No. 25-171

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN D. HALTIGAN,

Plaintiff – Appellant,

v.

MICHAEL V. DRAKE, in his official capacity as President of the University of California; CYNTHIA K. LARIVE, in her official capacity as Chancellor of UC Santa Cruz; BENJAMIN C. STORM, in his official capacity as Chair of the UC Santa Cruz Psychology Department; and KATHARYNE MITCHELL, in her official capacity as Dean of the UC Santa Cruz Division of Social Sciences,

Defendants – Appellees.

On Appeal from the United States District Court
for the Northern District of California
Case No. 5:23-cv-02437-EJD
The Honorable Edward J. Davila, United States District Judge

OPENING BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

This case asks whether a public university may impose a political litmus test on prospective faculty, effectively barring the viewpoints of accomplished professors from a public campus.[1] That practice, akin to the "loyalty oaths" the Supreme Court has long denounced, poses a bona fide threat to academic freedom. *See Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967). The lower court held that a professor who—but for the diversity statement requirement—was eminently qualified for the position, and was genuinely interested in it, could not satisfy Article III's injury requirement. In effect, the lower court would require a qualified professor to first apply and be rejected for the

[1] On Wednesday evening, March 19, 2025, after the drafting of this brief was substantially complete, Appellant learned that the UC Board of Regents and University President Drake directed UC System Provost Katherine Newman to promulgate a memorandum to the UC community prohibiting the use of standalone diversity statements in faculty hiring at all UC campuses, including UC Santa Cruz. As of the filing of this brief, counsel for Appellees has not indicated how or when this resolution will be implemented, nor whether Appellees believe this resolution moots this litigation. Appellant therefore files this brief out of an abundance of caution to preserve his appellate rights. If the Court subsequently determines on its own motion that the appeal has become moot, Appellant respectfully requests that the Court vacate the district court's judgment below pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

position before he or she could challenge the loyalty oath. That is not the law of this Court or the Supreme Court, and the district court should be reversed.

Appellant Dr. John Haltigan filed this First Amendment lawsuit challenging the University of California, Santa Cruz's ("University" or "UC Santa Cruz") diversity statement requirement. Under University policy, all applicants must submit a statement discussing their adherence to the University's views on the concepts of "diversity," "equity," and "inclusion" (the DEI statement). The University explains, through reams of posted material on the application website and elsewhere, which views are acceptable in DEI statements and which are unacceptable. It does so in surprising detail. The University also emphasizes that the DEI statement is used to screen out applicants with dissenting views as a first cut in the application process. Thus, the DEI statement creates a barrier that makes it impossible for applicants who disagree with the University on these political topics to ever be considered for employment. In the highly competitive world of tenure track academic work, failure to hew to the line dooms an application regardless of the applicant's qualifications.

Dr. Haltigan is a psychology Ph.D. currently seeking an academic job. He has applied to many universities in the course of that job hunt. However, he holds strong views on DEI and DEI-related issues. In 2023, a job was posted at UC Santa Cruz which was a perfect match with Dr. Haltigan's interests and background. However, Dr. Haltigan saw that this opportunity was gated behind the DEI statement requirement. Given how the University clearly explained what is required for a successful DEI statement, Dr. Haltigan knew he would either have to apply and submit a dishonest statement, or crash onto the rocks of the DEI statement requirement.

Faced with the choice of Scylla or Charybdis, Dr. Haltigan chose neither. He elected to file suit challenging the DEI statement requirement at the University. His suit alleges that the DEI statement requirement discriminates against him based on his views and compels him to speak on issues unrelated to the job in question. Under the DEI statement requirement, as enforced and advertised by the University, Dr. Haltigan is entirely precluded from a job at UC Santa Cruz and any honest application would be unequivocally futile.

The district court dismissed Dr. Haltigan's First Amendment claims on the pleadings. The court held that Dr. Haltigan had failed to plead concrete and imminent injury from the DEI statement requirement. The decision of the district court should be reversed.

JURISDICTIONAL STATEMENT

Dr. Haltigan brought this lawsuit in the District Court pursuant to 42 U.S.C. § 1983 and the First Amendment to the United States Constitution. This appeal arises from the District Court's order dismissing his second amended complaint pursuant to Fed. R. Civ. P. 12(b)(1). The District Court entered its final judgment on December 18, 2024. ER-003. Dr. Haltigan filed a timely notice of appeal on January 3, 2025. ER-191–93. The District Court possessed jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3), and this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Does Appellant Dr. John Haltigan have standing to challenge UC Santa Cruz's use of a political litmus test to screen applicants for employment?

