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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAYMON JOHNSON, *Plaintiff*, v. JERRY FLIGER, et al., *Defendants.*	Case No.: 1:23-cv-00848-KES-CDB

PLAINTIFF DAYMON JOHNSON'S SUPPLEMENTAL BRIEF RE: MOTION FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

The Ninth Circuit has simplified this case. While it affirmed the dismissal of some of Professor Johnson's claims, its decision inexorably leads to the conclusion that Johnson is entitled to relief on his remaining claims.

By confirming his standing to challenge two of the state's DEIA regulations and their implementation by the Education Code, the Ninth Circuit established that these regulations do in fact injure Professor Johnson. The only remaining question is one of law: Do these injuries violate Professor Johnson's First Amendment rights?

They do. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). And no matter how fervently officials or political majorities may believe in the overwhelming justice of a cause, "[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command." *Janus v. AFSCME, Council 31*, 585 U.S. 878, 892 (2018).

The challenged regulations require that Professor Johnson be evaluated based on his "demonstrated, or progress toward [DEIA] proficiency," Cal. Code Regs. tit. 5, § 53602(b), that he "must have or establish [DEIA] proficiency . . . to teach, work, or lead" at Bakersfield College, *id.*, and that he must conform his teaching to "DEIA and anti-racist principles," *id.* § 53605(a). Each of these chill Johnson's ideologically non-compliant speech, and compel him to speak contrary to his conscience. They cannot be sustained under any standard of review. The other preliminary injunction factors flow naturally from application of these longstanding doctrines. Violating the First Amendment inflicts irreparable harm, and barring state officials from violating fundamental rights always serves the public interest.

The Court should grant Johnson's requested preliminary injunction.

STATEMENT OF FACTS

1. Regulations remaining before the Court

California community colleges may fire professors for "[p]ersistent violation of, or refusal to obey . . . 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." Cal. Educ. Code § 87732(f).

Among these regulations, Cal. Code Regs. tit. 5, § 53602(b) provides:

> 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 that enable work with diverse communities, as required by section 53425. District employees must have or establish proficiency in DEIA-related performance to teach, work, or lead within California community colleges.

And Cal. Code Regs. tit. 5, § 53605(a) provides:

> Faculty members shall employ teaching, learning, and professional practices that reflect DEIA and anti-racist principles, and in particular, respect for, and acknowledgement of the diverse backgrounds of students and colleagues to improve equitable student outcomes and course completion.[1]

2. Professor Johnson's speech

"Johnson has sufficiently alleged an intention to engage in a course of conduct arguably affected with a constitutional interest under the First Amendment," which is "arguably proscribed by these provisions." Dkt. 104, at 3 (internal quotation marks omitted). He faces a "credible threat of enforcement" under these provisions, based on "his desired speech and his refusal to express support for diversity, equity, inclusion, and accessibility (DEIA) principles." *Id.* (citations omitted).

Johnson, a professor of history, also serves as Faculty Lead for the Renegade Institute for Liberty (RIFL). Johnon Decl., ¶ 2. Johnson's desired speech includes classroom instruction, *id.* ¶¶ 100-105; and other teaching-related speech that Johnson would express as faculty, such as service on school committees, *id.* ¶¶ 1, 61. It also includes "off duty" desired speech like posting on and managing RIFL's Facebook page, and engaging in other RIFL-related activities such as hosting speakers, *id.* ¶ 3; speaking to the media, *id.* ¶ 55; and protesting and other dissenting expression about gender issues, *id.* ¶ 59.

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[1] Further section references are to Title 5, California Code of Regulations unless noted otherwise.

Johnson's classroom speech is antithetical to DEIA. "Almost everything I teach violates the new DEIA requirements—not just by failing to advance the DEIA and anti-racist/racist ideology, but also by criticizing it." *Id.* ¶ 100. Indeed, Johnson's classroom material, pedagogy, and views are "utterly contrary to [the Code's] DEIA dictates." *Id.*¶ 105. "If I teach my classes as I normally would and always have, I will not be 'demonstrating' or 'progressing' toward compliance with the new DEI standards." *Id.* Johnson's other speech as faculty is likewise incompatible with advancing the state's DEIA agenda. For example, Johnson has already stopped participating on faculty screening committees, plainly a part of "working" and "leading" at Bakersfield College, § 53602(b), because he cannot and will not successfully complete DEIA training, and will not perpetuate DEIA ideology through such committee participation, Johnson Decl. ¶ 61. The outlook Johnson would advance through RIFL, *id.* ¶ 2, and his other various political expression, *e.g. id.* ¶ 59,. is also incompatible with DEIA. *See, e.g., id.* ¶¶ 2, 59, 106. "The political and social viewpoints which I would like to express are inconsistent with and even defiant of so-called 'antiracist' ideology that I view as racist ideology in itself." *Id.* ¶ 37. "I do not share the 'embracing diversity' ideology as defined in the California Code of Regulations and enforced by Bakersfield College." *Id.* ¶ 38.

