

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

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.

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 OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY
INJUNCTION**

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"), respectfully submit this supplemental brief in opposition to Johnson's
Supplemental Brief on his Motion for Preliminary Injunction. ECF Nos. 26, 110.

///

///

///

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	6
II. JOHNSON HAS NOT SATISFIED THE <i>WINTER</i> FACTORS FOR A PRELIMINARY INJUNCTION	6
A. JOHNSON HAS NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS	7
1. <i>Pickering</i> Balancing is the Correct Standard of Review	7
a. <i>NTEU</i> Does Not Apply	7
b. Strict Scrutiny Does Not Apply to Government Employee Speech Claims	10
2. <i>Pickering</i> Balancing Favors The District Defendants	11
a. The State’s Legitimate Administrative Interests In Furthering Its Educational Mission Outweigh Johnson’s Interest in Speech	12
b. Johnson’s Refusal to Complete Mandatory Trainings is Not Compelled Speech.....	14
3. Johnson’s Failure to Identify a Local District Policy Makes It Unlikely He Will Prevail On the Merits.....	15
4. Johnson’s Facial Challenge Lacks Merit	15
B. JOHNSON IS NOT LIKELY TO SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY RELIEF	17
C. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR THE DISTRICT DEFENDANTS	18
III. CONCLUSION.....	19

TABLE OF AUTHORITIES**Page(s)****Federal Cases**

<i>Aliser v. SEIU Cal.</i> 419 F. Supp. 3d 1161(N.D. Cal. 2019)	15
<i>Anderson v. U.S.</i> 612 F.2d 1112 (9th Cir. 1979)	18
<i>Barone v. City of Springfield</i> 902 F.3d 1091 (9th Cir. 2018)	10
<i>Bates v. Pakseresht</i> 146 F.4th 772 (2025).....	11
<i>Berry v. Dep’t of Soc. Servs.</i> 447 F.3d 642 (9th Cir. 2006)	10
<i>City of San Diego v. Roe</i> 543 U.S. 77 (2004).....	7, 8
<i>Clementine Co., LLC v. Adams</i> 74 F.4th 77 (2d Cir. 2023)	7, 17
<i>Connick v. Myers</i> 461 U.S. 138 (1983).....	11
<i>Damiano v. Grants Pass Sch. Dist. No. 7</i> 140 F.4th 1117 (9th Cir. 2025)	10
<i>Demers v. Austin</i> 746 F.3d 402 (9th Cir. 2014)	7, 12, 13, 14
<i>Downs v. Los Angeles Unified Sch. Dist.</i> 228 F.3d 1003 (9th Cir. 2000).	14
<i>Heim v. Daniel</i> 81 F.4th 212 (2d Cir. 2023)	12, 13, 14
<i>Hernandez v. City of Phx.</i> 43 F.4th 966 (9th Cir. 2022)	8, 9
<i>Janus v. AFSCME, Council 31</i> 585 U.S. 878 (2018).....	10, 11
<i>Johnson v. Poway Unified Sch. Dist.</i> 658 F.3d 954 (9th Cir. 2011)	11
<i>Josephine Cty. v. Watt</i> 539 F. Supp. 696 (N.D. Cal. 1982)	18, 19

1	<i>Kentucky v. Graham</i>	
2	473 U.S. 159 (1985).....	15
3	<i>Kilborn v. Amiridis</i>	
4	135 F.4th 1100 (7th Cir. 2025)	13
5	<i>Knight v. State Dep’t of Pub. Health</i>	
6	275 F.3d 156 (2d Cir. 2001).....	10
7	<i>Martinez v. Mathews</i>	
8	544 F.2d 1233 (5th Cir. 1976)	18
9	<i>Maryland v. King</i>	
10	567 U.S. 1301 (2012).....	18
11	<i>Members of City Council of Los Angeles v. Taxpayers for Vincent</i>	
12	466 U.S. 789 (1984).....	15
13	<i>Moody v. NetChoice, LLC</i>	
14	603 U.S. 707 (2024).....	15, 17
15	<i>Moonin v. Tice</i>	
16	868 F.3d 853 (9th Cir. 2017)	9
17	<i>Moser v. Las Vegas Metro. Police Dep’t</i>	
18	984 F.3d 900 (9th Cir. 2021)	7
19	<i>Munroe v. Cent. Bucks Sch. Dist.</i>	
20	805 F.3d 454 (3d Cir. 2015).....	7
21	<i>Nat’l Endowment for the Arts v. Finley</i>	
22	524 U.S. 569 (1998).....	13
23	<i>Nat’l Inst. of Family & Life Advocates v. Becerra</i>	
24	585 U.S. 755 (2018).....	9
25	<i>Norgren v. Minn. Dep’t of Hum. Servs.</i>	
26	96 F.4th 1048 (8th Cir. 2024)	14
27	<i>Pickering v. Bd. of Educ.</i>	
28	391 U.S. 563 (1968).....	7
	<i>Regents of Univ. of Mich. v. Ewing</i>	
	474 U.S. 214 (1985).....	13
	<i>Rosenberger v. Rector & Visitors of the Univ. of Virginia</i>	
	515 U.S. 819 (1995).....	14
	<i>Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.</i>	
	547 U.S. 47 (2006).....	8
	<i>Snyder v. King</i>	
	745 F.3d 242 (7th Cir. 2014)	15

