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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA - BAKERSFIELD

DAYMON JOHNSON,

Plaintiff,

v.

STEVE WATKIN, in his official capacity as Interim President, Bakersfield College; et al.;,

Defendants.

Case No.: 1:23-cv-00848 ADA-CDB

Complaint Filed: June 1, 2023
FAC Filed: July 6, 2023

RESPONSE TO PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS

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I. INTRODUCTION

The Magistrate Judge's Findings and Recommendation (ECF No. 70, "Recommendation") provides for a preliminary injunction in favor of Plaintiff Daymon Johnson ("Johnson"), a professor in the Social Sciences Department at Bakersfield College. The proposed preliminary injunction prohibits the enforcement against him of Board Policy 3050 relating to civility and prohibits him from being evaluated under California's new Diversity, Equity, Inclusion, and Accessibility ("DEIA") regulations now applicable to all community college faculty in the State. The trustees and administrators of the Kern Community College District (the "District") who are named as individual defendants in this matter[1] have objected to the Recommendation, explaining how issuance of a preliminary injunction would be improper under the circumstances. Johnson lacks standing, the stringent requirements for a preliminary injunction are not met, and his First Amendment claims in any event lack a likelihood of success.

Johnson himself has objected to features of the proposed preliminary injunction. He argues it improperly excluded from its scope his work on the Equal Opportunity and Diversity Advisory Committee ("EODAC") and screening committees. Johnson also argues that the preliminary injunction should not just apply to him alone but to the challenged DEIA regulations facially, so that the preliminary injunctive relief extends across the District. For the reasons explained below, both objections have no merit and should be overruled.

II. DISCUSSION

A. THE MAGISTRATE JUDGE CORRECTLY DETERMINED THAT EODAC AND SCREENING COMMITTEE WORK WERE OUTSIDE THE SCOPE OF THE PROPOSED PRELIMINARY INJUNCTION

Plaintiff objects to the Recommendation's limitation of the proposed preliminary injunction so that it does not apply "to enjoin Defendants from requiring DEIA compliance as a condition of serving on screening committees or the EODAC." (ECF No. 70 at 31.) The

[1] The above-captioned counsel represents each Defendant in this matter, except Sonya Christian. These Defendants include the following sued in their official capacity: Steve Watkin, Richard McCrow, Thomas Burke, Romeo Agbalog, John S. Corkins, Kay S. Meek, Kyle Carter, Christina Scrivner, Nan Gomez-Heitzeberg, and Yovani Jimenez (collectively and with the exception of Sonya Christian the "District Defendants").

limitation derives from the Ninth Circuit's interpretation of the "official duties" rule from *Garcetti v. Ceballos*, 547 U.S. 410 (2006); in particular, although *Garcetti* provides that "official duties" speech of a public employee generally lacks First Amendment protection, *id.* at 421, this rule does not apply to speech of a professor "related to scholarship or teaching." *Demers v. Austin*, 746 F.3d 402, 411-12 (9th Cir. 2014). This is true even though professors render such speech pursuant to "official duties." Nevertheless, *Garcetti*'s rule excluding "official duties" from protection does apply to a professor's speech outside this category ("related to scholarship or teaching") and precludes First Amendment protection for it. *Id.*

The Magistrate Judge correctly decided that certain speech at issue here – Johnson's speech in the course of his work on screening committees and the EODAC – fell into this category of un-protected speech by a professor. The Magistrate Judge reasoned:

> "The 'primary purpose' of Bakersfield College's [EODAC] 'is to actively assist/facilitate' the school's 'cultural and institutional policies and practices that demonstrate a commitment to greater diversity and inclusion.'" (Doc. 26-1 at 10). The purpose of screening committees is hiring faculty. (Doc. 26-2 at ¶ 61). Neither activity involves "scholarship or teaching." Thus, *Garcetti* applies and Plaintiff's speech in the course of his work on screening committees and the EODAC is not protected.

