



April 22, 2022

Regulations Coordinator  
California Community Colleges  
Chancellor's Office  
1102 Q Street, Suite 4550  
Sacramento, CA 95811-6549

Re: Opposition to proposed rulemaking regarding evaluation and tenure review regulations

Dear Chancellor Oakley:

Pacific Legal Foundation (PLF) opposes the proposed regulation that would amend Title 5 of the California Code of Regulations to include diversity, equity, inclusion, and accessibility (DEIA) standards in the evaluation and tenure review of community college employees.<sup>1</sup>

PLF is a non-profit public interest law firm that advocates for the freedom of speech and equality under the law. PLF opposes the growing trend among universities and colleges to require adherence to ideological tenets such as anti-racism as a condition in the hiring, retention, and promotion of faculty. Such demands share an unsettling resemblance to the unconstitutional loyalty oaths required by California universities in the 1950s.

The proposed regulation will entrench a political orthodoxy, reduce intellectual diversity on college campuses, threaten First Amendment freedoms, and impair the education of students who deserve exposure to a rich and robust range of viewpoints on the critical issues facing our country. In the words of the Supreme Court in striking down a law compelling a classroom flag salute: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."<sup>2</sup> The proposed regulation would prescribe just such an orthodoxy.

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<sup>1</sup> See California Community Colleges, Proposed Regulatory Action Amending Title 5, of the California Code of Regulations, to Include Diversity, Equity, Inclusion, and Accessibility Standards in the Evaluation and Tenure Review of District Employees.

<sup>2</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

## I. The Proposed Regulation Promotes Ideological Uniformity, not Genuine Diversity

The proposed regulation will result in greater political and ideological uniformity among community college employees. The proposed regulation is not neutral with respect to viewpoint—it will give strong preference to faculty who agree with and actively promote a specific political and philosophical vision regarding some of the most controversial topics of our day. The regulation will likewise disfavor those employees and job applicants with an alternative viewpoint.

The regulation would require that all faculty “employ teaching and learning practices and curriculum that reflect DEIA and anti-racist principles.”<sup>3</sup> It further requires that administrators incorporate “significant consideration of DEIA and anti-racist principles into existing policies and practices.”<sup>4</sup> And all employees must “promote and incorporate culturally affirming DEIA and anti-racist principles” in performing their job duties.<sup>5</sup> The proposed regulation would define “anti-racism” and “anti-racist” as “policies and actions that lead to racial equity.”<sup>6</sup>

Anti-racism and DEIA are not viewpoint-neutral or non-controversial concepts. The terms represent a distinctly partisan vision of equality. For example, a core notion behind anti-racist thought is that “[t]he only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination.”<sup>7</sup> The anti-racist paradigm takes controversial and openly partisan stances on issues like race-based student admissions and hiring, testing with disparate impacts on minorities, and other hotly debated policy issues of our time. As one article on diversity published by the Association of American Colleges & Universities puts it, “equity-mindedness” requires “race-consciousness” and the embrace of explicit affirmative action programs.<sup>8</sup> Another article explains, “[e]quity-minded individuals are . . . color-conscious” as well as “[w]illing to assume responsibility for the elimination of inequality.”<sup>9</sup> Anti-racism also extends to broader partisan critiques of major societal institutions, whether it be the belief that capitalism is the “conjoined twin” of racism, or that the nation’s founding is marred by racist motives. Anti-racism calls for a wholesale transformation of our

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<sup>3</sup> Proposed Regulatory Action, § 53605(a).

<sup>4</sup> *Id.* § 53605(b).

<sup>5</sup> *Id.* § 53605(c).

<sup>6</sup> *Id.* § 52510(d).

<sup>7</sup> Ibram X. Kendi, *How To Be an Antiracist* 22 (2019).

<sup>8</sup> See Lindsey Malcom-Piqueux, *Taking Equity-Minded Action to Close Equity Gaps*, PEER REV. (Spring 2017).

