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

Attorneys for Plaintiff Daymon Johnson

UNIT ED 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 BRIEF IN OPPOSITION TO DEFENDANTS' SUPPLEMENTAL BRIEF RE: THEIR MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The Ninth Circuit's decision bars consideration of Defendants' various dismissal theories. This Court lacks jurisdiction to do so, as that would be inconsistent with the mandate remanding the case "to consider Johnson's motion for a preliminary injunction in the first instance." Am. Memo., Dkt. 104, at 7. Moreover, the Ninth Circuit's decision confirming Professor Johnson's standing and affirming this Court's dismissal of state Chancellor Christian is law of the case, barring Defendants' claims.

In any event, Defendants' arguments remain meritless. Defendants' claim that the Kern Community College District (KCCD) is somehow "a separate and distinct legal and political entity from the State," KCCD Supp. Br. at 8, for purposes of enforcing the challenged regulations, defies credulity. KCCD is the "moving force" behind Johnson's injuries, *Kentucky v. Graham*, 473 U.S. 159, 166 (1985), because it is the enforcement arm of the state government system whose purpose is to draft and implement the challenged regulations. KCCD *is* the state here, for all purposes, as a matter of both California law and Ninth Circuit precedent.

And for the same reason that KCCD is the (only) responsible part of the state system, the Board of Governors is not. Johnson believes that Chancellor Christian plays a role, but the courts have disagreed because she lacks KCCD's enforcement authority. The Board is no different. Nor could it be named as a party. Nor is any additional state participation is required here.

The motion to dismiss cannot be given further consideration. And if it is, it should be denied.

STATEMENT OF FACTS

The Court is familiar with the Johnson's factual allegations. For purposes of this supplemental briefing, the following additional facts are relevant:

Since the matter was last submitted, this Court granted the motions to dismiss by Defendants and former defendant Christian for lack of standing. With respect to Christian, this Court credited her statement "not only that she *will* not take action, but that she *cannot* take action against Johnson, as she is not a prosecuting authority of the section under state law." Dkt. 89 at 48 (citing Cal. Educ. Code § 70902(b)(4) ("mandating that community college districts are responsible for the

employment and assignation of faculty"); Cal. Code Regs. tit. 5, § 53602 ("establishing that the district, not the Chancellor, is responsible for employee evaluations")).

The Ninth Circuit affirmed in part and reversed in part. With respect to the remaining Defendants, it held, "Johnson has alleged sufficient facts to establish standing to sue the District Defendants under Cal. Code Regs. tit. 5, §§ 53602(b), 53605(a), and Cal. Educ. Code § 87732(f), to the extent it incorporates those regulations." Am. Memo., Dkt. 104, at 4. But the Ninth Circuit affirmed this Court's "conclusion that Johnson lacks standing to sue Defendant-Appellant Sonya Christian, CCC Chancellor," because "Chancellor Christian lacks authority to enforce the challenged statutes, regulations, and policies against Johnson, and she disavows enforcement for that reason." *Id.* at 6 (citing *Peace Ranch, LLC v. Bonta*, 93 F.4th 482, 490-91 (9th Cir. 2024)). Finally, the Ninth Circuit "remand[ed] for the district court to consider Johnson's motion for a preliminary injunction in the first instance." *Id.* at 7.

SUMMARY OF ARGUMENT

The mandate rule requires this Court to execute the Ninth Circuit's instructions. While this Court is free to do what is not forbidden, it cannot vary or decline to implement the mandate. This Court cannot grant a motion to dismiss, which would preclude it from carrying out the Ninth Circuit's instructions to consider Johnson's preliminary injunction motion.

Moreover, this Court cannot enter a decision that would conflict with the Ninth Circuit's holdings in this case, explicitly or by necessary implication. Defendants' remaining dismissal claims all go to standing—a matter the Ninth Circuit resolved in Johnson's favor. Were Defendants correct on any of their claims, Johnson would lack standing: his injuries would either be untraceable to Defendants ("the DEIA regulations aren't our policy"), or not redressable by this Court ("no complete relief because Johnson didn't name one of our policies, or didn't sue another essential party").