(ECF No. 70 at 31 (citing *Sullivan v. Univ. of Wash.*, 60 F.4th 574, 582 n.6 (9th Cir. 2023), and *Hong v. Grant*, 516 F. Supp. 2d 1158, 1168 (C.D. Cal. 2007), *aff'd on other grounds* 403 F. App'x 236 (9th Cir. 2010)).

The Magistrate Judge's decision rests on an accurate reading of the line between a professor's speech "related to scholarship or teaching" and other speech as part of a professor's job duties. Although the Court in *Demers* used the phrase "related to" in referencing scholarship and teaching, elsewhere in the opinion it references the type of speech at issue more narrowly, using the phrase "teaching and academic writing": "We conclude that if applied to *teaching and academic writing*, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court." *Demers*, 746 F.3d at 411 (emphasis added). In this part of the discussion, the Court does not use the term "related to." It uses this same narrower language in announcing its holding: "We conclude that *Garcetti* does not — indeed, consistent

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with the First Amendment, cannot — apply to *teaching and academic writing* that are performed 'pursuant to the official duties' of a teacher and professor." *Id.* at 412 (emphasis added). Indeed, in a Ninth Circuit case from this year, the Court in *Sullivan*, 60 F.4th 574, interpreted the *Demers* language narrowly and to have an "engaged in" requirement. In finding committee work to be un-protected, the Court concluded: "*Demers* is inapplicable here because, in performing the official work of the Committee, the members are not thereby *engaged in* 'teaching and academic writing.'" *Id.* at 582 n.6 (emphasis added) (quoting *Demers*, 746 F.3d at 412)). (*Sullivan*'s treatment of committees is discussed further below.)

The facts of *Demers*, and the Court's reasoning in addressing them, also shows speech "related to scholarship and teaching" has limited scope. The Ninth Circuit found that the plaintiff's preparation of a short pamphlet titled a "7-Step Plan" came within the scope of his scholarship and teaching for purposes of the *Garcetti* carve-out for academic freedom, and could potentially have protection under *Pickering* balancing. The plaintiff, David Demers, was a member of the communications department faculty at his university, and widely circulated his "7-Step Plan" for a fundamental restructure of his journalism school within the university so that (in essence) the role of professional journalism grew and the role of more theoretical communications theory diminished. In concluding that Demers' circulation of the short pamphlet came within the scope of speech "related to scholarship and teaching," the Ninth Circuit emphasized the fundamental changes the document demanded to the academic mission of the school in which Demers taught: "The 7-Step Plan was not a proposal to allocate one additional teaching credit for teaching a large class instead of a seminar, to adopt a dress code that would require male teachers to wear neckties, or to provide a wider range of choices in the student cafeteria. Instead, it was a proposal to implement a change at the Murrow School that, if implemented, would have *substantially altered the nature* of what was taught at the school, as well as the *composition of the faculty* that would teach it." *Id.* at 415 (emphasis added).

Here, there is no evidence that the work of the screening committees for hiring or EODAC seeks to "substantially alter[] the nature of what is taught." Certainly, those committees can bring about important change, but will do so through established committee processes that are a regular

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operation of the school. (ECF No. 26-2, p.2 ¶ 4 (Johnson declaration describes purpose of EODAC as "call[] for end to systemic racism at Bakersfield College by promoting racial diversity, equity and inclusion"), p.9 ¶ 38 (Johnson has served on EODAC "[f]or many years"), p.16, ¶ 61 (Johnson describes screening committees on which he participated but does not describe that their purpose was to call for fundamental changes in instruction).) Also, the "7-Step Plan" focused on the school in which Demers himself taught, whereas here the screening committee and EODAC work as Johnson describes it applies to other areas of instruction at the College. (ECF No. 26-2, p.2 ¶ 4, p.16, ¶ 61.)