1	<i>Sullivan v. Univ. of Wash.</i>	
2	60 F.4th 574 (9th Cir. 2023)	14
3	<i>Sweezy v. New Hampshire</i>	
4	354 U.S. 234 (1957).....	13
5	<i>Tucker v. Cal. Dep’t of Educ.</i>	
6	97 F.3d 1204 (9th Cir. 1996)	10
7	<i>U.S. v. Nat’l Treasury Emps. Union</i>	
8	513 U.S. 454 (1995).....	7, 8, 9, 10
9	<i>United States v. Williams</i>	
10	553 U.S. 285 (2008).....	15
11	<i>Urofsky v. Gilmore</i>	
12	216 F.3d 401 (4th Cir. 2000)	13, 14
13	<i>Wash. State Grange v. Wash. State Republican Party</i>	
14	552 U.S. 442 (2008).....	16, 17
15	<i>Waters v. Churchill</i>	
16	511 U.S. 661 (1994).....	11
17	<i>West Virginia Bd. of Ed. v. Barnette</i>	
18	319 U.S. 624 (1943).....	11
19	<i>Winter v. Natural Resources Def. Council, Inc.</i>	
20	555 U.S. 7 (2008).....	6, 17, 19
21	<u>Cases</u>	
22	<i>CFTC v. Monex Credit Co.</i>	
23	2020 U.S. Dist. LEXIS 221777, *9-10 (C.D. Cal. 2020)	18, 19
24	<u>Federal Statutes</u>	
25	42 U.S.C. § 1983.....	15
26	<u>State Statutes</u>	
27	Cal. Ed. Code, § 66010.2(b)	13
28	<u>State Regulations</u>	
	California Code Regulations title 5, § 52510(d).....	9
	California Code Regulations title 5, § 53602(b).....	passim
	California Code Regulations title 5, § 53605(a)	passim
	California Code Regulations title 5, § 53605(c)	7

I. INTRODUCTION

The Ninth Circuit has “simplified” this case, as Johnson’s brief states, cutting down the large number of challenged statutes, regulations, and policies to just two specific regulations. But limiting Johnson’s challenge does not establish Johnson is actually entitled to preliminary prospective relief, especially in light of the murky record and Johnson’s many premature and speculative allegations. Johnson overreads the Ninth Circuit’s Amended Memorandum as affirmatively deciding that because Johnson established pre-enforcement First Amendment standing to challenge sections 53602(b) and 53605(a) of Title V of the California Code of Regulations, he therefore is presumptively entitled to preliminary injunctive relief as to those sections. ECF No. 110, p. 1, 10. However, the Ninth Circuit *explicitly* declined to determine anything other than that Johnson’s alleged proposed speech conduct is “arguably proscribed” by sections 53602(b) and 53605(a).¹ Amended Memorandum Decision at *3, *6-7. Johnson’s leap in logic highlights the flaws in his attempt to seek a preliminary injunction against the District Defendants. Ultimately, his broad constitutional claims do not withstand scrutiny and he has failed to make the required showings outlined in *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008), that he is entitled to a preliminary injunction. Therefore, both his as-applied and facial challenges to sections 53602(b) and 53605(a) fail and the Court should deny his motion for a preliminary injunction.

II. JOHNSON HAS NOT SATISFIED THE WINTER FACTORS FOR A PRELIMINARY INJUNCTION

As a plaintiff seeking a preliminary injunction, Johnson must affirmatory establish (1) he is likely to succeed on the merits of his claims, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter*, 555 U.S. at 20. He has failed to meet his burden, relying on speculation and assumptions about how sections 53602(b) and 53605(c) will be interpreted and applied to him. He seeks to imply the Ninth Circuit, in finding Johnson adequately alleged

¹ All further references will be to Title V of the California Code of Regulations unless otherwise noted.

sections 53602(b) and 53605(c) “arguably prescribe” Johnson’s intended speech for the purpose of Article III standing, also decided he is entitled to preliminary injunctive relief. *But see Clementine Co., LLC v. Adams*, 74 F.4th 77, 86-87 (2d Cir. 2023) (concluding that Plaintiffs plausibly alleged Article III standing, but failed to “plausibly allege that their free speech rights were violated”).

