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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 KCCD DEFENDANTS' OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS RE: MOTION TO DISMISS

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 304(d) to the Local Rules, Plaintiff Daymon Johnson respectfully responds to the KCCD Defendants' objections to the Magistrate Judge's Findings and Recommendations that that their Motion to Dismiss be denied.

I. THE MAGISTRATE JUDGE CORRECTLY FOUND JOHNSON HAS STANDING TO SUE DEFENDANTS

Defendants object to the Magistrate Judge's finding that Johnson has standing to bring suit. They do so by incorporating by reference, and briefly summarizing, the arguments made on this point in their concurrently filed Objections to the Magistrate Judge's Recommendation on Johnson's Motion for Preliminary Injunction ("MPI Objections")—and tellingly, in their Motion to Dismiss. Doc. 73 at 7.

The latter reference is not appropriate. As Johnson relates in his response to Defendants' Objections with respect to the preliminary injunction motion, Doc. 79 at 1-2, 9-10, objections to a

Magistrate Judge's findings and recommendations are not intended to rehash everything that objector has already argued without success. Nor is there a need for Johnson to address for a third time—and for the second time in response to some of the same objections—the question of standing. The Magistrate Judge correctly determined that Johnson has standing to sue the KCCD Defendants. *See* Doc. 79 at 5-7.

II. THE MAGISTRATE JUDGE CORRECTLY DETERMINED THAT DEFENDANTS ARE NOT MUNICIPAL ACTORS.

Defendants object to the Magistrate Judge's Recommendation that *Monell* is inapplicable "for the reasons stated in [Defendants'] briefing on the Motion for Preliminary Injunction and the Motion to Dismiss," and then provide "an abbreviate discussion" of these arguments. Doc. 73 at 9. Again, this is not the proper role of an objection. And those reasons are not any more valid now than they were previously.

Defendants persist in arguing that *Monell v. Dep't of Soc. Servs. Of City of New York*, 436 U.S. 658 (1978), applies to Johnson's challenges to the DEIA Regulations, and that it does so in some fashion that exempts them from being enjoined. Finally understanding that *Monell* concerns *municipal* entities, and that community college districts are *state* entities, Defendants claim that the Kern Community College District is somehow not a state entity for purposes of this lawsuit, and that they are therefore entitled to *Monell*'s (nonexistent) benefits. Defendants labor under the misimpression that under *Monell,* they can only be enjoined from enforcing the rules of their "municipality," and not the rules of the state.

Respectfully, that is not how *Monell* operates.

Unlike municipalities, state entities are not "persons" within the meaning of Section 1983, and they are immune from lawsuit in federal court under the Eleventh Amendment. Community college districts are *state entities*. "[T]he Ninth Circuit has held that community college districts in California are state entities that possess Eleventh Amendment immunity from 1983 claims[.]" *Berry v. Yosemite Cmty. Coll. Dist.*, No. 1:18-cv-00172-LJO-SAB, 2018 U.S. Dist. LEXIS 64732, at *7 (E.D. Cal. Apr. 17, 2018) (citing *Mitchell v. Los Angeles Cmty. Coll. Dist*., 861 F.2d 198, 201 (9th Cir. 1988)); *see also First Interstate Bank v. State of California*, 197 Cal. App.3d 627, 633 (1987)) (California community college districts "are considered agencies of the state for the local operation

of the state school system."). The Magistrate Judge's finding that KCCD is a state entity, and that Defendants are therefore state actors, Doc. 70 at 27, is unassailable. Defendants, as district board members, are *always* state officials. *Id*. They do not work for any municipality.

As state officials, Defendants are liable for a suit seeking prospective relief under Section 1983 under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908).

Defendants appear to concede they may be "'State' defendants," but insist that, nevertheless, their actions should still be analyzed under *Monell* standards. Doc. 73 at 11. The Supreme Court would disagree. The Court has been very clear that it "limited [its] holding in *Monell* 'to local government units *which are not considered part of the State* for Eleventh Amendment purposes.'" *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989) (emphasis added). This suit is against state actors – not a local government unit – who are sued for prospective relief in their official capacities as "part of the State." *See id*. at 71 (holding that a suit against a state official in his or her official capacity is a suit against the official's state office); *see also Tingirides v. Cal. Dep't of Corr. & Rehab*., No. 5:18-cv-02098-JFW (MAA), 2020 U.S. Dist. LEXIS 160351, at *28-29 (C.D. Cal. May 5, 2020) ("a state official can be sued in his or her official capacity for prospective declaratory or injunctive relief to challenge policies that violate the constitution —albeit not via *Monell*.").