Indeed, the Magistrate Judge's Recommendation properly relies on the recent Ninth Circuit decision in *Sullivan*, 60 F.4th 574, and confirms that faculty work on a committee is outside the scope of speech "related to scholarship and teaching." Its holding supersedes any dictum in *Demers* that Johnson argues can indicate a broader scope to the *Garcetti* carve-out. The Court in *Sullivan* held that faculty participation in committee work that affected research and scholarship at the university (requiring that research using live animals complied with government standards) was "official duties" work outside the scope of protection First Amendment protection under *Demers*. *See id.* at 582 n.6. In reaching its holding, the Court's opinion did not consider, and evidently did not consider relevant, what impact the important committee work could have on academic work at the institutions represented on the committee, either their scholarship or teaching. *Id.*

Another case cited in the Recommendation, *Hong*, 516 F. Supp. 2d 1158, also squarely supports the Recommendation's conclusion. Decided shortly after the *Garcetti* Court described its "official duties" rule in 2006, the District Court's decision separates out certain types of faculty scholarship and teaching and explains of what this consists, ultimately finding it protected upon applying *Garcetti*'s holding: "While Mr. Hong's professional responsibilities undoubtedly include teaching and research, they also include a wide range of academic, administrative and personnel functions in accordance with [University of California Irvine's] self- governance principle," including "providing for faculty involvement in departmental governance, the approval of course content and manner of instruction, appointment and promotion of faculty, and

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faculty and student discipline[.]" *Id.* at 1166-1167. Indeed, for example, Mr. Hong's criticisms with regard to the hiring process were within the scope of official duties and un-protected because they "were the result of his professional obligation to participate in departmental self-governance." *Id.* at 1168. The Court could have applied the *Garcetti* "carve-out" for speech related to scholarship and teaching for these activities, but did not do so. *Id.* at 1166-1168.

The Magistrate Judge's Recommendation has support in the Sixth Circuit's post-*Garcetti* decision in *Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012), in which the Court found that an instructor-librarian's First Amendment claim based on a committee book recommendation for student instruction was unprotected under the *Garcetti* carve-out. The Court reasoned: "[The Plaintiff] Savage's speech as a committee member commenting on a book recommendation was not related to classroom instruction and was only loosely, if at all, related to academic scholarship. Thus, even assuming *Garcetti* may apply differently, or not at all, in some academic settings, we find that Savage's speech does not fall within the realm of speech that might fall outside of *Garcetti*'s reach." *Id.* at 739*; see also Adams v. Trustees of the Univ. of N. Carolina-Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011) ("There may be instances in which a public university faculty member's assigned duties include a specific role in declaring or administering university policy, as opposed to scholarship or teaching. In that circumstance, *Garcetti* may apply to the specific instances of the faculty member's speech carrying out those duties.").

Even if Johnson's EODAC and screening committee work did come within the scope of speech related to scholarship and teaching, a balancing of interests under *Pickering* would still favor no protection, and support excepting such speech from the preliminary injunction's scope. The District is allowed under First Amendment law to discipline employees for acts in violation of policy that cause a sufficient disruption. *Pickering v. Board of Education*, 391 U.S. 563, 572-73 (1968); *Brewster v. Bd. of Educ.*, 149 F.3d 971, 980-81 (9th Cir. 1998). Actions that violate the Education Code's prohibitions on "unprofessional conduct" among other things, *see* Cal. Educ. Code § 87732, and that violate the Board Policy's prohibition on "verbal forms of aggression" can certainly generate the disruption required to satisfy *Pickering*. This balancing constitutes a separate and distinct basis for supporting the proposed preliminary injunction's

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exclusion of certain work by Johnson.

The Objections acknowledge that Johnson's screening committee and EODAC work does not itself constitute Johnson's scholarship or teaching, but instead argues that the *Garcetti* "carve-out" acknowledged by *Demers* is wide enough to encompass it. The Objections contend first that *Garcetti* used the term "speech related to scholarship or teaching" in its carve-out, and that *Demers* used this same term including the modifier "related to." (Objections at 3 (quoting *Garcetti*, 547 U.S. at 421, and adding emphasis).) The argument lacks merit because, as described above, other phrasing from *Garcetti* clarifies that the term "related to" cannot apply broadly; the *Demers* Court elsewhere in its opinion characterizes the range of protected speech as "teaching and academic writing." The Ninth Circuit has subsequently confirmed this narrower scope. *See Sullivan*, 60 F.4th at 582 n.6 (using phrase "teaching and academic writing").