But Johnson's standing is law of the case. Defendants can no longer argue that someone else is responsible for Johnson's injuries; the law of the case holds that *they* are injuring Johnson. Nor can Defendants argue that a necessary party is missing, or that Johnson hasn't identified the true source his injury; again, the law of the case holds that that Johnson's allegations are sufficient, and that his

injuries are redressable. Indeed, the argument that Johnson should name the state Board of Governors is especially unavailing considering Christian's dismissal, affirmed by the Ninth Circuit, for lacking direct supervisory authority over Johnson.

Even if the Court could reach Defendants' dismissal arguments, they lack merit. Defendants construct an elaborate theory that posits KCCD is not actually an arm of the state of California. At least not for purposes of this case. As their theory goes, the District may have sovereign immunity, but to the extent Defendants could be enjoined in their official capacity under *Ex parte Young*, KCCD is *not* an arm of the state at all, but a "local government," akin to a municipality. Of course, unlike community college districts, municipalities *can* be sued directly. By selectively pretending that KCCD is not an arm of the state (but *is* an arm of the state for sovereign immunity), Defendants claim that they are not the "moving force" behind the violations as they are not responsible for state laws and regulations, over which they lack discretion in enforcement.

The problems with this theory are many. The Ninth Circuit holds that California's community college districts are indeed arms of the state of California. But contrary to Defendants' theory, the Ninth Circuit also holds that once an entity is an arm of the state, it remains an arm of the state, always, for all purposes. It does not lose that character from case to case, depending on the allegations. KCCD is never akin to a municipality, for any purpose.

One need not look to precedent to understand KCCD's status. The statute establishing California's community college system confirms that the system is composed of two parts: local districts including KCCD, and the Board of Governors. They are both sides of the same California Community Colleges coin. Cal. Educ. Code § 70900. And within this one system, California law exclusively assigns to KCCD the power to enforce the challenged regulations—with maximal discretionary authority.

Thus, even if KCCD were some kind of distinct entity, the state's laws and regulations are *KCCD's* laws and regulations, because KCCD is a part of the state system that issued the regulations, is *the* state agency tasked with enforcing them, and it has wide latitude in doing so. The fact that KCCD may also create its own local policies is irrelevant. The question is whether Defendants are responsible for the challenged policies. They are.

And even if Defendants were not state officials, there is no requirement that the state appear to defend its supposed interests where non-state parties litigate the constitutionality of state laws and regulations. The state's participation is *optional*. The rules require only that the state have notice and an opportunity to intervene. Here, the state's Attorney General had notice, and appeared for the purpose of successfully extricating his client from the case.

Defendants' assertion that the state Board of Governors is a necessary party is incoherent. Nowhere do Defendants attempt to explain why the Board is a necessary party, beyond the state allegedly having an interest in the case. Nowhere do they even cite, let alone explore the requirements of Rule 19 with respect to indispensable parties. Of course the Board is not an indispensable party. Indeed, the state Board of Governors *cannot* be a party, because it enjoys Eleventh Amendment immunity, and it is not a person under 42 U.S.C. § 1983. Nor do the individual governors have anything more to do with enforcing the provisions against Johnson than does Chancellor Christian (indeed, they have even less involvement than her).

This Court should deny Defendants' motion to dismiss.

ARGUMENT

I. THE MANDATE RULE BARS CONSIDERATION OF DEFENDANTS' MOTION TO DISMISS.

"The mandate rule states that when a higher court decides an issue and remands the case, that issue is finally settled. The lower court is bound by the decree as the law of the case and cannot vary [the decision], or examine it for any other purpose than execution." *Montana v. Talen Mont., LLC*, 130 F.4th 675, 691 (9th Cir. 2025) (internal quotation marks omitted). "The lower courts on remand must implement both the letter and the spirit of the mandate, taking into account the higher court's opinion and the circumstances it embraces." *Id.* (internal quotation marks and brackets omitted).

The mandate rule is jurisdictional. "[I]f a claim falls outside the scope of our remand, then the district court is without jurisdiction to hear the claim." *Alaska Dep't of Fish & Game v. Fed. Subsistence Bd.*, 139 F.4th 773, 788 (9th Cir. 2025); *see, e.g., Fowler v. Guerin*, No. 23-35414, 2024 U.S. App. LEXIS 30030, at *4-*5 (9th Cir. Nov. 26, 2024) (district court violated mandate in allowing defenses beyond the scope of remand); *United States v. Olsen*, No. 22-50185, 2024 U.S. App. LEXIS 11319 (9th Cir. May 9, 2024) (district court violated mandate to reinstate indictment

and try case); *United States SEC v. Liu*, No. 21-56090, 2022 U.S. App. LEXIS 23773, at *8-*9 (9th Cir. Aug. 24, 2022) (district court lacked jurisdiction to consider motion to dismiss on remand for recalculation of disgorgement award).