STATEMENT OF THE CASE

Dr. John Haltigan has a Ph.D. in developmental psychology. He is working as a part-time lecturer and is currently searching for an academic job. ER-027–28, ¶¶ 59–67; ER-030, ¶ 86. In February 2023, Dr. Haltigan posted a sample diversity statement, a requirement for many academic jobs in the United States, on his personal website in which he expressed his commitment to colorblind inclusivity, viewpoint diversity, and merit-based evaluation. ER-028–29, ¶¶ 74–78; ER-176-180, Ex. F.

At the time he filed the complaint, the University had an open position in developmental psychology which was a close fit with Dr. Haltigan's background and interests. ER-028–29, ¶¶ 68, 80; ER-181–84, Ex. G. Dr. Haltigan had the necessary application materials prepared at the time he learned about the position, in early 2023, but he knew that his application would not be competitive because of the DEI Statement policy. *See generally* ER-024–29, ¶¶ 58–78; ER-031–32, ¶¶ 89–98. While this position is no longer open, it was open at the time Dr. Haltigan filed his complaint. And because UC Santa Cruz routinely posts other similar

psychology job offerings that remain subject to the DEI requirement, the unconstitutional barrier continues to injure and deter him from applying.

I. The DEI Statement Requirement

The University requires every candidate for every academic job to submit a DEI statement. ER-030, ¶ 81. It uses this requirement to screen candidates. *Id.* ¶ 82. In fact, the job opening Dr. Haltigan was interested in stated expressly that the initial screening of candidates would be performed using *only* the DEI statement and a research statement. *Id.* The University uses the DEI statement requirement to eliminate candidates from consideration without regard to their background, experience, or education. ER-031, ¶¶ 90–93.

In three separate ways, the University describes the content applicants must include in their DEI statements to avoid being screened out. First, the University provides official supporting documents on the main "Diversity" page for the UC Santa Cruz Office of Academic Personnel (APO)—a page linked to in the job posting Dr. Haltigan was qualified for and interested in. It defines the terms "diversity," "equity," and "inclusion" and instructs candidates that their application must express and incorporate these definitions and ideas. ER-024–25, ¶¶ 37–

41. Second, the University provides a detailed scoring rubric for DEI statements that instructs candidates that they will be evaluated on the extent of their "awareness," "knowledge," and willingness to advance the orthodoxy the University has articulated on the topics of diversity, equity, and inclusion. ER-025, ¶¶ 42–46. Third, the University provides supplementary material on the positions that applicants must adopt if they wish to be competitive, including the Psychology Department webpage and the Academic Personnel Office "DEI Resources" page. ER-026, ¶¶ 50–54. The direct effect of these materials—in conjunction with the mandate of DEI statements to screen applicants—means that applicants must affirm the University's preferred political positions if they wish to even be interviewed.

Dr. Haltigan alleges that this requirement places any application he would submit with the University at a fatal disadvantage. Among other things, he cannot truthfully accept the University's definition of equity and diversity as valid: he rejects the usefulness of concepts like intersectionality; he expressly desires to treat students and faculty the same regardless of their race; he specifically disagrees that racial proportionality should be a goal sought by the university; and, he

disagrees that disparities in outcome should be ipso facto taken as indicating social oppression or injustice. ER-176–80, Ex. F.

Given his public views on color-blind inclusivity and merit-based achievement, any honest DEI statement he submits will receive a score under the University's published scoring rubric that would automatically reject his application. ER-031–32, ¶¶ 94–95. Faced with this choice, he chose instead to vindicate his rights in court. Since filing suit, the University has continued to impose this loyalty oath requirement on all job applicants, including in new positions in the Psychology Department which Dr. Haltigan is qualified for. ER-030, ¶¶ 86–88.

II. Procedural History

Dr. Haltigan filed his initial complaint on May 18, 2023, and his First Amended Complaint on June 19, 2023. Both stated claims against the University under the First Amendment. Appellees filed their first motion to dismiss on August 7, 2023. On January 12, 2024, the district court dismissed Appellant's claims on standing grounds. The district court gave Appellant leave to amend to provide more detailed allegations on his readiness and ability to apply for a position.

Appellant filed his Second Amended Complaint on February 2, 2024. The complaint asserted the same First Amendment claims as the First Amended Complaint while aiming to provide more allegations related to Dr. Haltigan's readiness and ability to apply for a position at the University that the district court believed were lacking in his previous complaint. Appellees again filed a motion to dismiss, and the district court once again dismissed Dr. Haltigan's claims on November 15, 2024, holding that he had failed to allege a jurisdictional injury in fact. In the same order, the court gave Appellant leave to amend the complaint to provide more allegations showing that his injury is actual or imminent and that an applicant would be futile. Believing that his Second Amended Complaint already makes allegations sufficient to establish standing, Dr. Haltigan chose to stand on his Second Amended Complaint. The district court issued its final judgment on December 18, 2024, ER-003, and Dr. Haltigan timely filed his Notice of Appeal on January 3, 2025. ER-191–93.