The Objections analogize this case to the speech at issue in *Demers*, explaining: "In *Demers*, a professor claimed he had suffered retaliation for distributing a pamphlet advocating a plan for restructuring the school. The pamphlet did not appear to be itself a scholarly work, nor did its distribution constitute teaching. But the Ninth Circuit 'conclude[d] that the short pamphlet was related to scholarship or teaching,' and thus covered by *Pickering*['s] test." (Objections at 3 (quoting *Demers*, 746 F.3d at 406).) The pamphlet is distinguishable from the committee work here, however, because the pamphlet was work that Demers had prepared individually, and it called for changes that would "have substantially altered the nature of what was taught at the school," the very school of journalism in which Demers taught. *Demers*, 746 F.3d at 415. Here, Johnson's committee work is ongoing over the course of years, in collaboration with other faculty, and applies not just to Johnson's own discipline and department. (ECF No. 26-2, p.2 ¶ 4, p.9 ¶ 38, p.16, ¶ 61.)

The Objections contend that the "relationship between faculty composition and selection, and scholarship and teaching, is self-evident," and argue that applying the DEIA criteria to Johnson as part of his participation on committees (and the same for other participants) is a means of "impos[ing] ideological conformity." (Objections at 4.) The argument misses the mark because it appears the proposed preliminary injunction already does apply to imposing DEIA

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criteria in Johnson's work in the committees. (Recommendation at 44.) What is at issue is Board Policy 3050 and the Education Code disciplinary provisions to Johnson's work on those committees. (*Id.* at 43.)

The Objections contend that the EODAC's work "plainly impacts 'the nature of what [is] taught at the school'" in the words of *Demers*. (Objections at 5.) But "impact" alone was not enough to match the holding of *Demers*, and instead the Court emphasized the *Demers* pamphlet sought to "substantially alter[] the nature of what was taught at the school" including "the composition of the faculty that would teach it." *Demers*, 746 F.3d at 415. This was Demers' own school of journalism as well, not the university as a whole or a committee whose work extended to administration of other disciplines in the institution, as here. *Id.*

B. JOHNSON IS NOT ENTITLED TO FACIAL RELIEF AS TO THE DEIA REGULATIONS

As relevant here, the Magistrate Judge recommended that the District Defendants and Defendant Christian "be enjoined, pending final judgment, from enforcing Cal. Code of Regs. tit. 5, §§ 51200, 51201, 53425, 53601, 53602, and 53605, and the customs, policies, and criteria in evaluating faculty performance against Plaintiff." (ECF No. 70 at 44:1-5.) Johnson now objects that the Magistrate Judge should have enjoined enforcement of the DEIA regulations altogether and that "[l]imiting the relief to Professor Johnson would be erroneous." (ECF No. 74 at p. 7:1.) Johnson failed to meet his heavy burden justifying such broad facial relief.

1. <u>The Standard for Facial Relief</u>

Johnson seeks a preliminary injunction blocking all enforcement of the DEIA regulations. Because this relief would "reach beyond the particular circumstances of [this] plaintiff," Johnson must "satisfy [the] standards for a facial challenge." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). To do this, he must at least show that a "substantial number of [the DEIA regulations'] applications are unconstitutional, judged in relation to the [DEIA regulations'] plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 n.6 (2008) (internal quotation marks omitted). Johnson's burden is heavy, because "[f]acial challenges are disfavored." *Id.* at 450.

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If a plaintiff presents a facial challenge under the First Amendment to a statute's constitutionality, the facial challenge is an overbreadth challenge. *City of Houston, Tex. v. Hill*, 482 U.S. 451, 458 (1987) ("Only a statute that is substantially overbroad may be invalidated on its face.") (citing *New York v. Ferber*, 458 U.S. 747, 769 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)). However, facial overbreadth should be applied sparingly, and courts often impose a limiting construction, rather than striking the whole statute, where possible. *United States v. Stansell*, 847 F.2d 609, 612-13 (9th Cir. 1988). Exercising judicial restraint in a facial challenge "frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." *United States v. Raines*, 362 U.S. 17, 22 (1960).