The Ninth Circuit did not remand this case without instructions. Nor did the Ninth Circuit remand this case with a generic, open-ended mandate to "conduct further proceedings not inconsistent with our opinion." Rather, the Ninth Circuit issued a very specific instruction: "for the district court to consider Johnson's motion for a preliminary injunction in the first instance." Dkt. 104, at 7. This Court cannot follow the Ninth Circuit's instruction to resolve Johnson's preliminary injunction motion if it dismisses the case. Indeed, doing so would recreate the case's posture on appeal over a year ago. But the Ninth Circuit had the motion to dismiss before it, and it was aware of the circumstances surrounding the case. Given the excessive delays, Johnson asked the court to decide the preliminary injunction motion. The Ninth Circuit responded to Johnson's request by issuing its specific instruction that this Court address the motion, reflecting the appellate court's view of the circumstances. Respectfully, this Court lacks jurisdiction to depart from that instruction.

II. THE NINTH CIRCUIT'S DECISION IS LAW OF THE CASE WHICH BARS DEFENDANTS' REMAINING DISMISSAL CLAIMS.

"The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case . . . Under the doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007) (citation omitted). The doctrine extends to issues that "have been decided explicitly *or by necessary implication* in the previous disposition." *Id.* (citation omitted) (emphasis added).

"An argument is rejected by necessary implication when the holding stated or result reached is inconsistent with the argument." *United States v. Jingles*, 702 F.3d 494, 502 (9th Cir. 2012) (internal quotation marks omitted). The doctrine applies "even where the first panel's holding was cryptic and somewhat ambiguous." *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (9th Cir. 1995) (internal quotation marks omitted).

A plaintiff with standing has established (1) an injury-in-fact, (2) traceability to the defendants, and (3) the court's ability to grant relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Accordingly, the Ninth Circuit's holding that "Johnson has alleged sufficient facts to establish standing to sue the District Defendants under Cal. Code Regs. tit. 5, §§ 53602(b), 53605(a), and Cal. Educ. Code § 87732(f), to the extent it incorporates those regulations," Dkt. 104, at 3, has at least two "necessary implications" relevant here:

First, Johnson's injuries are traceable to the Defendants. That's why he can sue them; *they* are causing the alleged injuries. His injuries are "not . . . the result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). And critically, per the Ninth Circuit, Johnson has standing to sue Defendants *for their enforcement of the challenged provisions*. Defendants cannot argue that their supposed lack of enforcement discretion means that they are not "the proximate cause of the alleged constitutional injury." KCCD Supp. Br. at 15. The Ninth Circuit held that they are (which is unsurprising, because they are the state officials assigned to enforce the state's policies).

Second, Johnson's "sufficient" allegations are redressable by this Court. That means that this Court has before it all the claims—and all the defendants—necessary to redress the injuries. If essential claims or parties are missing, the injuries are not redressable. *See Carroll v. Nakatani*, 342 F.3d 934, 944 (9th Cir. 2003) (no redressability absent necessary party); *Nuclear Info. & Res. Serv. v. NRC*, 457 F.3d 941, 955 (9th Cir. 2006) (no redressability when injury caused by unchallenged regulation).

Simply put: If Defendants are right about any of their theories, the Ninth Circuit was wrong in confirming Johnson's standing. But this Court lacks authority to reconsider the Ninth Circuit's decision. Defendants' arguments, that they are not responsible for the injuries, that Johnson hasn't challenged a necessary rule, that a necessary party is missing—are all precluded, because they are inconsistent with the Ninth Circuit's holding and result. *Jingles*, 702 F.3d at 502.