STANDARD OF REVIEW

A district court's determination whether a party has standing is reviewed de novo. *See Meland v. Weber*, 2 F.4th 838, 843 (9th Cir. 2021).

In establishing Article III standing, "[f]irst, the plaintiff must have suffered an injury in fact … [s]econd, there must be a causal connection between the injury and the conduct complained of[,] … and [t]hird, it must be likely … that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (quotation marks and citations omitted). "The basic inquiry is whether the 'conflicting contentions of the parties … present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.'" *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945)).

On a motion to dismiss under Fed. R. Civ. P. 12, courts must take all facts in the complaint as true, make all reasonable inferences in favor of the plaintiffs, and determine whether the complaint states a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is facially plausible when a plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The plausibility standard requires courts to

assume that all the alleged facts are true, even when their truth is doubtful. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007).

A complaint requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint "does not need detailed factual allegations," nor is there a "probability requirement" at the pleading stage. *Twombly*, 550 U.S. at 555–56; *see also Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) ("[s]pecific facts are not necessary"). The complaint needs only enough facts to suggest that discovery may reveal evidence of illegality, even if the likelihood of finding such evidence is remote. *Twombly*, 550 U.S. at 556. The border lies "between the factually neutral and the factually suggestive." *Id.* at 557 n.5. Finding this border is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 678.

Standing is assessed at the "outset of the litigation." *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000); *Wilbur v. Locke*, 423 F.3d 1101, 1107 (9th Cir. 2005), *abrogated on other grounds by Levin v. Com. Energy, Inc.*, 560 U.S. 413 (2010). "[P]ost-filing developments do not defeat jurisdiction if jurisdiction was

properly invoked as of the time of filing." *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. Shell Oil Co.*, 602 F.3d 1087, 1091–92 (9th Cir. 2010). The relevant time of filing for this purpose is the time of the original complaint, not the amended complaint. *See Lutter v. JNESO*, 86 F.4th 111, 125 (3d Cir. 2023).

SUMMARY OF ARGUMENT

The district court erred in dismissing this case. The detailed factual allegations in Dr. Haltigan's complaint are more than sufficient to raise a reasonable inference of unlawful behavior on the part of the University. The claims are plausible on their face and additional details are unnecessary under Rule 8. For this reason, the district court's dismissal is unwarranted, particularly in light of the Supreme Court's instruction that courts must accept all alleged facts as true and must make all reasonable inferences in favor of the plaintiff. This Court should reverse and remand to allow the parties to engage in discovery and give Dr. Haltigan the opportunity to demonstrate his genuine interest in a job at the University and the existence of the unconstitutional barrier the DEI statement poses to him successfully applying for a position.

If this Court reverses, the consequence will simply be discovery and factual development of important constitutional claims. But if the district court's decision is affirmed, a significant barrier to judicial review of viewpoint discrimination in academic hiring would be established, with significant impacts on academic freedom throughout California.

ARGUMENT

I. Dr. Haltigan Alleged a Concrete and Particularized Injury

A. Dr. Haltigan sufficiently alleged that he was "ready and able" to apply

Competitor standing does not require Dr. Haltigan to demonstrate that he would have been hired if he had applied, only that he is being denied the opportunity to compete equally. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) ("We note that, contrary to respondents' suggestion … Adarand need not demonstrate that it has been, or will be, the low bidder on a Government contract."). The injury is the denial of equal treatment, not the loss of the opportunity in question. Accordingly, all Dr. Haltigan needs to allege is that he is ready and able to apply to the University and that the DEI statement requirement poses an unconstitutional barrier to him fairly competing for a job. *See Planned Parenthood of Greater Wash. & N. Idaho v. U.S.*

Dep't of Health & Human Servs., 946 F.3d 1100, 1108 (2020) ("A plaintiff need not participate in the competition … only demonstrate that it is able and ready to bid.") (cleaned up); *see also Bras v. Cal. Pub. Utils. Comm'n*, 59 F.3d 869, 873–74 (9th Cir. 1995) (plaintiff who challenged Minority Business Enterprise program had standing to challenge the program based on evidence he had provided services for 20 years, was able and ready to continue providing services, but was disadvantaged by program). Even if a court is "doubtful" that Dr. Haltigan is sincere about his desire to apply at the University, his allegations in the complaint are sufficient to suggest that discovery may reveal evidence of this illegal barrier, which is all he needs to establish standing at this stage of the litigation. *See Twombly*, 550 U.S. at 556.

Applying this well-known standard, Dr. Haltigan's standing to sue is plain. Dr. Haltigan was ready, able, and interested in applying for the position he wanted at the University at the time the complaint was filed. The position was open, and he had the materials required—specifically a cover letter, an updated C.V., a research statement, a diversity statement, a teaching statement, and two to five reprints or preprints of

published work prepared. ER-027–28, ¶¶ 61–73; ER-036–180, Ex. A–F. All physical preparations necessary for the application were complete.