2. The Overbreadth Doctrine is Inapplicable Because the DEIA Regulations Regulate Conduct

At no point in the briefing on these issues has Johnson addressed the overbreadth doctrine or identified any portion of the DEIA regulations that is overbroad. Yet Johnson now argues that the DEIA regulations are overbroad as "[t]here does not exist a single valid application of [the DEIA regulations and the "Competencies and Criteria"], let alone a plainly legitimate 'sweep' in their enforcement." (ECF No. 74 at p. 7:11-12.)

If the Court is inclined to engage in the overbreadth analysis, the first step "is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). In determining whether a law is facially invalid, the Court "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange*, 552 U.S. at 450.

a. Sections 51200, 51201, 53425, and 53601 do not regulate speech

The DEIA regulations at issue generally express the State's "commitment to diversity and equity in fulfilling the [community college] system's educational mission." Cal. Code Regs. tit.

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5, § 51200.[2] Section 51200 expresses the California Community College Board's "intent . . . that the statement on Diversity, Equity, and Inclusion set forth in Section 51201" be the Board's "official position . . . on their commitment to diversity and equity in fulfilling the system's educational mission and that it should guide the administration of all programs in the California Community Colleges." Section 51201 further explains that "intent" and the Board's "official position," stating that the Board "embrace[s] diversity among students, faculty, staff, and the communities [it] serves." The section further explains what *the Board* believes *it* must do to further its intent and goals concerning diversity and anti-racism.

As noted by Defendant Christian, neither of these regulations reference any individual's speech or beliefs, or purport to impose upon others the Board's official recognition of the diversity of the community colleges. (See ECF No. 71 at p. 7.) Governmental entities like the Board are entitled to express their ideals and principles concerning diversity, equity, inclusion, and accessibility, particularly when that expression does not regulate another person's speech. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828, 833 (1995) (although "the government may not regulate speech based on its substantive content . . . when the State is the speaker, it may make content-based choices"); *see also Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000). Indeed, governmental entities "may decide not only to talk about . . . tolerance in general, but also to advocate such tolerance if it so decides." *Downs*, 228 F.3d at 1014 (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

Next, Section 53425 provides that "all district employees shall demonstrate the ability to work with and serve individuals within a diverse community college campus environment as required by local policies regarding DEIA competencies." Again, there is no reference in this section to any individual's speech. District employees can "demonstrate the ability to work with and serve individuals within a diverse community college campus environment" without uttering a single word. And if they do choose to demonstrate this ability by speaking, section 53425 does not regulate their choice of words in any way.

[2] Unless otherwise specified, all future regulatory references are to Title 5 of the California Code of Regulations.

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Section 53601 provides that the "Chancellor shall adopt and publish guidance describing DEIA competencies and criteria," which "shall be used as a reference for locally developed minimum standards in community college district performance evaluations of employees and faculty tenure reviews." Again, this section does not reference or purport to regulate any speech by District employees.

Neither Johnson nor the Magistrate Judge attempt to explain how the above regulations could possibly be interpreted to regulate speech. This lack of evidence and analysis does not support enjoining these regulations against Johnson, let alone on their face.

b. Sections 53602 and 53605 do not regulate speech

With respect to the remaining DEIA regulations, the Recommendation finds that:

> Cal. Code of Regs. § 53602(a) requires faculty demonstrate (or progress toward) proficiency in the locally-developed DEIA competencies, or those published by the Chancellor for their evaluation, including tenure review. For instance, § 53602(b) provides that "District employees *must have* or establish proficiency in DEIA-related performance to teach, work, or lead within California community colleges" (emphasis added). Similarly, § 53605(a) provides that "Faculty members *shall employ* teaching, learning, and professional practices that reflect DEIA and anti-racist principles, and in particular, respect for, and acknowledgement of the diverse backgrounds of students and colleagues to improve equitable student outcomes and course completion" (emphasis added). Likewise, § 53605(c) provides that "[s]taff members *shall promote and incorporate* culturally affirming DEIA and anti-racist principles to nurture and create a respectful, inclusive, and equitable learning and work environment" (emphasis added).