A. JOHNSON HAS NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS

1. Pickering Balancing is the Correct Standard of Review

a. NTEU Does Not Apply

In *Demers v. Austin*, the Ninth Circuit held “academic employee speech not covered by *Garcetti* is protected under the First Amendment, *using the analysis established in Pickering*.” *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)) (emphasis added). Johnson relies on this carve-out in *Demers* for scholarship and teaching, and therefore, the appropriate standard is the *Pickering* balancing test. *Id.* *Pickering* would apply to Johnson’s off-duty, non-scholarship and teaching speech, just as it would apply to any other government employee. *City of San Diego v. Roe*, 543 U.S. 77, 80-82 (2004) (applying *Pickering* to government employee speech that “took place outside the workplace and purported to be about subjects not related to his employment”); *Moser v. Las Vegas Metro. Police Dep’t*, 984 F.3d 900, 906-07 (9th Cir. 2021) (applying *Pickering* to an employee’s Facebook comment); *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 465-66 (3d Cir. 2015) (applying *Pickering* to a teacher’s personal social media blog).

Johnson argues a higher standard of *Pickering* as modified by *U.S. v. Nat’l Treasury Emps. Union* (“*NTEU*”), 513 U.S. 454 (1995), applies to broad regulations on speech. *See* ECF No. 110, p. 5-6. To get there, Johnson relies on characterizing the DEIA Regulations as “wholesale deterrent[s]” on speech. *Id.* at 7. However, *NTEU* dealt with government workers’ expression in their personal capacity and a restriction on their ability to make financial earnings for this expression outside their employment. *NTEU*, 513 U.S. at 465 (“[Plaintiffs] seek compensation for their expressive activities in their capacity as citizens, not as Government

employees.”). The content of the employees’ expression in *NTEU* had “nothing to do with their jobs and [did] not even arguably have any adverse impact on the efficiency” of their employing agencies. *Id.*; *see also Roe*, 543 U.S. at 80 (“In *NTEU* it was established that the speech was unrelated to the employment and had no effect on the mission and purpose of the employer.”).

Johnson focuses his proposed speech on his teaching and academic speech pursuant to his position as a faculty member and on “what is taught in public college classrooms.” *See* ECF No. 110 at 8-9. His speech in that context directly relates to the educational mission of the District to improve equitable student outcomes and course completion. *See Roe*, 543 U.S. at 80 (noting *NTEU* applies “when government employees speak or write on their own time on topics *unrelated to their employment . . .*”) (emphasis added).

Moreover, NTEU’s “heavier burden” applies to broad *restrictions* on speech, which the DEIA Regulations are not. *See, e.g., Hernandez v. City of Phx.*, 43 F.4th 966, 979-80 (9th Cir. 2022) (applying *NTEU* to a police department’s prohibition of certain types of social media posts made on- or off-duty). The DEIA Regulations do not prohibit *any* speech by the plain text of sections 53602(b) and 53605(a), either in and out of the classroom. Rather, they focus on the teaching and learning *practices* Johnson employs in his classrooms and Johnson’s demonstrated, or progress toward, *proficiency* in the District’s DEIA competencies. *See* Cal. Code Regs. tit. 5, §§ 53602(b), 53605(a). Johnson can employ DEIA-proficient teaching, learning, and professional *practices* such as grading anonymously, creating opportunities to discuss feedback with students, and using low-cost or zero-cost course materials – none of which depends on the content of the material taught or requires speech by Johnson. These practices “neither limit[] what [Johnson] may say nor require[] [him] to say anything” as they regulate “conduct, not speech.” *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) (noting the challenged law regulates conduct because it says what the regulated party “must *do . . .* not what they may or may not *say*”) (emphasis in original). Any burden on associated speech by requiring faculty to improve their teaching practices as required by sections 53602(b) and 53605(a) is incidental, and implementing these professional practices has no effect on the substantive content

///

1 taught in the classroom. *Id.* at 64-65; *Nat’l Inst. of Family & Life Advocates v. Becerra*, 585 U.S.
2 755, 768 (2018).

