

Court Issues Nationwide Preliminary Injunction Preventing Enforcement of “Divisive Concepts” Executive Order Against Institutions of Higher Education

On Dec. 22, 2020, the U.S. District Court for the Northern District of California partially granted a petition for preliminary injunctive relief barring the enforcement of Executive Order 13950, Combatting Race and Sex Stereotyping, (EO or Order) against federal contractors and grantees. The lawsuit, *Santa Cruz Lesbian & Gay Community Center, et al. v. Donald J. Trump*, Case no. 5:20-cv-07741 (N.D. Ca. Dec. 22, 2020), seeks to permanently enjoin enforcement of the entire Order as unconstitutional on two grounds:

1. The Order violates the first amendment by unlawfully chilling Plaintiffs’ exercise of constitutionally protected speech based on the content and viewpoint of the speech and
2. The Order is unconstitutionally vague because it does not provide adequate notice of the conduct it purports to prohibit.

The Order prohibits federal contractors from promoting “divisive concepts” in workplace trainings, and further conditions the receipt of certain federal grant funding on a guarantee that such funds will not be used to promote “divisive concepts.” The following are identified as “divisive concepts” in the Order:

- (1). one race or sex is inherently superior to another race or sex;
- (2). the United States is fundamentally racist or sexist;
- (3). an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- (4). an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
- (5). members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
- (6). an individual’s moral character is necessarily determined by his or her race or sex;
- (7). an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
- (8). any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or
- (9). meritocracy or traits such as a hard work ethic are racist or sexist or were created by a particular race to oppress another race.

The term “divisive concepts” also includes any other form of race or sex stereotyping¹ or any other form of race or sex scapegoating.²

1 “Race or sex stereotyping” is defined as ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex.

2 “Race or sex scapegoating” is defined as assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex.

Plaintiffs are nonprofit organizations, community centers, physicians and consultants whose work focuses on eliminating health disparities experienced by underserved communities. In furtherance of that mission, Plaintiffs provide training to health care providers, local government and law enforcement agencies, and businesses about implicit bias, systemic racism and intersectionality, privilege and anti-LGBT bias. Plaintiffs filed suit alleging that the Order's restrictions would unlawfully impede their ability to provide this training, which is central to their institutional missions.

Petition for Preliminary Injunctive Relief

Shortly after filing suit, Plaintiffs moved for preliminary injunctive relief pending the litigation of their claims. In considering the petition for preliminary injunctive relief, the Court first determined the justiciability of Plaintiffs' claims, then it considered the arguments of *amicus curiae*, and finally it rendered a decision on the merits of each claim.

Justiciability

The Court determined that Plaintiffs had standing to challenge the Order's application to federal contractors and federal grantees. Through the government's creation of a telephone hotline, complaint email address, published guidance, and published information request, it demonstrated an intention to enforce the Order's terms. Plaintiffs' declarations made clear that their respective missions required them to engage in training that could include "divisive concepts" subject to the restrictions of the Order. Thus, the Court concluded that enjoining enforcement of the Order against contractors and grantees would redress the threat to speech posed by its terms, and Plaintiffs' claim for injunctive relief was justiciable on those grounds.

Arguments Advanced by Amicus Curiae

The Court received briefing from three sets of *amicus curiae*: higher education institutions, cities and counties, and the New Teacher Center. The higher education institutions argued that the Order jeopardized their ability to conduct critical federally funded research by asking universities to refrain from engaging in protected speech or risk debarment, loss of grant funding or some other unspecified sanction. The cities and counties argued that they did not know whether the Order prevented them from conducting training essential to their efforts to promote racial and gender justice. They further argued that the Order could create new and onerous demands for governmental services if nonprofit organizations that serve marginalized communities are stripped of their federal funding. The New Teacher Center, a nonprofit that provides teacher training to promote equal educational opportunities, argued that Order would discourage school districts from utilizing its services which focus on issues of bias and historical privilege.

Decision to Grant Relief

In deciding whether Plaintiffs were entitled to injunctive relief, the Court considered (1) the likelihood of success on the merits of their first amendment and due process claims, (2) whether Plaintiffs could establish irreparable harm and (3) whether the balance of the equities and the public interest call for such relief. After analyzing these factors, the Court partially granted Plaintiffs' motion, enjoining the EO's application to federal contractors and grantees.

1. Likelihood of Success on the Merits

First Amendment Claim

The Court held that Plaintiffs were likely to succeed on the merits of their challenge to the EO's application to federal contractors as violative of the first amendment. In so holding, the Court noted that the restrictions on workplace training were meant to apply to all training offered by a contractor, regardless of whether the training related to a federal contract. Moreover, the restricted speech addressed matters of public concern: racism and discrimination. The Court reasoned that the government's interest in the training of federal employees and use of federal funds could be protected by narrowing the scope of an injunction, and that interest did not outweigh Plaintiffs' interest in training their own employees and using funds unrelated to the federal contracts.

The Court likewise held that Plaintiffs were likely to succeed on their first amendment claim on behalf of recipients of federal grants. In so holding, the Court opined that requiring federal grantees to certify they will not use grant funds to promote concepts the government considers divisive, even where a grant program is wholly unrelated to such concepts, is a clear violation of a grantee's free speech rights. In so holding, the Court found persuasive arguments advanced by higher education *amici* that while the EO's restrictions would require institutions to curtail promotion of "divisive concepts," scholars must be able to endorse opposing views in order for intellectual progress to occur - thus the Order would inhibit the advancement of a core component of these institutions' missions.

Due Process Claim

The Court agreed with Plaintiffs' argument that the EO's restrictions were too vague to determine the scope of prohibited conduct. Because the language of the EO and subsequent interpretive guidance failed to provide fair notice, the Court held that Plaintiffs were likely to succeed in their due process claim on behalf of both federal contractors and grantees.

2. Irreparable Harm

The Court found substantial evidence in Plaintiffs' declarations that the EO had chilled their exercise of free speech rights. Moreover, those who provide workplace trainings had already lost opportunities and income as a result of their potential clients' understandings of the EO.

3. Public Interest and Balance of the Equities

The Court opined that it is always in the public interest to prevent violation of a party's constitutional rights, and it also noted that the importance of Plaintiffs' work in underserved communities was undisputed. While the government has an interest in controlling its message to its workforce, the Court reasoned that that interest was protected by limiting the scope of a preliminary injunction to the EO's application to federal contractors and grantees. The balance of the equities, therefore, weighed in favor of Plaintiffs.

What Does This Mean for Institutions of Higher Learning?

The Court's decision to partially grant Plaintiffs' motion for a preliminary injunction means that the restrictions of the Order will not be enforceable against federal contractors or grantees, including institutions of higher education, during the pendency of the litigation. However, it is important to note that the EO's restrictions will still apply to federal agencies and U.S. Uniformed Services, and this could impact the terms of the contracts they may have with colleges and universities going forward. With that said, if President-elect Biden rescinds the Order once in office, it will no longer be enforceable against any entities.

If you have questions about the impact of Executive Order 13950 and this nationwide preliminary injunction on your institution's contracts or operations, please contact any [member](#) of Bond's [Higher Education practice](#) or the attorney with whom your regularly work.



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