Leslie Salt is instructive. The plaintiff challenged a rule that extended the Army Corps of Engineers' jurisdiction over its waters, claiming procedural defects in the rule's adoption. But because an earlier panel had upheld the rule, finding that the Corps had jurisdiction over at least

some of the waters, the subsequent panel applied the law of the case doctrine to bar the challenge. By holding that the facts could support the Corps' jurisdiction over the waters, "the [earlier panel] implicitly rejected all arguments that the rule is invalid for procedural reasons under the Administrative Procedure Act as well." *Leslie Salt*, 55 F.3d at 1393. The law of the case doctrine more clearly applies here, because Defendants directly attack elements of Johnson's standing.

No aspect of standing was absent from the appeal. Johnson, after all, argued for traceability and redressability in his opening brief. Appellant's Opening Br. at 56-57 ("D. Defendants cause Johnson's injuries, which the court can redress"). Defendants did not counter, though they asserted their *Monell* theory, KCCD Appellees' Br. at 66-67, to which Johnson replied, Reply Br. at 40-42.

Perhaps the Ninth Circuit believed that Defendants did not sufficiently argue the points. Or perhaps the court understood that their arguments lack merit (*see infra*). This Court can only assume that the Ninth Circuit fulfilled its independent obligation to assure itself of standing regardless of what the parties briefed. *Lawyers for Fair Reciprocal Admission v. United States*, 141 F.4th 1056, 1064 n.6 (9th Cir. 2025). In any event, "[t]he law of the case turns on whether a court previously decided upon a rule of law . . . not on whether, or how well, it explained the decision." *Leslie Salt*, 55 F.3d at 1393 (internal quotation marks omitted). The Ninth Circuit's decision plainly encompasses Defendants' dismissal theories. The law of the case doctrine ends this inquiry.

III. DEFENDANTS ARE RESPONSIBLE FOR JOHNSON'S INJURIES, BECAUSE KCCD IS THE STATE AGENCY CHARGED WITH ENFORCING THE CHALLENGED PROVISIONS.

The central overriding theme of Defendants' argument, repeated many times and in many ways, is that KCCD is allegedly a "local government," a veritable municipality that is wholly distinct from the state. Accordingly, goes their theory, KCCD can only be held liable for enforcing policies that it adopts, not policies adopted by the Board of Governors (or the legislature), over which it lacks any discretion in enforcement.

This is simply not true. KCCD is *not* an independent local government. It is a constituent part of the California Community Colleges system—the part that is responsible for enforcement, which is why its enforcers are the only logical defendants here. Moreover, state law affords Defendants a great deal of discretion as to how to implement the DEIA policies. There is no need to over-

complicate matters. Structurally, this is a garden-variety case seeking to enjoin state officials from enjoining unconstitutional state laws.

Johnson does not contend 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." KCCD Supp. Br. at 11 (citation omitted). To the contrary: there are states and state entities, which enjoy Eleventh Amendment immunity from suit; and units of local government, who have personhood and *can* be sued directly under *Monell v. New York City Dep't of Social Svcs.*, 436 U.S. 658 (1978). As an exception to the states' immunity, state officials acting in their official capacity can be sued for injunctive relief if they have "some connection with the enforcement of the act." *Woolard v. Thurmond*, No. 24-4291, 2025 U.S. App. LEXIS 23475, at *8 n.2 (9th Cir. Sep. 11, 2025) (quoting *Ex parte Young*, 209 U.S. 123, 57 (1908)). That is how people challenge unconstitutional actions by state government entities.

Section 1983 does not allow for respondeat superior liability. "[A] governmental entity is liable under § 1983 only when the entity itself is a moving force behind the deprivation; thus, in an official-capacity suit the entity's policy or custom must have played a part in the violation of federal law." *Graham*, 473 U.S. at 166 (cleaned up).

Johnson sues these Defendants in their official capacity, and not "KCCD," because KCCD is an instrumentality of the state that cannot be sued; it is not a *Monell* local government. The customs and policies are the state's challenged regulations and enabling statute. The Defendants are the state officials who enforce the challenged provisions, and they have great latitude in doing so.

A. KCCD IS AN ARM OF THE STATE—WITHOUT EXCEPTION.

Defendants admit that KCCD "possesses Eleventh Amendment immunity as an arm of the State under current Ninth Circuit precedent." KCCD Supp. Br. at 8 (citing *Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201-02 (9th Cir. 1988)). They also correctly note that the Ninth Circuit recently modified the *Mitchell* test to determine what qualifies as an arm of the state, but that these modifications do not alter *Mitchell*'s conclusion with respect to Community College Districts. *Id.* n.3 (citing *Kohn v. State Bar of California*, 87 F.4th 1021 (9th Cir. 2023) (en banc)). It remains the case that "community college districts are dependent instrumentalities of the state of California."