This was no passing interest either. He was genuinely interested in the position, which was a perfect fit for his background and interests. The complaint expressly states that Dr. Haltigan's job search is directed at places where he wants to live and work with openings that fit his background and interests, by which measure UC Santa Cruz is a fit. ER-027, ¶ 60. First, Dr. Haltigan wants to live and work in California, which is attested to by the fact that he applied to multiple openings in the state in 2023. *Id.* ¶ 64. Second, Dr. Haltigan's research interests—including "the legacy of early caregiving experiences," "life history," and "measurement and classification of child and adolescent psychopathology" all dovetail with UCSC's search for a professor "whose research addresses the intersection of developmental psychology …. with a focus on the well-being of children and youth in their families, peer relations, schools, and/or cultural communities." ER-181–85. This job bears a close resemblance to other jobs Dr. Haltigan applied to (and continues to apply to). *See, e.g.*, ER-067–68 (seeking a similar position at California in September of the same year).

Furthermore, the DEI statement requirement poses a significant barrier to Dr. Haltigan's application. The University explains to applicants that it recognizes and expects a certain orthodoxy in DEI statements. ER-024–27, ¶¶ 36–57. Applicants are encouraged to review the materials describing this orthodoxy, and they are even presented with the scoring rubric which explains in explicit terms how their statements will be judged against this standard. ER-024–27, ¶¶ 36–57; ER-030, ¶ 81. Finally, job openings are explicit that DEI statements are of critical importance and are considered separately from most application materials at a screening level. ER-030, ¶¶ 81–82. These facts prevent Dr. Haltigan, who cannot write an honest DEI statement in line with University orthodoxy, from competing fairly for any position there. ER-031–32, ¶¶ 89–98.

These facts are enough for standing; however, other considerations also weigh in favor of jurisdiction here. In particular, the fact that the DEI statement requirement is *intended* to have a broad chilling effect suggests that impacted academics must be able to challenge it. *See, e.g.*, ER-027, ¶ 57 (DEI statement requirement "has the intent and effect of driving contrary views out of the marketplace of academic hiring."). This

Court has routinely allowed plaintiffs to bring pre-enforcement challenges in cases involving the First Amendment. *See Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (discussing unique standing considerations presented in the First Amendment context). *See also Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003) ("Particularly in the First Amendment-protected speech context, the Supreme Court has dispensed with rigid standing requirements."). This is especially true because the DEI statement requirement will surely evade review if it cannot be challenged by applicants. This Court has previous observed that a plaintiff who is unconstitutionally burdened in a competitive process may have standing if he is able and ready to apply, even if he has not submitted an application, in part because without this safeguard, competitive processes evade judicial review. *See Planned Parenthood*, 946 F.3d at 1109 ("If Planned Parenthood did not have standing, then the instant agency action would be insulated from judicial review.").

The district court, however, concluded that Dr. Haltigan lacked standing because he had not sufficiently alleged his readiness and genuine interest in the position. In reaching this conclusion, the court

repeatedly drew inferences and resolved factual disputes against Dr. Haltigan or ignored Dr. Haltigan's unambiguous allegations. When those allegations are resolved in favor of Dr. Haltigan, as they must at this stage, it is clear that he has satisfied the pleading standards and discovery is appropriate.

First, the court observed that Dr. Haltigan did not allege preparations specifically for the role he wanted at the University. ER-009–10. However, Dr. Haltigan alleged that he had the relevant material ready, and his cover letter would have required only cosmetic modifications. ER-027–28, ¶¶ 61–73; ER-036–180, Ex. A–F. Although the court acknowledged it was "relevant" that Dr. Haltigan had alleged he had these application materials ready to go, it asserted, without support, that having materials that were not specifically prepared for the position could not show readiness and ability. ER-010. Especially in the context of the complaint as a whole, this runs contrary to the ordinary understanding of "ready and able." Someone with application materials ready to go for a position he desires is clearly "ready and able to apply." A greater level of specificity at this stage of the litigation is inappropriate given that the complaint "does not need detailed factual allegations."

Twombly, 550 U.S. at 555; *see also Erickson*, 127 S. Ct. at 2200. It transforms the pleading requirement into an evidentiary burden that should be addressed at summary judgment or trial, not on a Rule 12 motion.

It isn't as if Dr. Haltigan had these materials prepared at random or by coincidence. To the contrary, they were prepared because Dr. Haltigan is a Ph.D. psychologist in an active job hunt for an academic position. ER-027, ¶¶ 58–59. He's not a bystander to the University's discriminatory process, he's a prospective job applicant—the very target of the University's discriminatory activity. At the time of the complaint, the University had an open job that he was qualified for and he wanted. This is enough to satisfy the pleading rules.

