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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

DAYMON JOHNSON, Plaintiff, **v.** **STEVE WATKIN, et al.,** Defendants.	1:23-cv-00848-NODJ-CDB **DEFENDANT SONYA CHRISTIAN'S RESPONSE TO PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS** Judge: Not Assigned Trial Date: Not Scheduled Action Filed: June 1, 2023

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Defendant Sonya Christian, in her official capacity as California Community Colleges Chancellor, responds to Plaintiff Daymon Johnson's objections to the Magistrate Judge's Findings and Recommendations as follows.

I. PLAINTIFF'S FACIAL CHALLENGE FAILS AS NEITHER THE REGULATIONS NOR THE CHANCELLOR'S RECOMMENDATIONS REQUIRE ANY PARTICULAR MESSAGE.

Johnson alleges that the regulations and the Chancellor's Competencies and Criteria are invalid as written, asserting that the Findings and Recommendations should be expanded to enjoin regulations seeking to promote diversity, equity, inclusion, and accessibility for California's community colleges in their entirety and as to all persons. Pl.'s Objs. to Magistrate Judge's Findings and Recommendations (Pl.'s Objs.) at 6-7. But neither the regulations nor the Chancellor's recommendations are constitutionally infirm on their face (or as applied), and so there are no grounds to broadly expand the holding in the case beyond Johnson. The Court should reject Johnson's objections.

A. The Regulations and the Chancellor's Recommendations Are Constitutionally Valid as Written.

To assert that a law is unconstitutional as written, a plaintiff must "'establish that no set of circumstances exists under which the [law] would be valid,' i.e., that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Alternatively, "a facial challenge must fail where the statute has a 'plainly legitimate sweep.'" *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 739–740, and n. 7 (1997)). Notably, a court must not go "beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id.* at 450. Indeed, "[c]laims of facial invalidity often rest on speculation. As a consequence, they raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.'" *Id.* (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)).

In *Washington State Grange*, a state political party challenged the constitutionality of the state's "blanket" primary system, requiring candidates to declare a "major or minor party preference, or independent status" before being placed on a primary ballot. *Wash. State Grange,* 552 U.S. at 447. Candidates with the highest and second-highest vote totals advance to the

general election, regardless of party preference. *Id.* at 447-48. In rejecting a challenge that the law violates voters' First Amendment rights of free association on its face, the Supreme Court held that the "sheer speculation" that voters would assume that candidates on the general election ballot were the nominees of their preferred parties could not support a finding that the law was facially unconstitutional. *Id.* at 454.

In the present matter, the District has yet to finalize the policies it will promulgate in response to the challenged regulations. And local community college districts must negotiate the manner of evaluating employees with their employee unions, as such evaluations are a subject within the scope of bargaining under the Educational Employment Relations Act (EERA). Cal. Gov't Code § 3543.2, subd. (a)(1). Under the EERA, it would be unlawful for a community college district to fail to meet and negotiate in good faith with the relevant employee organization over matters within the scope of bargaining. *Id.*, § 3543.5, subd. (c). It is thus "sheer speculation" that anything the District might ultimately draft will have *any* impact on Johnson's speech, much less implicate his First Amendment rights. As detailed in the Chancellor's objections to the Findings and Recommendations, the Magistrate Judge's conclusion that Johnson's speech will be impaired "**whatever** competencies and criteria are imposed on him through the DEIA regulations" is overly broad for the very same reason. Def. Christian's Objs. to Findings and Recommendations at 2.[1] There is no showing that—in every conceivable circumstance—policies drafted in response to the regulations will impermissibly restrain Johnson's First Amendment rights.

Johnson's claim that the policies drafted by all of the State's other community college districts in response to the regulations will also implicate their employees' First Amendment rights is even more speculative. Indeed, neither Johnson's First Amended Complaint nor his preliminary injunction motion presents any evidence regarding the policies that the other 72 districts have (or may in the future) promulgate under the regulations, much less any evidence

[1] Johnson also cannot maintain an "as-applied" challenge to the regulations and Chancellor's recommendations, given that they do not apply to him.

that these unspecified policies will restrict any person's speech.[2] Thus, any injunction that contains all of California's community college districts within its scope would be impermissibly premised on pure conjecture.