<sup>9</sup> Estela Mara Bensimon, Alicia C. Dowd & Keith Witham, *Five Principles for Enacting Equity by Design*, 19 DIVERSITY & DEMOCRACY (Winter 2016), five-principles-for-enacting-equity-by-design-1-4.pdf (stephens.edu).

nation's institutions. Requiring staff to conform to such views as a condition of employment "amounts to an ideological litmus test."<sup>10</sup>

By requiring commitment to anti-racism, the proposed regulation shuts its doors to staff holding alternative viewpoints on a variety of important issues. The proposed regulation would, for instance, disfavor the hiring of a sociologist who has published research promoting mismatch theory (a theory that race-based admissions harms minority students), or a history professor who has criticized the historical accuracy of the 1619 Project. It would also disfavor the hiring of a professor who has argued in favor of Chief Justice Roberts' view that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>11</sup>

The proposed regulation's express preference for this partisan worldview in the hiring and retention of faculty will reduce intellectual diversity on campus while doing little to nothing in creating a diverse environment. Consider, for example, how the proposed regulation would disfavor the hiring of black scholars like John McWhorter, Glenn Loury, or Thomas Sowell, who have openly criticized anti-racism, while favoring the hiring of white professors who align more closely with anti-racist ideals, such as Professor Jonathan Metzl, author of "Dying of Whiteness." Indeed, it is telling that in defining "diversity" the regulation never mentions intellectual, academic, or political diversity, instead focusing on physical, psychological, and class-based characteristics.<sup>12</sup> The proposed regulation merely promotes viewpoint homogeneity.

This is an unfortunate irony, because the justification for cultivating diversity in the educational setting is to form a rich intellectual environment with a wide range of viewpoints. As the Supreme Court has noted, post-secondary schools' interest in diversity is only legitimate to the extent that it promotes viewpoint diversity, such as by helping "nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students."<sup>13</sup> Diversity should serve the end of nurturing a robust exchange of ideas, but the proposed regulation threatens to enervate that exchange.

This deficiency in intellectual diversity will not be limited to viewpoints on racial equity. Support for anti-racist principles is highly correlated with membership in the Democratic Party.<sup>14</sup> Thus, the proposed regulation will result in greater

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<sup>10</sup> John D. Sailer, *America's Largest System of Higher Education Proposes Political Litmus Tests*, National Association of Scholars (March 21, 2022), <https://www.nas.org/blogs/article/americas-largest-system-of-higher-education-proposes-political-litmus-tests>.

<sup>11</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (Roberts, J., plurality opinion).

<sup>12</sup> Proposed Regulatory Action, § 52510(j).

<sup>13</sup> *Grutter v. Bollinger*, 539 U.S. 306, 319–20 (2003).

<sup>14</sup> See Pew Research Center, *Beyond Red vs. Blue: The Political Typology* (Nov. 9, 2021), <https://www.pewresearch.org/politics/2021/11/09/beyond-red-vs-blue-the-political-typology-2/>.

partisan homogeneity among college staff that spans the full range of political and cultural controversies.

Research indicates that intellectual homogeneity undermines academic rigor and the search for truth. Peer reviewers tend to go easier on scholars that they agree with, and researchers tend to focus on research questions and methods that support their viewpoint, while neglecting questions that may challenge a prevailing orthodoxy.<sup>15</sup> The proposed regulation thus undermines a fundamental purpose of post-secondary institutions.

## **II. The Proposed Regulation Endangers Academic Freedom and Free Speech**

The proposed regulation will constrict teachers' rights to express themselves freely in the classroom. The regulation therefore likely violates the First Amendment's guarantees of academic freedom and freedom of speech.

