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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAYMON JOHNSON, *Plaintiff*, v. STEVE WATKIN, et al., *Defendants*.	Case No. 1:23-cv-00848-NODJ-CDB Date: N/A Time: N/A Dept: N/A Judge: NODJ Trial Date: Not Scheduled Action filed: June 1, 2023

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

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 304(d) to the Local Rules, Plaintiff Daymon Johnson respectfully responds to Defendant Christian's objections to the Magistrate Judge's Findings and Recommendations.

I. THE PROPOSED INJUNCTION IS NEITHER VAGUE NOR OVERBROAD.

Christian alleges that the proposed injunction is overbroad in that it restricts "every district policy" that seeks to promote DEIA, as well as government speech promoting DEIA policies. Doc. 71 at 1. Christian also claims that the proposed injunction is vague with respect to "the customs, policies, and criteria in evaluating faculty performance against Plaintiff." *Id*. at 8-9. These objections lack merit.

A. The proposed injunction is not overbroad because it is limited to only the DEIA regulations and their associated Competencies and Criteria.

The proposed injunction is not overbroad. "District courts have broad latitude in fashioning equitable relief when necessary to remedy an established wrong." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010) (quoting *Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004)) (internal quotation marks omitted). The "purpose of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits." *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1023 (9th Cir. 2009) (quoting *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980)) (internal quotation marks omitted). "Status quo ante litem" refers to "the last uncontested status which preceded the pending controversy." *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (quoting *Tanner Motor Livery, Ltd. v. Avis, Inc*., 316 F.2d 804, 809 (9th Cir. 1963)).

Christian laments that, if she is enjoined, then "no matter what non-regulatory guidance the Chancellor drafts, or what policies the Kern Community College District eventually crafts to acknowledge, promote, and accommodate the diversity of all California community college students, they will inevitably violate the First Amendment." Doc. 71 at 2. As an initial matter, although Johnson has sought to enjoin Christian from enforcing the DEIA Regulations and Competencies and Criteria since his First Amended Complaint, *see* Doc., at no time in the past five months has Christian argued that such an injunction would be overbroad. "Absent exceptional circumstances, a district court need not entertain arguments raised for the first time in a request for reconsideration of a magistrate judge's order or recommendation." *Sarkizi v. Graham Packaging Co*., No. 1:13-CV-1435 AWI SKO, 2014 U.S. Dist. LEXIS 159972, at *3 (E.D. Cal. Nov. 13, 2014) (citations omitted)..

In any event, the objection falls short. Christian's complaint is based on a single line in the Recommendations. *See* Doc. 71 at 2 (quoting Doc. 70 at 36)[1] ("the Undersigned finds it likely that at some point Plaintiff will face the consequences if he does not adhere to whatever competencies and criteria are imposed on him *through the DEIA regulations*.") (emphasis added). But this line

[1] The quoted language appears at p. 23 of the Findings and Recommendations.

clearly refers to policies, competencies, and criteria that implement the challenged DEIA regulations. The Complaint, after all, challenges only "the customs, policies, and practices adopted on their bases," Doc. 8 at 40, Prayer for Relief ¶¶ B, D, "their" referring to the challenged regulations. Indeed, this aspect of the injunction is required, as some of the enjoined regulations' functions are the maintenance and utilization of unlawful policies. *See, e.g.,* Cal. Code of Regs. tit. 5, §§ 53601(a), (b); *id.* § 53602(a), (c)(1). Nothing in the Findings and Recommendations suggests that defendants cannot draft or enforce policies regarding diversity that do *not* compel or restrict protected speech like the DEIA regulations do, and indeed, which are unconnected with the challenged provisions.