(ECF No. 70 at 34:5-15.) The Recommendation concludes that the above provisions "require faculty members like [Johnson] to express a particular message." (ECF No. 70 at 34:17-18.) While Johnson seizes on this conclusion to argue that the DEIA regulations are facially overbroad, the text of the regulations does not support this conclusion.

Establishing "proficiency" under section 53602 does not require Johnson to speak in any way or advocate a specific position on DEIA principles. (See also ECF No. 72 at pp. 26-27.) This section does not identify any particular way in which District employees may demonstrate their "proficiency," and there are certainly an infinite number of ways to do so. For those employees, like Johnson, who oppose DEIA principles, demonstrating proficiency may be as simple as

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understanding the DEIA principles. It is a desirable part of intellectual responsibility to consider opposing views and, should one feel the need, to respond to them. But simply understanding an opposing point of view does not require a person to embrace that point of view; becoming proficient in DEIA principles in this way does not communicate the message that a person supports those principles.

With respect to section 53605, nothing in the text purports to regulate faculty members' speech. The most this section requires of Johnson is that he "employ teaching, learning, and professional *practices* that *reflect* DEIA and anti-racist principles." A "practice"[3] is not speech, and employing practices that "reflect DEIA and anti-racist principles" does not require Johnson, or anyone else, to speak in any particular way. For example, DEIA teaching *practices* can include grading anonymously, creating opportunities to discuss feedback, and incorporating student choice regarding the deliverables for assigned work.[4] None of these practices would require Johnson or any other faculty member even to comment on DEIA principles. While some professors may choose to vocally endorse DEIA principles, section 53605 gives faculty members free reign to select among the many potential practices that reflect DEIA principles.[5] But simply employing teaching practices such as anonymous grading does not communicate the message that a professor supports DEIA principles.

In all, the DEIA regulations pertain to conduct, not speech. *See Arce v. Douglas*, 793 F.3d 968, 985 (9th Cir. 2015) (statute that prohibits any courses that "promote resentment toward a race or class of people" targets the design and implementation of courses and curricula is not overbroad on its face). Thus, they do not violate the First Amendment rights of persons not before the Court, and the Court should disregard Johnson's request to broaden the preliminary

[3] See Cambridge English Dictionary, "Practice" https://dictionary.cambridge.org/us/dictionary/english/practice?q=practice (last retrieved December 5, 2023) (defining "practice" as "action rather than thought or ideas.").

[4] See https://www.cmu.edu/teaching/designteach/diversityequityinclusion/index.html.

[5] The Recommendation incorrectly concludes that section 53605 requires "that faculty members *teach, learn, and employ professional practices* that reflect DEIA and anti-racist principles." (ECF No. 70 at p. 23:1-2 (emphasis added).) Such a reading is incompatible with the text of section 53605 ("Faculty members shall employ teaching, learning, and professional practices that reflect DEIA and anti-racist principles.").

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injunction on the grounds that the DEIA regulations are overbroad. *See Virginia v. Hicks*, 539 U.S. 113, 124 (2004) (an overbreadth challenge will "rarely" succeed unless the challenged statute is "specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)"); *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) ("there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds"); *L.A. Police Dep't v. United Reporting Publ'g*, 528 U.S. 32, 40 (1999) (refusing to engage in an overbreadth analysis the challenged law was "not an abridgment of anyone's right to engage in speech").

3. Johnson Failed to Show the DEIA Regulations are Overbroad

To the extent the DEIA regulations may indirectly influence speech, Johnson failed to show that the DEIA regulations are substantially overbroad in relation to their plainly legitimate sweep. *Broadrick*, 413 U.S. at 615 (a statute that regulates conduct as well as speech is not unconstitutionally overbroad unless the overbreadth is both "real" and "substantial.")