Second, the district court determined that because he never alleged that he had applied for a position at UC Santa Cruz, Dr. Haltigan was unlikely to have a genuine interest. ER-010. But this conclusion only follows if the Court is allowed to drill deep into the facts and question Dr. Haltigan's sincerity. This sort of analysis is simply inappropriate at the

motion to dismiss stage.[2] Truly evaluating this issue would require more information about what prior jobs were available, what other opportunities were available to Dr. Haltigan, and whether he typically prepared materials for jobs in a more detailed or specific matter. Of course, this is a matter for discovery, not pleading. Making the reasonable inferences in Dr. Haltigan's favor, the complaint could not be clearer—he does have a genuine interest in a position at UC Santa Cruz. He applied for jobs elsewhere in the state, the job has a close match with his interests, he was in an active job hunt, and his application materials were prepared. ER-027–28, ¶¶ 61–73; ER-036–180, Ex. A–F.

Third, the Court ruled that Dr. Haltigan's injury was not concrete and particularized because he did not explicitly allege that he was interested in a position at UC Santa Cruz. ER-010–11. But Dr. Haltigan's factual allegations support reasonable inferences about his interest: he alleged that his job search is directed toward places he wants to live and

[2] Dr. Haltigan did apply for a job at UC Santa Cruz—in 2013—a fact that surely would have been uncovered during discovery. Dr. Haltigan did not include this historical detail in the complaint because it was not necessary when the complaint need only contain a "short and plain statement" of the grounds for jurisdiction and relief. Fed. R. Civ. P. 8(a)(1)–(2).

work; he wants to live and work in the state of California; and his research interests dovetail with the 2022 Developmental Psychology position. ER-029–30, ¶¶ 79–80. Based on these allegations, it is reasonable to infer that he is genuinely interested in a developmental psychology position at the University.

A single conclusory allegation that he wanted the position at UC Santa Cruz is not needed—especially when it is self-evident based on the complaint as a whole. At this stage in the litigation, all Dr. Haltigan need do is state a plausible claim for relief, meaning that he need only plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Dr. Haltigan did so in his Second Amended Complaint. The details that the district court demands would render the complaint no more plausible than it already is—they would simply make it more detailed—and this is not required under Rule 8. *See Twombly*, 550 U.S. at 555; *Erickson*, 127 S. Ct. at 2200.

Carney v. Adams, 592 U.S. 53 (2020), which the district court relied on, does not hold otherwise. ER-011. *Carney* involved a challenge by a lawyer and political independent to the State of Delaware's political

balance requirement for appointments to the State's major courts. 592 U.S. at 56. After conducting discovery, which was largely focused on the plaintiff's history and intentions in becoming a judge, the parties filed cross-motions for summary judgment. *Id.* On summary judgment, the Supreme Court held that the record evidence failed to show that the plaintiff was ready and able to apply in the reasonably foreseeable future. *Id.* at 60.

But *Carney* shows that the district court should have rejected the motion to dismiss. First, the plaintiff in *Carney*, which involved *extensive* discovery, had no evidence supporting his readiness beyond two statements of intent. *Id.* at 60–64. He also failed to apply for openings during the period when he was eligible. *Id.* By contrast, Dr. Haltigan's Second Amended Complaint alleges that he has been engaged in a nationwide job hunt, has applied for other positions in California, has application materials prepared, and was interested in the Developmental Psychology position. ER-027–28, ¶¶ 61–73; ER-036–180, Ex. A–F.

Second, the Court in *Carney* held that the plaintiff lacked standing after discovery was completed, on summary judgment. 592 U.S. at 56. The plaintiff in *Carney* was given ample opportunity to create a factual

record demonstrating his readiness and ability to apply, but he failed to do so. *Id.* at 60–64. But here, the district court's order would deny Dr. Haltigan the same opportunity to create that factual record. ER-018. Just like the plaintiff in *Carney*, Dr. Haltigan deserves the chance to demonstrate his readiness and ability to apply through the discovery process. At this stage in the case, the relevant inquiry is whether he "plead[ed] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Dr. Haltigan has pleaded enough to get a chance to prove his case. There is no "probability requirement" at the pleading stage, and Dr. Haltigan "does not need detailed factual allegations" to survive a motion to dismiss. *Twombly*, 550 U.S. at 555–56.

B. Dr. Haltigan sufficiently alleged that the unconstitutional DEI statement requirement placed his application at a disadvantage

In a prospective discrimination case challenging a barrier that denies equal treatment in a competitive process, such as this one, the injury in fact for standing purposes is the lack of equal treatment in the competition, not the ultimate inability to obtain the position that the

plaintiff is seeking. *See Planned Parenthood*, 946 F.3d at 1108; *see also Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("The 'injury in fact' … is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."). All Dr. Haltigan needs to allege is sufficient facts to suggest that, with reasonable inferences drawn in his favor, discovery will reveal the existence of such an illegal barrier which denies him the chance to compete fairly for open positions at the University. *See Twombly*, 550 U.S. at 556; *Iqbal*, 556 U.S. at 678.