In short, the Findings and Recommendations speculate about the consequences to Johnson "whatever competencies and criteria" the District ultimately adopts. Any order holding that the regulations are constitutionally invalid on their face would be a premature interpretation of how the District (and other community college districts) might promulgate policies in response to them. Because such an injunction would be based on hypothetical events that have not occurred, Johnson's requested expansion of the proposed injunction should be rejected.

B. Plaintiff's Objections Impermissibly Seek to Convert His Case to a Class Action Matter.

"The purpose of . . . interim equitable relief is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." *Trump v. Int'l Refugee Assistance Project,* 582 U.S. 571, 580 (2017) (citation omitted). When an injunction might apply broadly, the "relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki,* 442 U.S. 682, 702 (1979). "This rule applies with special force where there is no class certification." *California v. Azar,* 911 F.3d 558, 583 (9th Cir. 2018); *see also Easyriders Freedom F.I.G.H.T. v. Hannigan,* 92 F.3d 1486, 1501 (9th Cir. 1996) ("[I]njunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification"); *Zepeda v. U.S. Immigr. & Naturalization Serv.,* 753 F.2d 719, 729 n.1 (9th Cir. 1985) (vacating injunction that gave "broad relief . . . not necessary to remedy the rights of the individual plaintiffs).

An injunction that flatly enjoins a state officer from enforcing a state law sidesteps this core principle, effectively converting the case into a class action. And it would "deprive appellate courts of a wider range of perspectives," particularly when the concepts of diversity, equity,

[2] Under the EERA, each community college district is a separate and distinct "public school employer" with its own bargaining obligations vis-à-vis its employee unions. Cal. Gov't Code §§ 3540, 3540.1(k); Cal. Code Regs. tit. 8, § 32001(c). Accordingly, it is highly unlikely that any two districts' DEIA evaluation policies will be the same.

inclusion, and accessibility may be evaluated when applied in districts apart from the Kern County Community College District. *Azar,* 911 F.3d at 583.

As shown by the Chancellor's objections to the Findings and Recommendations, there are no grounds for injunctive relief. But if an injunction does issue, it can and should be limited to Johnson, to "remedy" his allegedly violated individual rights. This maxim is particularly applicable in this case, because much of the evidence Johnson presents in support of an injunction—namely, the Kern County Community College District's termination of Professor Garrett—is allegedly relevant only to Johnson (who implausibly claims to be similarly situated to Professor Garrett) –and so could have no bearing on the State's other community college employees. Extending the injunction to enjoin the Chancellor's guidance to districts and their staff statewide is unwarranted and would be a severe injustice to the two million students in California's diverse community college system.

II. PLAINTIFF MISCHARACTERIZES THE REGULATIONS AND THE CHANCELLOR'S GUIDANCE IN REQUESTING THAT THE PROPOSED INJUNCTION BE BROADENED.

In his objections, Johnson submits that California Code of Regulations, title 5, sections 51200, 51202, 53425, 53601, 53602, and 53605 should all—without qualification—be enjoined as constitutionally invalid on their face, arguing that "[t]here does not exist a single valid application of these provisions." Pl.'s Objs. at 7. Even a cursory reading of the regulations shows that they are valid expressions of governmental intent, do not apply to Johnson, and in no way violate the Constitution. Johnson's objections should be rejected.