Preliminary injunctions are regularly issued against the enforcement of specific statutes, without barring the states from otherwise addressing the statutes' purposes. For example, in enjoining an Idaho law banning transgender athletes from public-school funded women's sport, the Ninth Circuit did not wholly deprive the State of "furthering women's equality and promoting fairness in female athletic teams." *Hecox v. Little*, 79 F.4th 1009, 1028 (9th Cir. 2023). And in enjoining enforcement of a law that barred some speech by street performers, the Ninth Circuit did not thereby declare that the State can never "protect[ ] the safety and convenience of persons using a public forum." *Berger v. City of Seattle*, 569 F.3d 1029, 1034 (9th Cir. 2009) (en banc). Indeed, the Magistrate Judge agreed that the State could still pursue its legitimate interests, even if the Constitution forbids enforcement of the challenged regulations. *See* Doc. 70 at 36-37 ("California's goal of promoting diversity, equity, inclusion, and accessibility in public universities does not give it the authority to invalidate protected expressions of speech.").

Finally on this point, Johnson notes that the DEIA regulations were only enacted this past April. It seems unlikely that Defendants would claim that, up until 8 months ago, they *never* promoted or enforced policies regarding diversity, equity, or inclusion on community college campuses. Of course, they have long had laws purportedly addressing such concerns to enforce. *See, e.g.,* Cal. Educ. Code §§ 221.5, 341.1; *see also* Cal. Gov't Code § 11135(a).

B. The proposed injunction as to Sections 51200 and 51201 would not restrict government speech.

Chistian argues that Sections 51200 and 51201, specifically, should not be enjoined because neither section is directly enforced against Johnson, but rather, merely constitutes government speech about the State's ideals and principles. But as the Magistrate Judge noted, "by their plain language, the regulations *require* faculty members like Plaintiff to express a particular message." Doc. 70 at 34. This is more than a reasonable reading. After all, Section 51201 requires that the "California Community Colleges"[2] – of which KCCD and Johnson is a part – "*must* intentionally practice...anti-racism," "act deliberately to create a safe, inclusive, and anti-racist environment," and "develop and implement policies and procedures" that demonstrate a "commit[ment] to fostering an anti-racist environment." Cal. Code of Regs. § 51201(b)-(d). And Section 51200 dictates that those requirements found in Section 51201 be the "guide [for] *the administration of all programs* in the California Community Colleges." Cal. Code of Regs. § 51200 (emphasis added). The DEIA regulations, including Sections 51200 and 51201, are directives meant to be implemented and followed by the districts and faculty.

C. The proposed injunction against Christian applies only to the DEIA Regulations Johnson has challenged.

Christian errs in arguing that the Magistrate Judge's proposed injunction would somehow enjoin the ability to evaluate a professor's ability to "work with a community college campus population." Doc. 71 at 9. First, as Christian has repeatedly argued, neither she nor the Board of Governors evaluate professors. Docs. 42 at 10, 65-1 at 12. Instead, they set the standards that districts must abide by when performing those evaluations. *Id*. So the proposed injunction would not enjoin Christian from evaluating anyone on any basis.

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[2] Christian argues that Section 51201 only "elucidates what the Board believes it must do to further its intent and goals concerning diversity and anti-racism." Doc. 71 at 12. But Section 51201 does not mention the Board of Governors. Instead, it refers to the entirety of the Community College System and, thus, the employees who make up that system. *See* Cal. Code of Regs. § 51201. And Section 51200 acknowledges those are two separate entities – although Christian removes that portion of the statutory text when she cites to it. *See* Cal. Code of Regs. § 51200 ("be the official position of the Board of Governors *and* the California Community Colleges") (emphasis added). The plain language of Section 50201 clearly shows it is not limited in dictating the required actions of the Board of Governors, but rather, the Community College system as a whole.