"The DEIA requirements chill my speech, including my academic freedom in the classroom and as the Faculty Lead of RIFL, and compel me to affirm, promote, and celebrate political ideology that I reject and even find abhorrent." *Id.* ¶ 63.

> [B]ecause I want to keep my job, I am feeling compelled to 'demonstrate' or at least 'progress toward proficiency' in applying and fulfilling, by word and deed, a political ideology that I oppose and which contravenes my conscience. Likewise, I fear that if I actually express my objections to DEI ideology, which I very much want to do, I will be either disciplined or terminated.

Id. ¶ 67.

SUMMARY OF ARGUMENT

Johnson remains entitled to a preliminary injunction; he would likely succeed on the merits, suffers irreparable harm absent relief, and the equities, reflected by the public interest, favor an injunction. *Short v. Brown*, 893 F.3d 671, 675 (9th Cir. 2018) (citation omitted).

Unlike the dismissed claims, which were based on anticipated retaliation for speech similar to that suffered by Professor Garrett, Johnson's remaining claims are somewhat different. They more

squarely address the direct application of regulations, which require that faculty "must have or establish proficiency in DEIA-related performance," § 53602(b), and "shall employ teaching, learning, and professional practices that reflect DEIA and anti-racist principles," § 53605(a). To the extent these regulations chill Johnson from expressing his views, they are subject to the test announced in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), as modified by *U.S. v. Nat'l Treasury Emps. Union (NTEU)*, 513 U.S. 454 (1995) to account for the differences between regulatory challenges and retaliation claims. But *Pickering* is inapplicable to Johnson's compelled speech claims, which are subject to strict scrutiny.

In any event, under any standard of scrutiny, the result is the same: Johnson wins. Defendants cannot carry their burden of showing that any of their supposed interests outweigh Johnson's interest in academic freedom, and his fundamental First Amendment right to express himself—or not—on political and social matters. Money cannot remedy these injuries, and the public interest always favors enforcing the Constitution. The Court should enjoin these regulations.

ARGUMENT

I. THE DEIA REGULATIONS VIOLATE PROFESSOR JOHNSON'S FIRST AMENDMENT RIGHTS.

A. The First Amendment protects all of Johnson's desired speech.

While the First Amendment does not protect "statements made by public employees pursuant to their official duties," *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014) (internal quotation marks omitted) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)), that rule "does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor." *Id.* at 412.

The exception protecting academic speech broadly encompasses a public employee's on-duty "speech related to scholarship or teaching." *Garcetti*, 547 U.S. at 425. "[T]he scholarship or teaching exception does not require that the speech be published in an academic journal or uttered while instructing a class." *Jensen v. Brown*, 131 F.4th 677, 689 (9th Cir. 2025). In *Demers*, the Ninth Circuit held that a professor's pamphlet advocating the school's restructuring was "related to scholarship or teaching." *Demers*, 746 F.3d at 406. "As *Demers* exemplifies, speech about a school's curriculum is 'related to scholarship or teaching' and so falls outside *Garcetti*'s purview,

even if that speech is not made while teaching a class or producing scholarship." *Jensen*, 131 F.4th at 689 (finding speech and handout criticizing curriculum at public meeting is related to scholarship or teaching).

All of Johnson's desired speech falls outside of *Garcetti*. Some of Johnson's speech, such as his social media use, is simply off-duty. *Hernandez v. City of Phx.*, 43 F.4th 966, 978 (9th Cir. 2022) ("publicly posting on social media suggests an intent to communicate to the public or to advance a political or social point of view beyond the employment context") (internal quotation marks omitted); *see also* Exh. E at 8 (Defendants admit Johnson's Facebook posts not made "in his role as a [KCCD] employee"). Johnson's relevant on-duty speech is either "related to scholarship or teaching" (e.g., hiring committee service), or *is* actually teaching.

B. Johnson's viewpoint discrimination claims are subject to the *Pickering/NTEU* test, while his compelled speech claims are subject to strict scrutiny.