Section 51200 states that the California Community College Board of Governor's "intent . . . [is] that the statement on Diversity, Equity, and Inclusion set forth in Section 51201 be" its official position and "should guide the administration of all [college] programs, consistent with all applicable state and federal laws." Section 51201 provides that the California Community Colleges "embrace diversity" among students and staff, further describing how that can be manifest in college programs. Under section 53425, the California Community Colleges district employees are expected to "demonstrate the ability to work with and serve [diverse] individuals" in a manner determined by each district's local policies. And section 53601

authorizes the Chancellor to issue "guidance describing DEIA competencies and criteria" that districts may use as a "reference" for their own policies.[3]

These statements of the Board's "intent" and "official position," and the "expectation" that staff be able to work within a diverse community, are not directed to Johnson, have no direct impact on his own speech, and in no way violate the First Amendment. Similarly, a regulation authorizing the Chancellor to issue guidance as a reference to be used by districts is not directed at Johnson and has no constitutional ramifications. To argue that these statements of the Board's intent and its aspirations for the community colleges, and a regulation authorizing the Chancellor to "publish guidance," somehow violate the First Amendment on their face is simply unfounded, and Johnson's objections fail.

III. IF ISSUED, THE RECOMMENDED INJUNCTION SHOULD NOT EXTEND TO PLAINTIFF'S POTENTIAL FUTURE SPEECH IN COMMITTEES.

Johnson objects that the proposed injunction does not extend to statements he may make in hiring committees and on the Equal Opportunity and Diversity Advisory Committee, arguing that future inflammatory statements he may make in these committees are "intramural speech." Pl.'s Objs. at 3. In support, Johnson criticizes the Ninth Circuit's ruling in *Sullivan v. Univ. of Wash,* 60 F.4th 574 (9th Cir. 2023). But if an injunction issues (which it should not), it should apply to Johnson's scholarship and classroom instruction only, and certainly not apply to whatever statements he intends to make during committee conferences.

Johnson acknowledges that the First Amendment protections provided to academic scholarship and classroom instruction in adult institutions under *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) do not extend to speech uttered outside of those forums. Pl.'s Objs. at 2 (citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006)). But relying on *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014), Johnson erroneously seeks to extend these protections to things he might say about prospective professors in committees. Pl.'s Objs. at 3-4. *Demers* is readily

[3] Johnson lumps the California Code of Regulations together with the Chancellor's "Diversity, Equity, and Inclusion Competencies and Criteria Recommendations," denominating them together as the "challenged provisions." *See, e.g.*, Pl.'s Objs. at 7. The Chancellor's guidance is just that—guidance and recommendations—and cannot be enforced against the districts or Johnson. Def. Christian's Objs. to Findings and Recommendations at 12-13.

distinguishable from Johnson's proposed future committee activities. In *Demers*, a professor circulated a plan to "increase the influence of professionals and reduce the influence of Ph.D.s within" a school's journalism program. *Demers*, 746 F.3d at 414. Although the Ninth Circuit found this publication to be of "public interest" and thus entitled to protection under *Pickering*, it stressed that the speech "did not focus on a personnel issue or internal dispute of no interest to anyone outside a narrow 'bureaucratic niche,'" which is not entitled to the same protection. *Id.* at 416 (quoting *Tucker v. Cal. Dep't of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996)).

Johnson concedes that the committees in question are "faculty screening committees" and are "engaged in hiring faculty" (Pl.'s Objs. at 4), the very functions that *Demers* found are not entitled to First Amendment protection. *Demers* at 414. And again, despite Johnson's assertions that the regulations and Chancellor's recommendations "impose ideological conformity" (Pl.'s Objs. at 4), they instead require that staff have knowledge of and proficiency in concepts of diversity, equity, inclusion, and accessibility. Cal. Code of Regs. tit. 5, § 53602(b). Rather than "imposing" speech, the regulations and recommendations detail the California Community Colleges' commitment to diversity, equity, and inclusion, goals that should be considered when districts and colleges are considering new professors. If Johnson chooses to disparage those concepts in committee meetings, that speech is not protected under the First Amendment.

CONCLUSION

There are no grounds to find either the regulations or the Chancellor's guidance are facially unconstitutional. Johnson's objections to the Findings and Recommendations should be rejected.

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Dated: December 12, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: ***Johnson, Daymon v. Watkin, Steve, et al.*** Case No. **1:23-cv-00848-ADA-CDB**

I hereby certify that on December 12, 2023, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **DEFENDANT SONYA CHRISTIAN'S RESPONSE TO PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 12, 2023, at San Francisco, California.

M. Mendiola
Declarant

M. Mendiola
Signature

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