Second, Christian makes her claim by citing to statutes that haven't been challenged. For example, she complains that, without the DEIA Regulations and competencies, the Board of Governors will somehow be unable to set minimum teaching qualifications (Cal. Educ. Code § 87356) or require that professors have certain degrees or experience (Cal. Code Regs. tit. 5, § 53410). Doc. 71 at 9. She also complains that it will not be able to allow dismissal of a professor for "unsatisfactory performance" (Cal. Educ. Code § 87332(c)) or require that district boards "develop criteria that include a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students" (Cal. Educ. Code § 87360(a)). Doc. 71 at 9.

This argument notably stands in a sharp contrast to the one that Christian has been belaboring before the Court that there is no injury traceable to her because neither she nor the Board handle district employee matters, including "employment practices[.]" Doc. 65-1 at 12. According to Christian now, "*[t]he State* and districts are *entitled to require* professors to 'work with and serve' diverse individuals," and an injunction would harm *both* of their abilities to do that. Doc. 71 at 10. It seems incongruous that Christian would claim that enforcement of the DEIA regulations is not traceable to her but *every other minimum standard* of employment she sets is so traceable that she will be harmed if she is enjoined from enforcing them against Johnson or any other faculty.

To be clear, however, the proposed injunction would not enjoin enforcement of any of the other statutes Christian (other than Section 87732, which is only challenged, as applied, against KCCD's practice of punishing faculty based on their viewpoints). Doc. 70 at 43-44. And she provides no explanation as to why a preliminary injunction specifically enjoining her from enforcing the DEIA regulations and competencies would somehow impact her or the Board of Governors' ability to act under those or any other statute concerning professor criteria or qualifications. *See* Doc. 71 at 9-10. The statutes Christian cites existed prior to the DEIA regulations and competencies, and there is no reason the statutes would not remain enforceable without them. Christian is simply being enjoined from maintaining and enforcing specific criteria that she created to evaluate professors based on their ability to advance her favored ideology.

Defendants can still require that their professors be able to work with a diverse population, but that does not empower Defendants to control what viewpoints those professors express while doing so. Christian's logic—conflating support for the state's official ideology with the ability to work with diverse people—would only empower a form of heckler's veto. In her world, the state's favored ideologues can declare that they are simply unable to coexist with those who disagree with them, and then claim that political disagreement is a form of discrimination that requires the termination of their ideological opposites. Christian's argument thus requires the Court to do something it cannot: to decide this case by accepting the truth of the state's ideology—that the state's DEIA and anti-racism concepts provide the one true path for social harmony, such that those that reject the ideology must be unfit to work within a diverse community. But agreement with the state's ideology is not a barometer of how well one works with others.

D. The proposed injunction provides Christian clear instruction as to what she is prohibited from doing.

Christian's final objection to the scope of the proposed injunction – that it is too vague –also lacks merit. Christian argues that, because her own recommendations are entitled "Diversity, Equity and Inclusion Competencies and Criteria," she cannot possibly discern what the Magistrate Judge means when he recommends the State be enjoined from enforcing the DEIA regulations "*and* the customs, policies, and criteria in evaluating faculty performance against Plaintiff." Doc. 71 at 8-9 (quoting Doc. 70 at 44). Notably, KCCD did not object that the phrasing was vague. *See* Doc. 72.

The recommended injunction is decidedly not vague. "Rule 65(d) requires the language of injunctions to be reasonably clear so that ordinary persons will know precisely what action is proscribed." *United States v. Holtzman*, 762 F.2d 720, 726 (9th Cir. 1985) (internal quotation marks omitted).. "However, injunctions are not set aside under [R]ule 65(d) [] unless they are so vague that they have no reasonably specific meaning." *Hecox*, 79 F.4th at 1037 (quoting *Holtzman*, 720 F.2d at 726).

Christian can easily discern what she would be prohibited from doing. She must not enforce Sections 51200 and 51201, meaning, she cannot demand that anyone "intentionally practice . . . anti-racism." Section 53601(a) directs Christian to "adopt and publish [DEIA] guidance" and further states that this guidance "shall be maintained" to adopt new practices and "scholarship." The

injunction stops her from doing that, and it stops her from enforcing compliance with any such guidance.