Given that the First Amendment protects Johnson's speech, what rule governs his challenges? In holding that *Garcetti* does not apply to academic speech, the Ninth Circuit concluded that "such speech is governed by *Pickering*." *Demers*, 746 F.3d at 406 (citation omitted). But the court there addressed public employee speech rights in retaliation cases, of which *Pickering* is a leading example. Johnson's case is different. He complains not about some particular adverse employment action, but about generally applicable rules, which he challenges not only as applied to himself but also facially. Accordingly, to the extent Johnson complains that his speech is chilled because the regulations discriminate against his viewpoints, the applicable test is the "*Pickering/NTEU*" test, *Progressive Democrats for Soc. Justice v. Bonta*, 73 F.4th 1118, 1123 (9th Cir. 2023), a form of *Pickering* as modified by *NTEU* for such claims.

1. *Pickering/NTEU*

Under the original *Pickering* test,

> the employee must [first] show that his or her speech addressed matters of public concern. Second, the employee's interest in commenting upon matters of public concern must outweigh the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Demers, 746 F.3d at 412 (internal quotation marks and citation omitted). "In balancing the interests on each side, we consider not only the employees' interest in speaking but also 'the importance of

promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion.'" *Moonin v. Tice*, 868 F.3d 853, 865 (9th Cir. 2017) (quoting *Garcetti*, 547 U.S. at 419).

But "the *Pickering* framework was developed for use . . . in cases that involve 'one employee's speech and its impact on that employee's public responsibilities;'" it does not map well to cases "involv[ing] a blanket requirement." *Janus*, 585 U.S. at 907 (quoting *NTEU*, 513 U.S. at 467). "A speech-restrictive law with 'widespread impact,' we have said, 'gives rise to far more serious concerns than could any single supervisory decision." *Id.* (quoting *NTEU*, 513 U.S. at 468). "'[U]nlike an adverse action taken in response to actual speech,' a prospective restriction 'chills potential speech before it happens.' The government therefore must shoulder a heavier burden when it seeks to justify an ex ante speech restriction as opposed to 'an isolated disciplinary action.'" *Moonin*, 868 F.3d at 861 (quoting *NTEU*, 513 U.S. at 468); *id.* at 865.

Accordingly, "in considering general rules that affect broad categories of employees, we have acknowledged that the standard *Pickering* analysis requires modification." *Janus*, 585 U.S. at 907 (citation omitted).

> [W]hen such a law is at issue, the government must shoulder a correspondingly heavier burden, and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights. The end product of those adjustments is a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis.

Janus, 585 U.S. at 907 (internal quotation marks and citations omitted).

Under *Pickering/NTEU*,

> [t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the Government, and must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

Progressive Democrats, 73 F.4th at 1123 (internal quotation marks omitted).

2. *Strict scrutiny*

"[T]he *Pickering* framework fits much less well where the government compels speech . . . . When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different." *Janus*, 585 U.S. at

908. Apart from official duty speech covered by *Garcetti*, "it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree. And we have never applied *Pickering* in such a case." *Id.*[2]

Strict scrutiny applies to a law that compels speech on the basis of content or viewpoint. *Bates v. Pakseresht*, 146 F.4th 772, 785 (2025). Defendants bear the burden of showing that these regulations are narrowly tailored in support of a compelling state interest, "a difficult showing to make." *Id.* at 798 (citations omitted).

C. Requiring Johnson to conform to DEIA precepts fails *Pickering/NTEU* review.

Professor Johnson is chilled from speaking. So much of what he has to say is utterly anathema to DEIA ideology, an outlook that Johnson relishes attacking, but § 53602(b) provides that he cannot expect to "teach, work, or lead" unless he becomes "DEIA-proficient." The requirement has already cost him service on faculty screening committees. It is hard to imagine how he could remain employed if he speaks his mind on political and social issues. This viewpoint discrimination violates Professor Johnson's fundamental First Amendment rights.

Defendants cannot carry their burden under *Pickering/NTEU* to save this regulation. Start with the requirement that they "must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the Government." *Progressive Democrats*, 73 F.4th at 1123. That is a substantial weight on the First Amendment side of the scale: the interests of "both potential audiences and a vast group of present and future employees in a broad range of present and future expression" are profound. Courts rarely use language like this:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.

Demers, 746 F.3d at 411 (internal quotation marks and citations omitted).

[2] In *Janus*, the Supreme Court applied an exacting scrutiny standard designed for compelled funding cases, as *Janus* concerned compelled funding. *Id.* at 894-95. But this is not such a case.