The district court focused instead on whether the DEI statement requirement rendered his application truly futile. However, the district court's reasoning on futility commits two serious errors: (1) conflating the ultimate success of an application with the issue of equal competitive opportunity, and (2) misreading or misunderstanding the allegations in the complaint. ER-011–12.

First, the district court's focus on futility is based on the false premise that Dr. Haltigan's injury was a failure to obtain the position. However, for the purposes of competitor standing, Dr. Haltigan need only show that the DEI statement requirement will lead to an "increase in

competition" or the "denial of equal treatment." *See, e.g.*, *City of Jacksonville*, 508 U.S. at 666; *Planned Parenthood*, 946 F.3d at 1108; *Bras*, 59 F.3d at 873. The allegations in Dr. Haltigan's complaint discussing the use of the rubric to screen applications for dissent undoubtedly meet that standard. ER-023–24, ¶¶ 30–34; ER-026–27, ¶¶ 53–57; ER-031–32, ¶¶ 91–98. It alleges that the University imposes a barrier that unconstitutionally denies Dr. Haltigan equal treatment—it discriminates against him based on his viewpoint. *Id.* At this stage in the litigation, that is sufficient to allege competitor standing and survive a motion to dismiss. *See Bras*, 59 F.3d at 873–74.

But even if futility were significant to this case, Dr. Haltigan has sufficiently alleged that his application would be futile, at least to the point where discovery on the question is warranted. Here, the Second Amended Complaint alleges that the university makes clear to applicants what views are acceptable, and that applicants understand that, in the highly competitive world of academic hiring, failure to adhere to those views is disqualifying. The most obvious way the University does this is through the use of a grading rubric in evaluating DEI statements, in which some views are favored and others are penalized in the application

process for faculty positions. ER-025–26, ¶¶ 44–53; ER-176–180, Ex. F. For example, the University defines the terms "diversity," equity," and "inclusion" in explicit terms and suggests that disagreement with the University's definitions of these terms is disfavored. ER-024–25, ¶¶ 37–41. Supporting documents from the University emphasize the University's commitment to race-based hiring, dismiss "common myths" about diversity, equity, and inclusion (such as the value of colorblindness and merit-based evaluation), and further emphasize that disagreement with the University's support for race-based hiring and its views on the "common myths" of DEI is undesirable. ER-026, ¶¶ 48–49. The DEI resources page on the Psychology Department's website does the same, stressing the importance of making decisions on the basis of race and, just like the University's other documents, indicating which views will be acceptable in job applications. *Id.* ¶¶ 50–53. Finally, the University's rubric evaluates DEI statements based on their knowledge and acceptance of the concepts and ideology laid out in its other supporting materials, and applicants' plans and past actions which advance those concepts and ideology. ER-025, ¶¶ 44–46. And because the University evaluates DEI statements with the rubric early in the application

process, it screens out applications that dissent from University orthodoxy. ER-023–24, ¶¶ 30–34; ER-026–27, ¶¶ 53–57; ER-031–32, ¶¶ 91–98. Similarly, the frequent use of diversity statements to eliminate applicants at UC Berkeley and his lack of success with his diversity statements that he submitted to other schools in the past further support a reasonable inference of futility, as they highlight how his views are disfavored in the UC system and academia more generally. *Id.*

The use of the rubric to screen applications—which the complaint alleges—places any application Dr. Haltigan would submit at a fatal disadvantage. There is no way that an honest application of the rubric to Dr. Haltigan's sample DEI statement on his website could result in him scoring more than one to two on any category. ER-030, ¶¶ 95–97. No one who believes that "'equity' is inconsistent with the principle of 'equal opportunity' and is used to denote equal outcomes irrespective of inherent capability or merit," ER-178, could possibly receive a higher than a one to two on a rubric evaluating one's knowledge of DEI at the University. The same is true for someone who doesn't feel a "personal

responsibility for helping to eliminate barriers"[3] as the DEI rubric requires. An applicant simply cannot reject core premises of DEI—as Dr. Haltigan does—and even be considered for a position at the University.