Christian also acknowledges that her Competencies and Criteria provide the "starting point" (Doc. 71 at 17) – in other words, the "customs, policies and criteria" - that Districts must impose in order to ensure compliance with the DEIA regulations. Cal. Code Regs. § 53601(b) ("The DEIA competencies and criteria identified by the Chancellor shall be used as a reference for locally developed minimum standards in community college district performance evaluations of employees and faculty tenure reviews."). The districts can then choose to use that starting point to create their own "customs, policies and criteria" that at least meet, if not exceed, the minimum standards Christian imposes. *Id*. Thus, the phrase is not meant to stand on its own, as Christian would want it. Instead, it is clearly meant to be understood as part of the overall injunction against enforcement of the DEIA regulations, which Christian admits are only effectuated through "customs, policies and criteria" set by both her and the districts. *See* Doc. 65-1 at 4-5 ("In April of 2023, the Board adopted additional regulations that direct the State's community college districts to create their own evaluation policies and practices that reflect these ideals and principles regarding diversity, equity, inclusion, and accessibility.").

II. THE RECOMMENDED INJUNCTION IS BASED ON PROPER FACTUAL FINDINGS.

Christian incorrectly claims the proposed preliminary injunction should not be adopted because the Magistrate Judge "misinterpreted the few facts" having to do with the KCCD Defendants' disciplining of Garrett and investigation of Johnson. Doc. 71 at 3. But her objections that the Magistrate Judge should have "interpreted" certain facts in a way that would benefit Defendants should be overruled.

Christian does not argue that the Magistrate Judge failed to examine the evidence—almost none of which was provided by Defendants, and which consisted in large part of Defendants' documents—but only that his conclusions about the evidence were wrong. She claims the Court gave "undue weight" to certain facts – such as that the phrase "Cultural Marxism" is "inflammatory

right-wing rhetoric"[3] – but not others. Doc. 71 at 4. She complains that the Magistrate Judge should have concluded, based on the facts he was presented, that there was "ample justification" for Garrett's termination and Johnson's investigation. *Id*.

This argument fails. Whatever Garrett may have done to deserve discipline, the KCCD Defendants chose, of their own volition, to write repeatedly and at some length about his constitutionally protected political expression while justifying their termination of his employment. And there is no reason to doubt the veracity of Professor Johnson's unrebutted declaration explaining his views, and setting out what he wants to say and cannot, and what he cannot say despite the pressure to do so. And against this backdrop of a community college district that punishes faculty for their views, the DEIA regulations and Christian's role in their implementation are especially alarming. As the Magistrate Judge explained, "the plain language of the DEIA regulations impose minimum qualifications on all employees, dictates what faculty must teach, how they should teach, and how they will be evaluated." Doc. 70 at 22. Those DEIA regulations are "implement[ed]" by the State, and made "binding on districts." *Id*. at 23, 25. In other words, the Magistrate Judge has recommended Christian be enjoined because she maintains, and binds districts to comply with, the DEIA Regulations and Competencies, and there is every reason to believe that these would be fully applied against Professor Johnson.

III. THE MAGISTRATE JUDGE CORRECTLY FOUND THAT THE DEIA REGULATIONS CONTROL WHAT FACULTY MUST TEACH.

Christian argues she should not be enjoined from enforcing 53602(a-b) and 53605(a) because these regulations only dictate "*how* [faculty] should teach" but not "*what* faculty must teach," Doc. 71 at 11 (emphasis added), as though pedagogy cannot itself be imbued with ideology.