Overbreadth analysis depends not only on statutory text but also on "actual fact," with the burden on the party challenging the law to demonstrate that it is substantially too broad. *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988); *see Boelter v. Advance Magazine Publrs. Inc.*, 210 F. Supp. 3d 579, 602 (S.D.N.Y. 2016). Plaintiffs "need not necessarily introduce admissible evidence of overbreadth, but generally must at least 'describe the instances of arguable overbreadth of the contested law.'" *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011) (quoting *Wash. State Grange*, 552 U.S. at 449 n.6). Courts therefore consider factual records—or the absence of a sufficient record—in determining whether to declare a law facially unconstitutional. *See, e.g., N.Y. State Club Ass'n*, 487 U.S. at 13-14. When assessing First Amendment facial challenges, the Court must not "apply the 'strong medicine' of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law." *Wash. State Grange*, 552 U.S. at 449 n.6.

As demonstrated in the District's Opposition and Objections, Johnson has not even

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established that the DEIA regulations are unconstitutional as applied to him. (*See* ECF Nos. 43, 72.) As relevant here, however, Johnson also has never offered any evidence or argument that the *DEIA regulations* are facially unconstitutional. Indeed, prior to Johnson's Objections, Johnson had never even addressed the standard for a facial challenge.

Nor has Johnson identified any phrase or word of any of the six DEIA regulations at issue that he contends is overbroad. Johnson's conclusory assertion that the DEIA regulations require him to "teach history through [Bakersfield College's] official ideological lens or use its politically inspired pedagogy" is based on a misreading of the DEIA regulations. (*See* ECF No. 26-1 at p. 20.) The text of the DEIA regulations do not require Johnson, or anyone else, to "teach" DEIA principles. *See* Cal. Code of Regs. § 53605(a).[6]

And while Johnson contends the DEIA regulations "call upon Defendants to punish faculty on the basis of viewpoint" (ECF No. 26-1 at p. 22:17-18), Johnson fails to identify any DEIA regulation that even refers to any disciplinary measures. Nor could he, because they do not. Johnson also presented no evidence whatsoever as to the effects of the DEIA regulations on other District employees. Rather, Johnson's arguments are tailored to his own theoretical speech. Based on the absence of argument and evidence on this issue, it is evident why the Magistrate Judge did not identify or even consider whether any portion of the DEIA regulations was overbroad on its face.

On the record before it, the Court cannot determine whether a "substantial number" of [the DEIA regulations'] applications are unconstitutional, 'judged in relation to the [regulations'] plainly legitimate sweep." *New York State Club Assn.*, 487 U.S. at 13-14 (rejecting a facial

[6] Johnson regularly conflates the text and requirements of the DEIA regulations with non-binding guidance documents to incorporate ideas, concepts, and definitions to which he objects but that do not exist within the plain text of the DEIA regulations. (*Compare* ECF Nos. 26-1 at p. 9:2-12 and 26-2 at p. 8:1-10 (relying on the definition of "anti-racist" from the non-binding Diversity, Equity and Inclusion Glossary of Terms, California Community Colleges Chancellor's Office, https://perma.cc/T22V-V866) *with* Cal. Code of Regs. § 52510(d) ("Anti-Racism" and "anti-racist" refers to "policies and actions that lead to racial equity"); *see also* ECF No. 26-1 at 10:3-16 (citing the "Competencies and Criteria" as requiring faculty to comply with "the state's political ideology" even though the "Competencies and Criteria are recommendations . . . [for a] sample starting point, and [] meant to serve as a reference" for local districts (ECF No. 26-4 at 2)); Cal. Code of Regs. § 53602(a) and (c) (requiring the evaluation process to include "an opportunity [for faculty] to demonstrate their understanding of [locally-developed] DEIA and anti-racist competencies").

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challenge to a law regulating club membership and noting the court could "hardly hold otherwise on the record before [them], which contain[ed] no specific evidence on the characteristics of any club covered by the [l]aw"). Having failed to identify any instances of arguable overbreadth, Johnson's request to broaden the scope of the injunction should be rejected.