3 Importantly, Johnson remains free to express his views outside of his employment with
4 his “off-duty” speech and also remains free to express his views in his scholarship and teaching.
5 *See Hernandez*, 43 F.4th at 980 (noting that determining whether *NTEU* applies depends first on
6 “whether the challenged restriction applies to employees’ speech in their capacity as private
7 citizens on matters of public concern”). Johnson speculates and assumes wrongly that criticizing,
8 questioning, or discussing various positions related to diversity, equity², inclusion, or accessibility
9 principles necessarily results in violation of the two DEIA regulations at issue and will be
10 disciplined by the District under Education Code section 87732(f). But the plain text of the DEIA
11 Regulations do not support such a reading, nor does Johnson identify any interpretation by the
12 District to that effect to support that assumption. Nor is it clear how exactly Johnson’s off-duty
13 speech would be incorporated into the District Defendant’s evaluation process under the
14 regulations at issue here, if it would at all.

15 Johnson therefore seeks to establish that the DEIA Regulations contain an *implicit*
16 prospective restriction or prohibition on his speech akin to a prior restraint in order to fall within
17 *NTEU*’s ambit. *See* ECF No. 110 at 6:6-12. But as explained by the Ninth Circuit, these types of
18 cases fall into three categories, even in the context of public employee speech: “(1) regimes
19 requiring that an employer be notified of the content of the employees’ speech; (2) regimes
20 requiring that an employee seek supervisor pre-approval before speaking; and (3) regimes
21 prohibiting any and all discussion of certain topics with the public.” *Moonin v. Tice*, 868 F.3d
22 853, 869 (9th Cir. 2017). In all categories, the focus is on “the text of the policy to determine the
23 extent to which it implicates public employees’ speech.” *Id.* at 861 n.5 (“[The] chilling effect is

24
25 ² “Equity” is not defined by the DEIA Regulations, but the ordinary dictionary definition defines
26 the term as “[t]he situation in which everyone is treated fairly according to their needs and no
27 group of people is given special treatment.” *See* Cambridge English Dictionary, “Equity”
28 <https://dictionary.cambridge.org/us/dictionary/english/equity> (last retrieved October 7, 2025).
The operative definition of “anti-racist” also refers to equity. *See* Cal. Code Regs. tit. 5, §
52510(d) (defining “anti-racism” as “policies and actions that lead to racial equity”).
“Diversity,” “Inclusion,” and “Accessibility” each have operative definitions for the purposes of
the DEIA Regulations. *See id.* § 52510(b), (j), (n).

determined by the language of the policy—what an employee reading the policy would think the policy requires. . .”); *Barone v. City of Springfield*, 902 F.3d 1091, 1102 (9th Cir. 2018). None of these categories applies because sections 53602(b) and 53605(a) do not require notification of what Johnson plans to say (inside or outside the classroom), do not require supervisor approval before speaking, and do not prohibit *any* kind of speech. See Cal. Code Regs. tit. 5, §§ 53602(b), 53605(a). Thus, the heightened *NTEU* standard does not replace or modify *Pickering* balancing in this context.

b. Strict Scrutiny Does Not Apply to Government Employee Speech Claims

Johnson also incorrectly argues that strict scrutiny applies to challenges to regulations on public employee speech that “compel[] speech on the basis of content or viewpoint.” ECF No. 110, p. 6-7. Johnson provides no authority that a compelled speech or viewpoint discrimination claim *by a government employee* requires the application of strict scrutiny to their claims rather than *Pickering* balancing. Indeed, many courts, including the Ninth Circuit, frequently reject claims by government employees that a higher standard of scrutiny applies in place of *Pickering* in viewpoint discrimination cases. See *Damiano v. Grants Pass Sch. Dist. No. 7*, 140 F.4th 1117, 1149 (9th Cir. 2025) (“We agree with Defendants that both the First Amendment retaliation and the as-applied, content- and viewpoint-based discrimination claims are subject to the *Pickering* analysis.”); *Berry v. Dep’t of Soc. Servs.*, 447 F.3d 642, 648-50 (9th Cir. 2006); *Tucker v. Cal. Dep’t of Educ.*, 97 F.3d 1204, 1209 (9th Cir. 1996); *Knight v. State Dep’t of Pub. Health*, 275 F.3d 156, 166-67 (2d Cir. 2001); see also *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 560-61 (4th Cir. 2011) (applying *Pickering* to a professor’s viewpoint discrimination claim). Johnson provides no explanation why compelled speech claims would receive special treatment compared to other kinds of alleged government employee First Amendment violations which remain subject to *Pickering*, including viewpoint discrimination.