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[3] Christian's labeling of the term "Cultural Marxism" as "inflammatory right-wing rhetoric" demonstrates why Johnson had to bring this lawsuit, confirming that the State will label disfavored political terms "harmful" to justify silencing opposing viewpoints. Doc. 71 at 4 n.2. In doing so, Christian relies upon the opinion of a left-wing advocacy group, the Southern Poverty Law Center, which has recently paid millions and apologized to settle a defamation claim. *See* Marc A. Thiessen, *The Southern Poverty Law Center has lost all credibility*, Washington Post, June 22, 2018, https://bit.ly/48aO7hh: *see also King v. S. Poverty Law Ctr., Inc*., No. 2:22-cv-207-WKW, 2023 U.S. Dist. LEXIS 70769 (M.D. Ala. Apr. 24, 2023) (denying SPLC motion to dismiss defamation claim). "Cultural Marxism" is an accepted, if critical term describing a political worldview. *See, e.g.,* Ted Cruz, *Unwoke: How to Defeat Cultural Marxism in America* (2023).

But while Christian may argue that the regulations do not "prescribe what a faculty member can or cannot say in the classroom," the Magistrate Judge correctly discerned that the DEIA regulations dictate that teaching hew to the state's favored ideology.

As the Magistrate Judge noted, the DEIA regulations dictate that faculty "*shall employ* teaching, learning, and professional practices *that reflect DEIA and anti-racist principles*" or "*shall promote* and incorporate culturally affirming *DEIA and anti-racist principles*" in their learning environments. Doc. 70 at 34 (emphasis added). A reading of this plain language readily supports a finding that Johnson must speak in a way that endorses certain ideologies. The Court afforded Christian the opportunity to argue against this conclusion not only in her briefing but also at the motion hearing. Instead, as the Findings and Recommendations reflect, "[d]uring oral argument, when asked by the Court whether Plaintiff's teaching of cultural Marxism to his students could reflect DEIA proficiency, counsel for Christian responded, 'I don't know. It would depend upon how he's doing that.'" Doc. 70 at 35 n.6 (quoting Doc. 57 at 15). Thus, far from arguing that the DEIA regulations do not regulate speech, Christian has acknowledged that *what* the State will allow Johnson to teach is directly related to *how* he teaches. For example, it seems clear, from both Christian's counsel's comments and her Objections, that Johnson is only permitted to speak about "Cultural Marxism" (the "what"), which Christian thinks is "inflammatory right-wing rhetoric," Doc. 71 at 4, if he does so in a critical manner (the "how")..

To be sure, Christian may still argue that this would not violate the First Amendment. After all, she goes on to claim that it is "wholly appropriate" for the State to make the ability to "facilitate "*equitable* student outcomes and course completion" . . . a key component of a faculty member's fitness to teach." Doc. 71 at 11 (quoting Cal. Code Regs. tit. 5, § 53605(a)) (emphasis added). In other words, she believes the State can require faculty to teach students, and reward their course completion, based on their "particular gender, race, socioeconomic, or disability status." *Id.*; *see also Diversity, Equity and Inclusion Glossary of Terms,* California Community Colleges Chancellor's Office, https://perma.cc/T22V-V866 at 5 (last visited Dec. 3, 2023) ("Equity-Minded: . . . Rather than attribute inequities in outcomes to student deficits, being equity-minded involves interpreting inequitable outcomes as a signal that practices are not working as intended."). But

"[e]quity-mindedness" is a viewpoint, which even the State appears to understand given that it distinguishes the concept from an "equality-minded" approach. *See id.* ("Equity accounts for systematic inequalities, meaning the distribution of resources provides more for those who need it most. Conversely equality indicates uniformity where everything is evenly distributed among people."). And Christian cannot force Johnson to adopt a viewpoint that he "fundamentally disagrees with." Doc. 26-2 ¶ 75.