4. Protected Speech in Relation to the DEIA Regulations' Plainly Legitimate Sweep

Even if the Court finds the DEIA regulations regulate speech and is able to decipher an overbreadth argument in Johnson's pleadings, Johnson failed to show that the DEIA regulations regulate speech impermissibly. This analysis requires weighing the interests implicated by that speech and its regulation. At their core, the DEIA regulations reflect the Board's commitment to diversity and respect for individuals from different backgrounds and experiences. Such diversity includes the following dimensions: "race, ethnicity, national origin or ancestry, citizenship, immigration status, sex, gender, sexual orientation, physical or mental disability, medical condition, genetic information, marital status, registered domestic partner status, age, political beliefs, religion, creed, military or veteran status, socioeconomic status, and any other basis protected by federal, state or local law or ordinance or regulation." Cal. Code Regs. tit. 5 § 51201.

Johnson argues that "applying any form of First Amendment scrutiny (strict, intermediate, *Pickering*, etc.), the findings call for facial relief against the DEIA regulations and the Competencies and Criteria." (ECF No. 74 at p. 9:1-5.) But both Johnson and the Recommendation fail to consider the government's compelling state interest in promoting diversity and reducing unfair treatment based on protected bases identified in section 51201. *See Grutter v. Bollinger*, 539 U.S. 306, 334-35 (2003) (rejecting the use of racial quotas in the race-conscious affirmative action context while recognizing a compelling interest in promoting diversity).

Regardless of whether the government interest here is characterized as "compelling" or "legitimate," the DEIA regulations are subject to facial invalidation only if they impermissibly burden the speech of all District employees in a "substantial number of its applications, judged in

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relation to the statute's plainly legitimate sweep." *See United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange*, 552 U.S. 442, 449 n.6). On the record before the Court, it is unclear what speech, if any, the DEIA regulations burden. Johnson's pleadings in this case largely focus on his challenges to California Education Code sections 87732 and 87735, the District's Board Policy 3050, and the Competencies and Criteria. But Johnson has never developed his arguments as to the DEIA regulations themselves or how they would interfere with any speech.

All told, the DEIA regulations are readily susceptible to a reading that is constitutional, as explained herein. In such circumstances, it is inappropriate for the Court to read the DEIA regulations more broadly to find that they unconstitutionally infringe First Amendment rights. *See Arce*, 793 F.3d at 985 (citing *Stevens*, 559 U.S. at 481); *see also FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 516 (2009) (referencing canon of construction that "ambiguous statutory language be construed to avoid serious constitutional doubts").

C. CONSIDERING ENJOINING THE DEIA REGULATIONS AND THE COMPETENCIES AND CRITERIA ON THEIR FACE IS NOT APPROPRIATE AT THIS STAGE OF THIS CASE

Injunctive relief is not warranted, especially at this stage of the case. Johnson's facial challenges are conclusory to the point of being imperceptible. (*See* ECF No. 26-1.) Without additional information, it is premature to consider whether the DEIA regulations (or the Competencies and Criteria) are facially overbroad. Additionally, the Court should not consider relief to non-parties when a narrower remedy, i.e., the remedy associated with the as-applied challenge, will fully protect the litigants. *Serafine v. Branaman*, 810 F.3d 354, 363 (5th Cir. 2016) (quoting *United States v. Nat'l Treas. Emps. Union*, 513 U.S. 454, 477-78 (1995)). In light of this, and because "when considering a facial challenge it is necessary to proceed with caution and restraint," *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975), the Court should not indulge Johnson's request to expand the scope of the preliminary injunction. Indeed, as the District Defendants have explained in their own Objection, it should not be entered at all. (*See* ECF Nos. 43, 72; *see also* ECF Nos. 42, 71.)

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III. CONCLUSION

For the foregoing reasons, the District Defendants respectfully request that this Court overrule Plaintiff's Objections to the Magistrate Judge's Findings and Recommendation.

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Respectfully submitted,

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