Cerrato v. San Francisco Community College Dist., 26 F.3d 968, 972 (9th Cir. 1994) (citation omitted); *Wasson v. Sonoma County Junior College Dist*., 4 F. Supp. 2d 893, 902 (N.D. Cal. 1997).

Not local municipalities, not any kind of entity with a separate personhood that can be sued under Section 1983, "dependent instrumentalities of the state." That is controlling Ninth Circuit precedent. And although California law may divide responsibility for tort claims or employment matters among different units of state government, state law consistent with the (relevant here) federal understanding of what KCCD is. *See, e.g., First Interstate Bank v. State of California*, 197 Cal. App.3d 627, 633 (1987) (California community college districts "are considered agencies of the state for the local operation of the state school system," though "[f]or purposes of the Tort Claims Act, [a] district is a 'local public entity'") (citations omitted).

Defendants nonetheless persist in re-imagining KCCD as a local government for this case's purposes. The Ninth Circuit bars this approach. "[A]n entity either is or is not an arm of the state: The status of an entity does not change from one case to the next based on the nature of the suit, the state's financial responsibility in one case as compared to another, or other variable factors." *Kohn*, 87 F.4th at 1031 (internal quotation marks and brackets omitted). The Ninth Circuit contrasted its "entity-based approach" with an "activity-based approach" of the kind Defendants argue (focusing on which policies are being enforced), finding that "the entity-based approach . . . makes sense as a matter of principle," and "also better promotes consistency, predictability, and finality." *Id.*

So KCCD is a state agency, and Defendants are state officials for purposes of the Constitution. Are they then the "moving force" behind the injury, the ones who apply the challenged state provisions against Johnson? Yes.

B. Defendants are the state officials charged by state law with enforcing the challenged state regulations and statute.

Defendants' discussion of how California structures its community college system avoids quoting the one statutory provision that explains KCCD's connection to the challenged policies:

> There is hereby created the California Community Colleges, a postsecondary education system consisting of community college districts heretofore and hereafter established pursuant to law and the Board of Governors of the California Community Colleges. The board of governors shall carry out the functions specified in Section 70901, local districts shall carry out the functions specified in Section 70902, and the California Online Community College shall carry out the functions specified in Section 75003.

Cal. Educ. Code § 70900. One "system," "consisting" of two parts: the local districts, including KCCD; and the Board of Governors. Local districts have one function, the board, another function, within the same unitary "system" that they comprise.

KCCD is not an independent, free-floating agency. Section 70900 hardly describes KCCD as "a separate and distinct legal and political entity from the State." KCCD Br. at 8.

Within the "system" known as California Community Colleges, the Board sets policy, but "shall at all times be directed to maintaining and continuing, to the maximum degree permissible, local authority and control in the administration of the California Community Colleges." *Id.* § 70901(a). "Every community college district shall be under control of a board of trustees," *id.* § 70902(a)(1), which may also establish its own rules, § 70902(a)(2). But state law commands local district trustees to "[e]mploy and assign all personnel not inconsistent with the minimum standards adopted by the board of governors and establish employment practices, salaries, and benefits for all employees not inconsistent with the laws of this state." *Id.* § 70902(b)(4).

The challenged regulations and statute are among "the minimum standards adopted by the [state] board of governors" and "the laws of this state" that Defendants are required to enforce. This Court dismissed Chancellor Christian because it saw her role as too attenuated to this mission, and the Ninth Circuit affirmed. Since the state established KCCD as that part of California Community Colleges whose purpose it is to enforce the challenged regulations, Defendants are obviously the correct defendant state officials in this lawsuit. It is *these* Defendants who would evaluate, promote, demote, retain, or fire Professor Johnson.