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."<sup>16</sup> Academic freedom is a "special concern of the First Amendment" as a "transcendent value to all of us and not merely to the teachers concerned."<sup>17</sup>

The proposed regulation will impair academic freedom by requiring teachers to adhere to the college's preferred viewpoint on controversial issues in their classrooms because the regulation will require them to "employ teaching and learning practices and curriculum that reflect DEIA and anti-racist principles" and otherwise incorporate anti-racist principles in all job duties.<sup>18</sup>

Although the government has some control over its employees' speech while on the job, that control does not extend to "speech related to scholarship or teaching."<sup>19</sup> Such teaching is fully protected by the First Amendment, and when it touches on matters of public concern the government cannot dictate the viewpoint taught. Otherwise, government schools could cast "a pall of orthodoxy over the classroom" by demanding that their teachers parrot only the government's preferred narrative.<sup>20</sup>

That is precisely what the proposed regulation would do here. By requiring teachers to incorporate anti-racism and DEIA principles into their teaching, the proposed regulation would warp the content and viewpoints discussed and espoused in classroom discussion and in faculty debates about how best to run the college

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<sup>15</sup> See Greg Lukianoff & Jonathan Haidt, *Coddling of the American Mind* 109, 111 (2018).

<sup>16</sup> *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

<sup>17</sup> *Keyishian v. Board of Regents of University of State of N.Y.*, 385 U.S. 589, 603 (1967).

<sup>18</sup> Proposed Regulatory Action, § 53605(a).

<sup>19</sup> *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014).

<sup>20</sup> *Keyishian*, 385 U.S. at 603.

system. In the classroom, a political science teacher may hesitate to argue that hate speech should be protected by the First Amendment or to explain the origin of controversial terms like “wetback” or “cracker.”<sup>21</sup> A foreign language teacher may hesitate to teach words that trigger racial sensitivities among students.<sup>22</sup> Regarding college policies, teachers may hesitate to express their viewpoints, for instance, on transgenderism in athletics or whether minority students should be graded more favorably than their peers.<sup>23</sup> The “pall of orthodoxy” that would descend on the community college system will raise serious First Amendment concerns.

This chilling effect is magnified by the vague language undergirding the proposed regulation.<sup>24</sup> Teachers must incorporate “DEIA and anti-racist principles” into their teaching and other job duties, yet those key terms lack a coherent meaning. The proposed regulation defines “anti-racism” and “anti-racist” as “policies and actions that lead to racial equity.” This definition does not dispel uncertainty. Does racial equity require an end to all disparities among races, even if that means treating individuals differently based on race? Or does it mean that an individual’s race should be immaterial to hiring, admissions, government contracting, medical care, and so on? Without a clear definition, the meaning of this basic term will turn on the political preferences of college administrators.

Likewise, “DEIA” lacks coherency. While “diversity” and “accessibility” are defined, “equity” and “inclusion” are not, nor is there clarity of meaning when all these terms are combined into a single concept, much less what “principles” should be derived therefrom. College staff who must comply with this proposed regulation are likely to self-censor to avoid crossing the blurry lines drawn by the proposed regulation. “If teachers must fear retaliation for every utterance, they will fear teaching.”<sup>25</sup> The outcome will be disastrous for free inquiry and freedom of thought. As the Supreme Court presciently warned more than 60 years ago, “Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students

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<sup>21</sup> See Mark Pratt, *Brandeis Professor Under Fire for Description of Racial Epithet*, Associated Press (Jan. 24, 2008), [http://archive.boston.com/news/education/higher/articles/2008/01/24/brandeis\\_professor\\_under\\_fire\\_f\\_or\\_description\\_of\\_racial\\_epithet/](http://archive.boston.com/news/education/higher/articles/2008/01/24/brandeis_professor_under_fire_f_or_description_of_racial_epithet/).

<sup>22</sup> See, e.g., Colleen Flaherty, *Failure to Communicate: Professor suspended for using a Chinese word that sounds like a racial slur in English*, Inside Higher Ed (Sept. 8, 2020), <https://www.insidehighered.com/news/2020/09/08/professor-suspended-saying-chinese-word-sounds-english-slur>.