Johnson cannot rely on *Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018), to remove his compelled speech or viewpoint discrimination claims from the realm of *Pickering*. As both Johnson and *Janus* recognize, *Janus* was a compelled funding case, not a *Pickering* case. See

ECF No. 110, p. 7, n. 2; *Janus*, 585 U.S. at 906-07. *Janus* contains dicta about a potential higher standard applying, but *Janus* explicitly declined to decide that question and acknowledged *Pickering* did not apply to the facts of *Janus* or the line of cases *Janus* overruled. *Janus*, 585 U.S. at 906, 908 (noting *Pickering* had “no bearing on the agency fee issue” and not deciding whether *Pickering* applied in the compelled speech context generally). The other cases Johnson cites for strict scrutiny do not include government employees and therefore are inapposite. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 962 (9th Cir. 2011) (“Not one of those cases relied upon by the district court applied a *Pickering*-based analysis because not one involved a government employee—a fact that renders *Pickering*’s absence not only unsurprising, but necessary.”); see ECF No. 110, p. 1, 7 (citing *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), and *Bates v. Pakseresht*, 146 F.4th 772 (2025)).

Indeed, applying a higher standard of scrutiny here would undermine the underlying reasoning supporting *Pickering* balancing as a doctrine. *Pickering* represents an acknowledgement that the government, as an *employer*, needs to maintain efficiency and further its mission just like any other employer. *Connick v. Myers*, 461 U.S. 138, 143 (1983); *Waters v. Churchill*, 511 U.S. 661, 672 (1994). That is why the government, acting as employer, may constitutionally apply restrictions, regulations, and policies to its employees that would otherwise be unconstitutional if applied to the citizenry at large when acting as the sovereign. *Waters*, 511 U.S. at 672. A higher standard applied in this case would risk turning every broadly applicable employment policy, regardless if it prohibits speech or not, into a “constitutional matter” – something the U.S. Supreme Court has explicitly warned against. *Connick*, 461 U.S. at 143.

2. **Pickering Balancing Favors The District Defendants**

The DEIA evaluation requirements in sections 53602(b) and 53605(a) do not “compel [Johnson] to affirm, promote, and celebrate” DEIA. Johnson Decl, ECF No. 26-2, ¶ 63. The DEIA evaluation component in sections 53602(b) and 53605(a) requires the District to evaluate Johnson on his demonstrated, or progress towards, proficiency in locally-developed DEIA competencies, and that Johnson employ “teaching, learning, and professional practices” that reflect “DEIA and anti-racist principles” to “improve equitable student outcomes and course

completion.” Cal. Code Regs. tit. 5, §§ 53602(b), 53605(a). These requirements focus on professional practices and conduct, not speech, and as described below, to the extent they implicate protected speech, legitimate administrative interests outweigh Johnson’s interest in his proposed speech.

Significantly, in describing the analysis under *Pickering* as to the challenged regulations, the District Defendants are put in the position of discussing regulations the District did not promulgate, and which are imposed on the District Defendants by the California Community Colleges (“State”). The District Defendants discuss the regulations here, and articulate why their mere existence and on this record should not result in a preliminary injunction. The State’s own briefing, if they are given an opportunity to provide it, should serve as a primary source for this analysis, however.

a. The State’s Legitimate Administrative Interests In Furthering Its Educational Mission Outweigh Johnson’s Interest in Speech

The State, in promulgating the challenged regulations, has an interest in advancing its legitimate and substantial interest in efficiently carrying out its educational mission, ensuring teaching excellence, and in securing equal education opportunities for students. Cal. Ed. Code § 66010.2; *see also* Cal. Code Regs. tit. 5, § 53605(a) (applying DEIA obligations to “improve equitable student outcomes and course completion”). This interest outweighs Johnson’s interest in his proposed speech.

To the extent sections 53602(b) and 53605(a) implicate protected speech, they do not constitute unconstitutional viewpoint discrimination. To evaluate faculty, the District must necessarily engage in content-based determinations, as it were, in order effectively to assess teaching performance of faculty members’ academic and teaching excellence, consistent with *Demers*. *See Demers*, 746 F.3d at 413 (faculty evaluations may involve a content-based judgment by the employing university about the quality of what the faculty member has written); *Heim v. Daniel*, 81 F.4th 212, 232-33 (2d Cir. 2023) (same). But that does not amount to unconstitutional viewpoint discrimination against Johnson’s protected teaching and academic speech or modify the substantive content taught in his classroom.