Defendants do not deny this. They readily admit that "administrative day-to-day operations and decisions fall to the local community college districts," and that "the District has control over Johnson's employment." KCCD Supp. Br. at 11 (citations omitted). They admit that "[t]he District [is] responsible for daily employment decisions." *Id.* They even admit that the State "delegated the . . . operational, district-specific employment decisions to the districts in Cal. Code Regs. tit 5, § 53602(a) to determine the implementation of [the DEIA] requirement." *Id.*

But their complaint that they have no choice but to enforce the challenged provisions is a confession, not an excuse. The reason Defendants must enforce the state's regulations is that they

work for the state agency charged with enforcing the regulations. Defendants—officers and employees of this state agency—cannot run for public office of a state agency, or seek employment with the state agency, and then claim that the state's regulations that they are charged with enforcing in the course of the jobs they signed up for are somehow not theirs. KCCD may be allowed to enact its own policies, but its main essential function is to implement California's Education Code and Title V of the state's Code of Regulations in operating "California Community Colleges," of which they are a constituent part. The two powers—to enforce state laws and regulations, and to make their own policies—are given by the same statute. The claim that Johnson can only sue Defendants for enforcing KCCD-specific policies but not for enforcing other state law, that Defendants are responsible for § 70902(a)(2) but not § 70902(b)(4), is untenable.

And so, this is not a situation where a plaintiff seeks to hold a *county* liable for enforcing the laws of a *state or federal* entity. KCCD Supp. Br. at 14-15. This is about one constituent part of California Community Colleges enforcing the policies of… California Community Colleges.

C. Even if Defendants were not state officials, they would still be the "moving force" behind their implementation of the challenged provisions, which assign them broad discretion.

While a true local government, such as a county, may not be liable for taking specific actions under a state policy, the equation changes when the local government exercises discretion in its enforcement of state law. Even if KCCD were an independent local government, it would be liable for enforcing the DEIA regulations because those regulations grant it wide latitude in doing so, as do the code provisions granting KCCD the authority to make employment decisions.

It's not the Board of Governors who will evaluate Professor Johnson, and determine whether he has "demonstrated" or "progress[ed] toward" DEIA "proficiency." Cal. Code Regs. tit. 5, § 53602(b). It's not the Board of Governors who will determine if Professor Johnson will "have or establish" enough "proficiency in DEIA related performance to teach, work, or lead within California community colleges." *Id.* It's not the Board of Governors who will determine whether Professor Johnson "employ[s] teaching, learning, and professional practices that reflect DEIA and anti-racist principles." *Id.* § 53605(a). And it's not the Board of Governors who will determine whether Professor Johnson has persistently violated or refused to obey the DEIA regulations. Cal.

Educ. Code § 87732(f). Defendants will do all these things, and they will have to exercise their discretion and judgment in doing so.

Indeed, in at least one respect, they have already done so. Defendants determined that Johnson must undergo DEIA training to continue serving on hiring screening committees, because the committees will employ DEIA principles in recommending faculty. This custom, practice and policy was memorialized in emails sent to Johnson, and he has now stopped participating on those committees. Johnson Decl. ¶ 61. He has stopped "working" and "leading" with respect to the hiring process, because that is the policy choice Defendants made in implementing Cal. Code Regs. tit. 5, § 53602(b).[1]

The Ninth Circuit's decision in *Evers v. Cnty. of Custer*, 745 F.2d 1196 (9th Cir. 1984) is directly on point. In *Evers*, state law "ma[de] it a duty of [county] commissioners to record as public highways roads which have become such by use." *Id.* at 1198 n.1. Plaintiff sued when the county declared a road running through her property public and prosecuted her for interfering with traffic on it, but the county claimed it was merely following its duty under state law. The Ninth Circuit rejected the argument. "It is difficult to imagine a case in which the act complained of more clearly 'implements or executes a . . . decision officially adopted and promulgated by that body's officers.'" *Id.* at 1203 (quoting *Monell*, 436 U.S. at 690). Likewise, Defendants' evaluations of Johnson are within their exclusive discretion. And if Defendants draft, recommend and enact a resolution dismissing Johnson for failure to comply with the DEIA regulations, that, too, would be an act within their discretion.

IV. THE BOARD OF GOVERNORS CANNOT BE—AND NEED NOT BE—A PARTY.

Johnson cannot sue the state Board of Governors for the same reasons he cannot (and did not) sue KCCD. "[T]he Eleventh Amendment bars suits against the State or its agencies for all types of relief, absent unequivocal consent by the state." *K.J. v. Jackson*, 127 F.4th 1239, 1251 (9th Cir.