The district court's first response—that a related study cited in Dr. Haltigan's complaint supposedly showed he had a 24% chance of not being rejected solely on the basis of his DEI statement—is based on a logical fallacy. ER-012. The fact that 24% of candidates who are rejected are not rejected solely because of their DEI statements does not, by itself, show that viewpoint-based discrimination is not at work or that the DEI statement requirement does not render some applications futile. All it shows is that 24% of candidates have *qualifying DEI statements* and are still rejected. Pointing out that some candidates are ultimately rejected for multiple reasons cannot negate the possibility that the DEI statement itself is an overriding or determinative factor for many (including Dr. Haltigan). In short, the court assumes that if not everyone is rejected solely for one reason, then no one is rejected for that reason—an inference

[3] UCSC Starting Rubric to Assess Candidate Contributions to Diversity, Equity and Inclusion, https://academicpersonnel.ucsc.edu/academic-employment/diversity-equity-and-inclusion/dei-resources-for-candidates/#dei-contributions (last visited March 20, 2025).

that does not follow, especially in the case of Dr. Haltigan, who harbors serious disagreements with the very premises underlying the University's DEI efforts.

The district court's second response—that consideration of the research statement means Dr. Haltigan could have advanced irrespective of his views on DEI—is similarly flawed. ER-012–14. It assumes that merely taking another factor into account (a research statement) necessarily neutralizes a requirement that may itself function as a threshold filter. But adding an additional evaluative criterion in no way refutes that the DEI requirement may still effectively bar or penalize applicants whose viewpoints do not align with the rubric's expectations. Further, the district court's position contradicts allegations in the complaint that the DEI statement is given overriding importance in the screening evaluation. ER-031–032, ¶¶ 89–98. The district court cannot simply disregard these allegations at this stage, even if it thinks them unlikely to be proven true.

The District Court also erred in relying on *Friery v. Los Angeles Unified School District*, 448 F.3d 1146 (9th Cir. 2006), to dismiss Dr. Haltigan's claims at the pleading stage. ER-011–12. *Friery* saw a white

physical education teacher bring an Equal Protection challenge to a transfer policy that barred intra-school-district faculty transfers that would move the destination school's ratio of white faculty to non-white faculty too far from district's overall ratio. 448 F.3d at 1148–49. The district court in that case assumed, without deciding, that the plaintiff had standing and granted summary judgment to the defendants. On appeal, this Court held that, based on the facts before it, it was unsure whether the policy in question would actually affect the plaintiff. *Id.* at 1149–50. It therefore remanded the case for further factual development on whether the plaintiff had standing. *Id.* at 1150.

Dr. Haltigan's case is distinguishable from *Friery* for the same reason it is distinguishable from *Carney*—the district court's order would deny Dr. Haltigan the opportunity to create the factual record on standing that the plaintiffs in *Carney* and *Friery* were allowed, and dismissal before he gets that opportunity is premature. ER-018. It may well be that after discovery is complete and this case has reached the trial or summary judgment stage, Dr. Haltigan will have failed to prove that his application was, in fact, futile. But on a motion to dismiss, even if the district court believes that proof of futility is "very remote and unlikely,"

Dr. Haltigan deserves the chance create a factual record on his standing. *Twombly*, 550 U.S. at 556.

Ultimately, the district court's objections confirm that whether Dr. Haltigan's application would be futile is a factual question. Given his disagreement with the University's favored views and the University's use of DEI statements to screen applications and disfavor dissenting views, it is reasonable to infer that any application Dr. Haltigan submitted would be futile. *See Iqbal*, 556 U.S. at 678. But futility isn't the standard anyway; it can hardly be questioned that the University's diversity statement requirement puts Dr. Haltigan at a competitive disadvantage. His complaint needs only enough facts to suggest that discovery may reveal evidence of illegality, even if the likelihood of finding such evidence is remote. *Twombly*, 550 U.S. at 556. The Second Amended Complaint did so here. Discovery is needed to ascertain the truth of his allegations.

II. Dr. Haltigan Alleged an Actual and Imminent Injury at the Time of Filing That Remains Ongoing Today

Lastly, the district court erred in trying to smuggle mootness into the standing inquiry by way of imminence. Standing is assessed "as of the date of the filing of the complaint." *See Wilbur*, 423 F.3d at 1107; *see*

also Lutter, 86 F.4th at 125. Here, Dr. Haltigan made sufficient allegations to suggest his injury was actual and imminent at that time, and that it remains actual today.

He alleged that the Developmental Psychology position, which was open when he filed his original complaint, aligned with his research interests, that he was interested in a tenure track job at the University, that he is interested in living in California, and that he had applied elsewhere in the state. ER-027, ¶¶ 60–64; ER-030, ¶¶ 84–88; ER-181–190, Ex. G–H. It is reasonable to infer from those allegations that he was interested in the Developmental Psychology position and future openings at the University. *See Iqbal*, 556 U.S. at 678. He also alleged that the University uses the DEI statement requirement to screen applications on the front end, that dissenting opinions from the University's views on diversity, equity, and inclusion are disfavored in the application process, that he himself dissents from the University's preferred views, and that any honest DEI statement he submits will be disfavored in the application process. ER-022–26, ¶¶ 16–53; ER-031, ¶¶ 89–92. The complaint thus sufficiently alleged that DEI Statement requirement poses a barrier to him successfully applying, and that this barrier deters

him from applying, and that is why he filed the complaint instead of applying for the job that he wanted. *See Iqbal*, 556 U.S. at 678.