IV. THE COURT SHOULD ENJOIN ENFORCEMENT OF THE DEIA COMPETENCIES THAT "DEFINE" CRITERIA REQUIRED OF FACULTY.

Christian objects to being enjoined from enforcing the DEIA Competencies and Criteria by repeating prior arguments that they are merely recommendations that cannot be enforced. *Compare* Doc. 71 at 12-13 *with* Docs. 42 at 8, 65-1 at 10. The Findings and Recommendations provide a number of reasons demonstrating the falsity of Christian's claims. As the Magistrate Judge noted, 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*." Doc. 70 at 34 (emphasis added). The Chancellor's Competencies and Criteria do not just make suggestions that districts can choose to consider or ignore. "The DEIA competencies and criteria identified by the Chancellor shall be used as a reference for locally developed minimum standards in community college district performance evaluations of employees and faculty tenure reviews." Cal. Code of Regs, tit. 5 § 53601(b). They ""are meant to *define* the skills, knowledge, and behaviors that all California Community College (CCC) employees *must demonstrate* to work, teach, and lead in a diverse environment that celebrates and is inclusive of diversity."" Doc. 70 at 12 (quoting Doc. 8-2 at 3).

Christian even agrees with the Magistrate Judge that the Competencies and Criteria are the "starting point" for each district when evaluating faculty. Doc. 71 at 12 (quoting Doc. 70 at 12). But Christian complains – as she did previously – that a Board of Governor's Standing Order dictates that, even though she has *created* a standard, she has no way to *enforce* that standard. *Id*. at 13. The Standing Order she cites states "The Board may, by resolution, adopt regulations that are binding on California community college districts . . . to make specific the laws enforced or administered by

the Board. Neither the Board nor the Chancellor may administer or enforce any regulation . . . unless that regulation is adopted in accordance with the provisions of this Chapter." *Id.*

The Magistrate Judge correctly rejected this argument. As the Standing Order indicates, the Board's adopted regulations are "binding" on districts and can be "administer[ed] and enforce[d]" by the Chancellor. *Id*. Cal. Code of Regs. tit. 5, § 53601, an adopted regulation, dictates "[t]he Chancellor *shall* adopt and publish guidance describing DEIA Competencies and Criteria[,]" which "*shall* be used as a reference" by districts in evaluating faculty. In addition, districts must include "proposed or active implementation goals to integrate DEIA principles" – including the principles applied when evaluating faculty - in the EEO plans they submit to Christian, who then has authority to alter those plans to ensure compliance with her DEIA standards. Cal. Code Regs. tit. 5, §§ 53024.2, 53602(c)(7).

Thus, the Standing does not advance Christian's argument. Christian maintains her Competencies and Criteria pursuant to "adopt[ed] regulations" as minimum standards, and she is able to enforce them. To be sure, regardless of what the Standing Order says, the regulation dictates that districts must follow minimum DEIA guidelines set by the Chancellor when evaluating faculty. KCCD Defendants have asserted the same. Doc. 43 at 16. Those guidelines are set forth in the Competencies and Criteria. Christian does not dispute this, and, as a result, it is enough to trace Johnson's injury to her. In any event, Christian's argument that the Standing Order should be read to ban her from enforcing the minimum guidelines that she is required ordered to maintain is illogical..

V. THIS COURT SHOULD ADOPT THE MAGISTRATE JUDGE'S RECOMMENDATION THAT CHRISTIAN'S MOTION TO DISMISS BE DENIED.

Christian objects to the Magistrate Judge's recommendation that her motion to dismiss be denied for the same reasons she objects to the recommendation that she be preliminarily enjoined. Doc. 71 at 13. There is no need to repeat this reply. Christian's objections are no more persuasive with respect to the motion to dismiss, which should be denied.

CONCLUSION

This Court should overrule Christian's Objections and adopt the Magistrate Judge's Findings and Recommendations, except as objected to by Johnson.

Dated: December 12, 2023

Respectfully submitted.

By: /s/ Alan Gura

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2023, I electronically filed the foregoing with the Clerk using the Court's CM/ECF system, and that all participants in this case are registered CM/ECF users who have thereby been electronically served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 12, 2023.

/s/ Alan Gura
Alan Gura