Courts recognize educational institutions’ ability to review the content of faculty scholarship and teaching, and to favor particular scholarship interests and approaches, without running afoul of the First Amendment. *Demers*, 746 F.3d at 413 (“Ordinarily . . . content-based judgment is anathema to the First Amendment. But in the academic world, such a judgment is both necessary and appropriate.”); *Heim*, 81 F.4th at 230-33 (explaining educational institutions have academic freedom interests to set a curriculum, prefer areas of scholarship, and establish academic standards for faculty, even when those interests go against an individual faculty member’s academic freedom interests); *Urofsky v. Gilmore*, 216 F.3d 401, 409-15 (4th Cir. 2000) (holding educational institutions have a constitutionally protected academic freedom interest). Therefore, courts also generally refrain from passing judgment on professional academic decision making and are unsuited to evaluate “the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions” – including competitive selection and evaluation processes. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 585-86 (1998).

The State can require evaluation of the quality of Johnson’s scholarship and teaching, including establishing academic standards for the quality and method of delivering instruction to students, through this institutional academic freedom (and the District could conduct that evaluation pursuant to its own academic freedom interests as well). *See* Cal. Ed. Code, § 66010.2(b); *Heim*, 81 F.4th at 232; *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (describing the “the four essential freedoms’ of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study”). Similarly, the District Defendants can require faculty to deliver instruction in particular ways, such as emphasizing particular topics or materials, or to utilize certain teaching practices, such as grading exams on a curve, because the institution itself possesses the academic freedom to set a curriculum and control the method of instruction. *See, e.g., Kilborn v. Amiridis*, 135 F.4th 1100, 1102 (7th Cir. 2025) (Easterbook, J., concurring) (“[W]hen a professor and a university are at loggerheads about what constitutes

///

1 effective teaching and scholarship, the university has to win. Otherwise the Judicial Branch and
2 the populace at large (through juries) displace academic freedom.”).

3 Moreover, government entities like the State and District are entitled to express their
4 ideals and commitment to DEIA, especially when that expression does not regulate another
5 person’s speech. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828,
6 833 (1995) (although “the government may not regulate speech based on its substantive content . .
7 . when the State is the speaker, it may make content-based choices”); *see also Downs v. Los*
8 *Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000). As described above and in prior
9 briefing, the DEIA Regulations, including sections 53602(b) and 53605(a), do not actually reach
10 faculty speech per se as opposed to matters related to teaching proficiencies. *See* ECF Nos. 71,
11 11:1-12:7; 72, 26:4-27:15.

12 The State’s substantial interest in promoting and improving equitable student outcomes
13 and course completion outweigh Johnson’s interest in being free from understanding and
14 becoming proficient in teaching, learning, and professional practices. *See Heim*, 81 F.4th at 234;
15 *Urofsky*, 216 F.3d at 409-15.

16 **b. Johnson’s Refusal to Complete Mandatory Trainings is Not**
17 **Compelled Speech**

18 Johnson cannot prevail on his claim that “service on school committees” is protected
19 speech for an additional independent reason. Specifically for committee speech, Johnson
20 indicates he “cannot successfully complete the DEIA training because I do not agree with the
21 ideology mandated by that training.” *See* ECF No. 26-2, § 61. First, work on a committee is not
22 “teaching or scholarship” within the meaning of *Demers* because committee membership is
23 pursuant to official duties and not any private expressive activities. *Sullivan v. Univ. of Wash.*, 60
24 F.4th 574, 582, n.6 (9th Cir. 2023). Second, a requirement for a public employee to complete
25 mandatory trainings, without more, does not qualify as compelled speech. *See, e.g., Norgren v.*
26 *Minn. Dep’t of Hum. Servs.*, 96 F.4th 1048, 1057-58 (8th Cir. 2024) (dismissing public
27 employees’ compelled speech claim because the trainings that allegedly compelled the
28 employees’ speech did not require affirmative agreement with the training’s content). Johnson’s

1 refusal to complete the training stems from his disagreement with alleged expressive messages
 2 within those trainings, but he fails to allege there are any penalties imposed for not completing the
 3 trainings or that he is required, as part of the trainings, that he affirmatively agree with any
 4 statements contained in the trainings. *See id.* Therefore, he is not likely to prevail on the merits
 5 with regard to his service on school committees.

6 **3. Johnson’s Failure to Identify a Local District Policy Makes It Unlikely**
 7 **He Will Prevail On the Merits**

8 As described in the District Defendant’s supplemental brief on the remaining motion to
 9 dismiss issues (ECF No. 109, p. 7:22-17:6), Johnson’s 42 U.S.C. § 1983 claim fails on the merits
 10 because he has failed to allege a *District* policy or custom is the “moving force” behind his
 11 alleged constitutional deprivation. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Only
 12 identifying the State DEIA Regulations in sections 53602(b) and 53605(a) is insufficient to
 13 support Johnson’s claim, and is therefore an independent reason why Johnson is unlikely to
 14 prevail on the merits of his as-applied or facial challenges. *See id.* at 166; *Snyder v. King*, 745
 15 F.3d 242, 247-249 (7th Cir. 2014); *Aliser v. SEIU Cal.*, 419 F. Supp. 3d 1161, 1165 (N.D. Cal.
 16 2019).