That the University closed the position that Dr. Haltigan was most interested in after the complaint was filed makes his injury no less imminent. ER-014–16. The question is simply whether the injury was imminent when he filed his initial complaint. If Dr. Haltigan was ready and able to apply for the position in developmental psychology at the University, as he was, his injury was undoubtedly imminent at the moment he filed his complaint because his injury was certain if he had chosen to apply.

But even on the question of whether there is continuing injury, Dr. Haltigan has alleged sufficiently that he is suffering an ongoing injury, even today, because the University continues to use the DEI statement requirement as a barrier to Dr. Haltigan successfully applying and it is likely to post jobs in the future he would be interested in.[4] An

[4] In addition, were the district court to have analyzed this question under mootness, the court would have had to confront the fact that this case is ideal for the mootness exception for injuries "capable of repetition yet evading review." *See, e.g.*, *Planned Parenthood*, 946 F.3d at 1109–1110 (case not moot even though challenged funding opportunity had closed where funding opportunity was less than 2 years and government had demonstrated no intention to change course).

injury is actual or imminent if there is a "real and immediate threat of repeated injury." *D'Lil v. Best Western Encina Lodge & Suites*, 538 F.3d 1031, 1036–37 (9th Cir. 2008) (cleaned up). To demonstrate this threat, a plaintiff need only demonstrate "a sufficient likelihood that he will again be wronged in a similar way." *Id.* at 1036. If a plaintiff is deterred from applying for a job or benefit due to the defendant's enforcement of an illegal barrier that makes it harder for him to successfully apply, his injury is actual. *See id.* at 1037; *see also City of Jacksonville*, 508 U.S. at 666. The injury in fact in discrimination cases "is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *City of Jacksonville*, 508 U.S. at 666.

The district court erred in its discussion of the issue of future injuries because it required Dr. Haltigan to allege detailed factual allegations to survive a motion to dismiss. ER-014–16. The district court held that the complaint failed to allege that Dr. Haltigan's injury was actual or imminent because he did not allege a specific timetable for when he would apply for a new opening, relying on *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983), and *Lujan*, 504 U.S. at 564. ER-015. It also faulted Dr. Haltigan's complaint for not including allegations discussing

how the Quantitative Psychology position that was open in 2023 aligned with his interests or alleging facts regarding his qualifications for that position, as well as for making what the court believed were insufficient allegations that there are regular, relatively frequent job opportunities UC Santa Cruz for which he is qualified. ER-015–16. On that point, the district court held that his allegation that the University posts similar openings on an annual basis was insufficient and that the recent hiring of a tenure track professor in Developmental Psychology makes it less likely that he will be hired. ER-016. It concluded that these purported faults with his complaint make his allegations a form of "some day" speculation that does not support standing. ER-015.

These conclusions were erroneous. Whether under mootness or imminence, *Lyons*, *Lujan*, and *Carney* do not change the Supreme Court's admonition that a complaint "does not need detailed factual allegations" to survive a motion to dismiss and there is no "probability requirement" at the pleading stage. *Twombly*, 550 U.S. at 555–56. Nor did they alter the rule that a complaint requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Ultimately, the court's doubts on the plausibility of Dr. Haltigan's

allegation that the University will post future jobs he is interested in can only be resolved through discovery—not through supposition on a motion to dismiss.

Dr. Haltigan made allegations sufficient to support a reasonable inference that the University uses the DEI statement requirement as a political litmus test, that this litmus test poses a barrier to Dr. Haltigan successfully applying for a position at the University, and that it deters him from applying, and there are likely to be positions in the future that he has an interest in. *See* ER-023–24, ¶¶ 30–34; ER-026–27, ¶¶ 53–57; ER-031–32, ¶¶ 91–98. At this stage in the litigation, all Dr. Haltigan needs to do is make sufficient allegations to suggest that discovery may reveal evidence that this unconstitutional barrier deters him from successfully applying. *Twombly*, 550 U.S. at 556; *see also D'Lil*, 538 F.3d at 1037. His complaint more than meets that standard.

CONCLUSION

Dr. Haltigan alleged facts in his Second Amended Complaint sufficient to support an inference that the University uses the DEI statement requirement as a barrier to make it harder for individuals with dissenting views like to him to successfully apply for a position at the

University. He should be allowed to conduct discovery to show the truth of his allegations. This Court should reverse the district court's dismissal of his complaint, instruct it to accept his Second Amended Complaint, and remand for further proceedings.

DATED: March 21, 2025.

Respectfully submitted,

s/ Wilson C. Freeman

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CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number: 25-171

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I hereby certify that on March 21, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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