of Governors or the Chancellor of the California Community Colleges can adequately represent the State's interest in both the constitutionality of the DEIA Regulations and the interest in enforcing compliance with them onto the District Defendants. Therefore, this action lacks a necessary party. *Shermoen*, 982 F.2d at 1320. Because the Ninth Circuit held that the Plaintiff lacks standing to sue the State, this

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704

action must be dismissed. *See id.*

IV. CONCLUSION

For the foregoing reasons, the Court should grant the District Defendants' motion to dismiss without leave to amend.

Dated: September 26, 2025

LIEBERT CASSIDY WHITMORE

By: /s/ Morgan J. Johnson
Jesse J. Maddox
David A. Urban
Olga Y. Bryan
Morgan J. Johnson
Attorneys for Defendants JERRY FLIGER, in his official capacity as President, Bakersfield College; et al.

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: **6033 West Century Boulevard, 5th Floor, Los Angeles, California 90045.**

On **September 26, 2025**, I served the foregoing document(s) described as **DISTRICT DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT** in the manner checked below on all interested parties in this action addressed as follows:

Alan Gura
Institution for Free Speech
1150 Connecticut Ave., N.W. Suite 801
Washington, DC 20036
Email: agura@ifs.org

Attorney for Plaintiff Daymon Johnson

Jay C. Russell
Jane E. Reilley
CALIFORNIA ATTORNEY GENERAL
455 Golden Gate Ave., Ste. 11000
San Fransisco, California 94102
Email: Jay.russell@doj.ca.gov
Jane.reilley@doj.ca.gov
docketingSFCLS@doj.ca.gov

Attorneys for Defendant Sonya Christian in her official capacity as Chancellor of the California Community Colleges

☐ **(BY U.S. MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Fresno, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **(BY FACSIMILE)** I am personally and readily familiar with the business practice of Liebert Cassidy Whitmore for collection and processing of document(s) to be transmitted by facsimile. I arranged for the above-entitled document(s) to be sent by facsimile from facsimile number 559.449.4535 to the facsimile number(s) listed above. The facsimile machine I used complied with the applicable rules of court. Pursuant to the applicable rules, I caused the machine to print a transmission record of the transmission, to the above facsimile number(s) and no error was reported by the machine. A copy of this transmission is attached hereto.

☐ **(BY OVERNIGHT MAIL)** By overnight courier, I arranged for the above-referenced document(s) to be delivered to an authorized overnight courier service, FedEx, for delivery to the addressee(s) above, in an envelope or package designated by the overnight courier service with delivery fees paid or provided for.

☑ **(BY ELECTRONIC SERVICE)** By electronically mailing a true and correct copy through Liebert Cassidy Whitmore's electronic mail system from cconley@lcwlegal.com to the email address(es) set forth above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☐ **(BY ELECTRONIC SERVICE PROVIDER)** I am readily familiar with the firm's practice for filing electronically. Through use of OneLegal, an electronic service provider, I arranged a true and correct copy of the above-reference documents to be electronically served to the e-mail address(es) registered with the court this day in the ordinary course of business following ordinary business practices.

☐ **(BY PERSONAL DELIVERY)** I delivered the above document(s) by hand to the addressee listed above.

Executed on **September 26, 2025**, at Los Angeles, California.

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

/s/ Carina Conley
Carina Conley

Liebert Cassidy Whitmore
A Professional Law Corporation
5250 North Palm Ave, Suite 310
Fresno, California 93704