17 **4. Johnson’s Facial Challenge Lacks Merit**

18 Johnson claims he asserts both an as-applied and facial challenge to sections 53602(b) and
 19 53605(a). *See* ECF No. 110 at 5:16-18. To mount a facial overbreadth challenge, Johnson must
 20 allege sections 53602(b) and 53605(a) “prohibit[] a substantial amount of protected speech
 21 relative to [their] plainly legitimate sweep.” *United States v. Williams*, 553 U.S. 285, 292 (2008).
 22 To decide facial challenges, even in the First Amendment context, “the courts below must explore
 23 the laws’ full range of applications—the constitutionally impermissible and permissible both—
 24 and compare the two sets.” *Moody v. NetChoice, LLC*, 603 U.S. 707, 726, 744 (2024). The
 25 “mere fact that one can conceive of some impermissible applications of a statute is not sufficient
 26 to render it susceptible to an overbreadth challenge.” *Members of City Council of Los Angeles v.*
 27 *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Courts must be “careful not to go beyond the

28 ///

1 statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash.*
 2 *State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

3 The initial barrier to Johnson's facial challenge is the fact that the DEIA Regulations do
 4 not prohibit anything, much less protected speech. *See* Cal. Code Regs. tit. 5, §§ 53602(b),
 5 53605(a). The DEIA evaluation requirement in sections 53602(b) and 53605(a) focus on a
 6 faculty member's knowledge and skills in relation to teaching a diverse student body comprising
 7 a multitude of backgrounds, identities, and perspectives. *Id.* These are lawful applications of the
 8 DEIA Regulations to achieve the ultimate goal of improving equitable student outcomes and
 9 course completion. Bakersfield College, where Johnson teaches, provides educational services to
 10 a diverse student body. Furthermore, developing an evaluation criterion – one of several criteria
 11 – that requires faculty to learn skills that effectuate cross-cultural teaching does not restrict
 12 Johnson's First Amendment rights, but seeks to ensure faculty are consciously reflecting on and
 13 improving the way they teach their classes.

14 But more fundamentally, Johnson has failed to develop the factual record enough for the
 15 Court to sufficiently evaluate the constitutional and unconstitutional applications of sections
 16 53602(b) and 53605(a). Indeed, Johnson has not even presented evidence of how the District's
 17 faculty evaluation process works generally, notwithstanding the new DEIA evaluation component
 18 required by sections 53602(b) and 53605(a). Reading Johnson's FAC and attached exhibits
 19 provides this Court with no insight into how faculty are evaluated other than that evaluation
 20 occurs once every three years, leaving key questions open. *Who* evaluates faculty? A peer? A
 21 department head? District administration? Is it a single evaluator or a panel? Who selects the
 22 evaluator(s)? Does Johnson have input on who evaluates him? What are the existing evaluation
 23 criteria *other* than the DEIA evaluation component? How are evaluation criteria balanced against
 24 one another, and how much impact does each individual criterion have on the overall evaluation
 25 rating? Does Johnson get an opportunity to respond to an evaluation, and if so, could he attempt
 26 to explain why a negative rating should be changed, either in an overall evaluation or with regard
 27 to a specific component? What is the effect of a "good" or "bad" evaluation? The answer to all
 28 of these questions impacts whether Johnson is entitled to a preliminary injunction against the

1 application of sections 53602(b) and 53605(a) in his faculty evaluation, yet the Court is
 2 inappropriately left to guess at the hypothetical answers to these questions. *Washington State*
 3 *Grange*, 552 U.S. at 450; *see also Moody*, 603 U.S. at 790 (2024) (Alito, J., concurring) (“A court
 4 cannot invalidate the challenged laws if it has to speculate about their applications.”).