Liability is thus assessed under *Ex parte Young*, which requires that the defendant (1) be a state official; (2) with "some connection" to enforcement of a law that is causing an ongoing injury; and (3) capable of redressing the alleged injury. *L.A. Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992). Since Defendants satisfy those requirements in regard to the DEIA Regulations and the Chancellor's Competencies and Criteria, they may be enjoined from enforcing those provisions.

As Johnson previously explained, if a state actor could escape liability for enforcing unconstitutional state law by simply alleging that they are "complying" with that law, there would be no *Ex Parte Young* exception and no ability for plaintiffs to escape a state's unconstitutional overreach. *See* Doc. 56 at 24 ("Allowing state actors to escape liability by claiming that they have a 'compelling state interest' in implementing a state law that violates federal law would make the Supremacy Clause hollow indeed") (quoting *Bessard v. Cal. Cmty. Coll*., 867 F. Supp. 1454, 1464 (E.D. Cal. 1994)); *see also Eu*, 979 F.2d at 704 (omitted citations) ("The rule of *Ex Parte Young*

'gives life to the Supremacy Clause' by providing a pathway to relief from continuing violations of federal law by a state or its officers.")

Defendants make no attempt to explain this obvious error in their reasoning. Instead, they move on to the Magistrate Judge's analysis of the *Sandoval* case, complaining that the Magistrate Judge failed to recognize that "*Sandoval* stands for the proposition that relying on mandatory state regulations cannot give rise to *Monell* liability." Doc. 73 at 12. They do not cite from the case in support of that assertion, however. Instead, Defendants suggest that the Ninth Circuit "appears to take this as a given," even though it never actually "ha[d] to determine whether *Monell* liability was precluded" in that case. Doc. 73 at 12.

As the Magistrate Judge explained, and Defendants never dispute, "the [Ninth Circuit] expressly declined to make a holding of the nature suggested by District Defendants" in *Sandoval*. Doc. 70 at 42 (quoting *Sandoval v. Cty. of Sonoma*, 912 F.3d 509, 518 (9th Cir. 2018)) ("We thus need not decide whether [the municipalities'] policies … could have given rise to liability under *Monell* even if the statute had authorized the impoundment"). And *Sandoval* does not negate the "binding authority [that] refutes the notion that a subordinate agency's mere implementation of state law excuses its engagement in unconstitutional behavior." *Id*. (citing *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010)). Most significantly, however, *Sandoval* is inapplicable because it is a *Monell* case that concerns a municipality. Defendants are state officials, not a municipal entity. *Sandoval* is irrelevant.

Another major flaw in Defendants' logic is that even if they *were* municipal actors, they would still be liable under *Monell* for enforcing state laws such as the DEIA Regulations, because they are required to exercise discretion in doing so. *Evers v. Cnty. of Custer*, 745 F.2d 1196, 1203 (9th Cir. 1984).

Finally, Defendants take issue with the Magistrate Judge finding that the DEIA Regulations are both "mandatory" and that Defendants can "exercise some discretion in implementing them." Doc. 73 at 13 (citing Doc. 70 at 41). According to Defendants, the "dispositive flaw" in this position is that "the record contains no evidence of how the District Defendants have interpreted the

regulations."[1] *Id*. This argument is nonsensical. Whether Defendants have yet to form or apply their own interpretation of what the DEIA Regulations require has no bearing on the fact that, as state actors, they now must apply the State's DEIA Regulations to their future tenure reviews. And there is nothing incredible about the fact that Defendants have not yet interpreted and enforced the DEIA Regulations specifically against Johnson, who is currently self-censoring so as not to violate them, and who is not up for review for another three years.

This is not to say, however, that the record does not indicate how Defendants would interpret the DEIA regulations going forward. The record shows Defendants already evaluate, and discipline, their professors for failing to fall in line with their preferred ideologies. Docs. 8-7, 8-8. The record also shows that Johnson has been warned that the DEIA regulations are the ultimate "direction on diversity, equity, and inclusion" in the Bakersfield College "community." Doc. 70 at 8 (Docs. 26-2 at ¶¶ 6-9; 26-6). Thus, there is plenty in the record for the Magistrate Judge to have based his conclusion that "District Defendants are required to evaluate Plaintiff based on DEIA requirements and exercise discretion in employment decisions." Doc. 70 at 41.

CONCLUSION

This Court should overrule Defendants' 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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[1] Defendants also appear to suggest that, because of this "dispositive flaw," the Court must conclude they are compelled to follow mandatory law and "cannot be held liable . . . under 42 U.S.C. § 1983" pursuant to case law on municipal liability. Doc. 73 at 13. To reiterate, Defendants are not a municipality.

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