> The essentiality of freedom in the community of American universities is almost self-evident . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Id. (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

To be sure, having at least one professor on campus expressing a conservative or libertarian thought *will* "necessary[ily] impact . . . the actual operation of" Bakersfield College. *Progressive Democrats*, 73 F.4th at 1123. For the better. "'[T]he efficient provision of services' by a university 'actually depends, to a degree, on the dissemination in public fora of controversial speech implicating matters of public concern.'" *Meriwether v. Hartop*, 992 F.3d 492, 510 (6th Cir. 2021) (quoting *Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir .1994)). Many schools have always functioned well without an official ideology to which all faculty must conform, and Plaintiff is unaware of any other public college or school system with the ideological mandate imposed by § 53602(b), which is itself quite recent. Enjoining it will not negatively impact "the actual operation" of Bakersfield College.

Because tolerance for *viewpoint* diversity will not hurt the college, Defendants cannot satisfy *Pickering/NTEU*'s second prong, which requires that they "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Progressive Democrats*, 73 F.4th at 1123.

Section 53602(b) discriminates against Professor Johnson on the basis of his political and social viewpoints, in violation of his First Amendment rights.

D. Requiring Johnson to "employ teaching, learning, and professional practices that reflect DEIA and anti-racist principles" compels his speech in violation of the First Amendment.

As Johnson previously noted, the Supreme Court observed that if a state "required all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties[,] [n]o one, we trust, would seriously argue that the First Amendment permits this." *Janus*, 585 U.S. at 892. Alas, those words preceded Section 53605(a) by five years. But while *Janus*'s assumptions about the universality of political goodwill may be seem quaint, its holding condemning the compulsion of speech remains valid.

Of course, a university must make judgments about what is "both necessary and appropriate to teach." *Demers*, 746 F.3d at 411. California is not required to establish Bakersfield College, nor is it required to establish a Department of History within it. But the power to create a school and set its curriculum does not allow a state to proclaim that it will only hire Democrats or Republicans. Indeed, people argue whether "DEIA and anti-racist principles" are "progressive," but a requirement that professors' teaching "reflect progressive principles" would be just as unconstitutional as a regulation commanding that their teaching "reflect conservative principles."

"In our system, state-operated schools may not be enclaves of totalitarianism." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969). If state college professors have any academic freedom at all—and precedent, as reviewed *supra*, confirms that they do—this kind of compulsion is not close to being constitutional. Simply put: there is no compelling state interest in ensuring that one (very controversial) political ideology control what is taught in public college classrooms, and how it is taught.

Nor would § 53605(a) be narrowly tailored to improving teaching in any way. Nothing demonstrates that *only* DEIA and anti-racist professors are capable of educating students, or that they are so vastly superior to all other professors that they can be the only ones employed. And the provision is also not narrowly tailored to advancing any compelling interest in teaching students about DEIA and anti-racist concepts. Bakersfield College can always establish a "DEIA and Anti-Racism Studies Department."

While § 53605(a) fails strict scrutiny, it bears mention that the provision also fails the exacting scrutiny standard of *Pickering/NTEU*. The interests of students in learning from non-DEIA, non-anti-racist professors, and those professors' expressive interests in teaching, vastly outweigh any supposed hypothetical impact of having classes taught, if not by opponents of the ideology like Johnson, by non-adherents (a very large subset of all professors). Evidence that Defendants' "recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way," *Progressive Democrats*, 73 F.4th at 1123, is also non-existent.

II. JOHNSON WILL CONTINUE TO SUFFER IRREPARABLE HARM IN THE ABSENCE OF RELIEF.

Ordinarily, "[i]rreparable harm is relatively easy to establish in a First Amendment case," as a plaintiff need only "demonstrate the existence of a colorable First Amendment claim." *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 694-95 (9th Cir. 2023) (en banc) (internal quotation marks omitted). "It is axiomatic that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Hubbard v. City of San Diego*, 139 F.4th 843, 853 (9th Cir. 2025) (internal quotation marks omitted). Johnson has always had at least a "colorable" First Amendment claim. The Ninth Circuit confirmed he has an injury-in-fact. There can be no doubt that Johnson suffers irreparable harm.

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR JOHNSON.

The law has not changed since the Court last considered this case: If Johnson is likely to prevail, enjoining Defendants' blatant viewpoint discrimination and compelled speech manifestly serves the public interest. To recap from the opening brief:

"Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Assoc. Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (internal quotation marks omitted). "Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (internal quotation marks omitted). Accordingly, "[t]he public interest and the balance of the equities favor preventing the violation of [Plaintiffs'] constitutional rights." *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017) (internal quotation marks omitted).

CONCLUSION

This Court should grant Professor Johnson's motion for preliminary injunction.

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Respectfully submitted,

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