5 The lack of this information also demonstrates the tenuous chain of reasoning and the
 6 multiple conclusory links between events Johnson believes will imminently occur. Without much
 7 elaboration, Johnson claims that expressing disagreement with the DEIA Regulations
 8 automatically means he will fail that evaluation component; that failing a single evaluation
 9 criterion automatically results in an overall negative evaluation; that an overall negative
 10 evaluation automatically results in discipline; and that discipline automatically means he will be
 11 terminated. These allegations were found sufficient to meet the relaxed pre-enforcement standing
 12 requirements for First Amendment claims, but because Johnson’s intended speech is “arguably
 13 proscribed” by sections 53602(b) and 53605(a) does not mean his intended speech is *actually*
 14 proscribed. *See* Amended Memorandum Decision at *3-7; *Clementine Co., LLC*, 74 F.4th at 86-
 15 87. The *possibility* of any of these events does not mean these events are *likely*, especially with
 16 so many links in the causal chain. *Winter*, 555 U.S. at 22.

17 **B. JOHNSON IS NOT LIKELY TO SUFFER IRREPARABLE HARM IN THE**
 18 **ABSENCE OF PRELIMINARY RELIEF**

19 Johnson fails make the required “clear showing” that “irreparable injury is *likely* in the
 20 absence of an injunction,” rather than a mere “possibility” of irreparable harm. *Winter*, 555 U.S.
 21 at 22. Johnson was last evaluated in 2023 and is not up for another evaluation until 2026. He has
 22 not provided evidence he received a negative evaluation in 2023 and provides no allegation that
 23 there has been any non-conclusory indication that his next evaluation is likely to be negative
 24 without a preliminary injunction. Johnson just generally assumes that because he disagrees with
 25 DEIA, the only action the District Defendants could plausibly take is to give him a negative
 26 evaluation. But this unsupported assumption underscores the inadequacy of the record before this
 27 Court, which cannot support the preliminary injunctive relief Johnson seeks. Additionally, the
 28 time from when Johnson filed his motion for a preliminary injunction in July 2023 to now in

1 October 2025 further highlights the lack of actual or impending irreparable harm justifying
 2 preliminary injunctive relief. *See Josephine Cty. v. Watt*, 539 F. Supp. 696, 707 (N.D. Cal. 1982);
 3 *CFTC v. Monex Credit Co.*, 2020 U.S. Dist. LEXIS 221777, *9-10 (C.D. Cal. 2020).

4 **C. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR**
 5 **THE DISTRICT DEFENDANTS**

6 The two years during which this litigation has taken place, however, have not changed the
 7 District Defendant’s arguments regarding the balance of equities and public interest factors for
 8 preliminary injunctions. *See* Doc. No. 43, 19:8-24:25. Enjoining the District Defendants from
 9 effectuating lawful statutes is a form of irreparable injury and, as described above, the DEIA
 10 Regulations do not unconstitutionally infringe on Johnson’s First Amendment Rights. *See*
 11 *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). The public interest
 12 favors the State and the District’s institutional academic freedom interests over Johnson’s limited
 13 individual academic freedom interests. *See* Doc. No. 43, 20:21-21:25.

14 Indeed, the passage of over two years since Plaintiff filed the Motion for Preliminary
 15 Injunction, and corresponding altered circumstances, requires that the Motion be denied.
 16 Plaintiff’s Motion was filed on a rush basis in July 2023 to block implementation of the State’s
 17 DEIA regulations that would be effective in Fall 2023. It is now Fall of 2025, and those
 18 regulations have been in effect statewide for more than two academic years. There is no longer
 19 any exigency whatsoever to justify preliminary injunctive relief. Issuance of a preliminary
 20 injunction now would not maintain the status quo – it would instead completely upend it.
 21 “Mandatory preliminary relief, which goes well beyond simply maintaining the status quo
 22 pendente lite, is particularly disfavored, and should not be issued unless the facts and law clearly
 23 favor the moving party.” *Anderson v. U.S.*, 612 F.2d 1112, 1114 (9th Cir. 1979) (quoting
 24 *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976)). Plaintiff here is not entitled to the

25 ///

26 ///

27 ///

28 ///

“extraordinary” remedy of a preliminary injunction under these circumstances. *See Winter*, 555 U.S. at 31 (“A preliminary injunction is an extraordinary remedy never awarded as of right.”).³

III. CONCLUSION

For the foregoing reasons, the Court should deny Johnson’s motion for a preliminary injunction.

Dated: October 10, 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

³ Courts acknowledge that the passage of time can require denial of a pending preliminary injunction request. *See Josephine Cty.*, 539 F. Supp. at 707 (acknowledging how delay affects a court's ability to decide on a preliminary injunction; "The Court is aware that the combination of the press of business of this Court and the prolixity of the documents filed in connection with this motion have held this matter under submission for an extensive period of time" and "[a]s a result, some affidavits may be stale and outdated."); *CFTC*, 2020 U.S. Dist. LEXIS 221777, at *9-10 (the long pendency of a preliminary injunction motion negatively affected the court’s ability to grant the requested relief).