[1] Defendants' imposition of a DEIA requirement for screening committee service, consistent with Section 53602(b), demonstrates their error in claiming that "[t]he only 'policy' [Johnson] has identified is the evaluation component of the DEIA Regulations." KCCD Br. at 13. And of course, Johnson challenges not only the policy of evaluating his DEIA "proficiency," but also the policy of terminating him if he falls short, Cal. Educ. Code § 87732(f).

2025). The Board of Governors is a state agency. S*ee*, *e.g.*, *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864-65 (9th Cir. 2016). The Board of Governors is also not a "person" under 42 U.S.C. § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 62 (1989); *Duke v. City Coll. of San Francisco*, 445 F. Supp. 3d 216, 227 (N.D. Cal. 2020).[2]

Moreover, this Court will recall that it dismissed Chancellor Christian because "she is not a prosecuting authority of the section under state law," Dkt. 89 at 48 (citing Cal. Educ. Code § 70902(b)(4) and Cal. Code Regs. tit. 5, § 53602), and the Ninth Circuit affirmed that decision. Johnson would expect this Court to dismiss the Board of Governors from this lawsuit for the same reason. And of course, the Board cannot be a *necessary* party within the meaning of Fed. R. Civ. P. R. 19(a)(1). The Ninth Circuit's holding that Johnson has standing means that the Court *can* afford complete relief, and the Board of Governors has not asserted an interest in the case, of which it is well-aware.[3]

Defendants claim that absent the Board of Governors, nobody here would represent the state's interests, is simply wrong. *Defendants* are state officials, because KCCD is a state agency. They can, and do, represent the state's purported interest. After all, they are a part of California Community Colleges, no less than the Board of Governors, and they represent the state's alleged interests in its regulations by enforcing them every day.

But even if Defendants were not state officials, nothing requires any (other) state attorneys to defend this lawsuit. Occasionally, a lawsuit not involving state officials nonetheless implicates the constitutionality of state law. Under those circumstances, the plaintiff notifies the state's attorney general, Fed. R. Civ. P. 5.1(a), the court certifies the challenge to the state's attorney general, Fed. R. Civ. P. 5.1(b), and the attorney general "may" intervene within 60 days, Fed. R. Civ. P. 5.1(c).

---

[2] "Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Will*, 491 U.S. at 71 n.10 (quoting *Graham*, 473 U.S. at 167 n.14).

[3] In case Chancellor Christian and the Board of Governors are not communicating, the Board has received regular legal updates about this case. *See, e.g.,* Agenda, July 25 Board of Governors Meeting, Item 2.1, https://cccco.primegov.com/Portal/Meeting?meetingTemplateId=45 (last visited Oct. 10, 2025); Agenda, May 20, 2025 Board of Governors Meeting, Item 2.1, https://go.boarddocs.com/ca/cccchan/Board.nsf/goto?open&id=DENVL48134B9 (last visited Oct. 10, 2025).

None of that happened here, because Defendants are state officials; the complaint was quickly amended to include another state official, Sonya Christian; and the state's attorney general appeared to successfully extricate the state's Chancellor from the litigation—on grounds that she (like the Board of Governors) is not responsible for what KCCD does to Professor Johnson.

The state's attorney general is *not* required to defend this lawsuit, of which he is well aware *and in which he has appeared* -- only to depart. The reasons for the Attorney General's approach are unknowable. Perhaps the attorney general has full faith in Defendants' ability to defend the state's interests, if any. Perhaps defending these regulations is just not a priority for the Attorney General. Or perhaps the Attorney General understands that the state's regulations are indefensible, in court and otherwise anywhere else off-campus, and he would rather avoid a hopeless political hot potato.

None of this matters. This Court cannot supervise the political and litigation decisions of California's attorney general. All that matters here is that as far as the Ninth Circuit is concerned, Johnson has standing to sue the Defendants—people responsible for inflicting the injuries of which he complains. All this Court can do—all it must do—is decide this case.[4]

CONCLUSION

Defendants' motion to dismiss should be denied.

Dated: October 10, 2025

Respectfully submitted,

By: /s/ Alan Gura

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

Attorneys for Plaintiff Daymon Johnson

[4] Should this Court disagree, and conclude that a necessary party is missing, Johnson would respectfully request leave to amend to add any potentially necessary parties.