<sup>23</sup> See Christian Schneider, *Professor who was suspended after refusing to grade black students more leniently sues UCLA*, The College Fix (Sept. 29, 2021), <https://www.thecollegefix.com/professor-who-was-suspended-after-refusing-to-grade-black-students-more-leniently-sues-ucla/>.

<sup>24</sup> See *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997) (“The vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect on free speech.”).

<sup>25</sup> *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993).

must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”<sup>26</sup>

### III. The Proposed Regulation Impairs Students’ Education

The proposed regulation purports to help students because “all students benefit from diverse faculty, staff, curriculum, and learning environments.”<sup>27</sup> But as already discussed, the proposed regulation does not in fact promote diversity, instead reducing the diversity most essential in the college environment: viewpoint diversity. Likewise, the claim that the proposed regulation will “support student success and retention by creating inclusive, anti-racist institutions, pedagogy, and curriculum” is a false promise.<sup>28</sup> Ideological homogeneity will harm students and leave them ill-prepared for life after graduation.

Students deserve an education that challenges them. The political and intellectual homogeneity that the proposed regulation will ensconce does not serve their interests—it only leaves them intellectually unarmed to grapple with the complexity, nuance, and soul-searching offered by a true marketplace of ideas. As the Supreme Court has put it, “The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.”<sup>29</sup>

Many of our nation’s minority leaders understand this truth. Consider, for example, the wisdom of Ruth Simmons, the first black president of an Ivy League university: “One’s voice grows stronger in encounters with opposing views. . . . The collision of views and ideologies is in the DNA of the academic enterprise. No collision avoidance technology is needed here.”<sup>30</sup>

Van Jones, Barack Obama’s green jobs advisor, likewise emphasized that true safety does not lie in avoiding ideas: “I don’t want you to be safe *ideologically*. I don’t want you to be safe *emotionally*. I want you to be *strong*. That’s different. I’m not going to pave the jungle for you. Put on some boots, and learn how to deal with adversity. I’m not going to take all the weights out of the gym; that’s the whole point of the gym. This is the gym.”<sup>31</sup>

The proposed regulation’s drive toward intellectual uniformity will harm students by exposing them only to a narrowly curated range of viewpoints in class. Not only is this a disservice to students who do not share in their college’s

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<sup>26</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 250(1957) (plurality opinion).

<sup>27</sup> California Community Colleges, Notice of Proposed Rulemaking 3 (March 11, 2022).

<sup>28</sup> Notice of Proposed Rulemaking at 3.

<sup>29</sup> *Keyishian*, 385 U.S. at 603 (tidied).

<sup>30</sup> R.J. Simmons, Commencement Address, Smith College (May 8, 2014), <https://www.smith.edu/about-smith/smith-history/commencement-speakers/2014>.

<sup>31</sup> University of Chicago Institute of Politics, CLIP: Van Jones on safe spaces on college campuses, YouTube (Feb. 2017), *available at* <https://www.youtube.com/watch?v=Zms3EqGbFOk>.

orthodoxy, but it also injures the students who embrace the orthodoxy but lack the intellectual strengthening that comes with regular exposure to a robust marketplace of ideas.

Four hundred years ago, John Milton, in his famous defense of free speech, warned against “cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary but slinks out of the race.”<sup>32</sup> California’s community colleges should not cloister their students from the intellectual adversaries that challenge and even discomfort them. The proposed regulation, in Van Jones’s analogy, removes the weights from the gym of post-secondary schooling, thus leaving students’ intellectual development “unexercised and unbreathed.”

### **Conclusion**

PLF urges California Community Colleges to reject the proposed regulation. By enshrining a political orthodoxy in California’s community colleges, the regulation will endanger the academic freedom of college faculty, dampen the rigor of free inquiry, and do a disservice to students who need a diverse and robust marketplace of ideas as they pursue their education.

Sincerely,



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<sup>32</sup> John Milton, *Areopagitica: A Speech for the Liberty of Unlicenc’d Printing to the Parliament of England* (1644).