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11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN JOSE DIVISION**

15 ELIZABETH WEISS,
16 Plaintiff,
17 vs.
18 STEPHEN PEREZ, in his official capacity as
President of San Jose State University; *et al.*,
19 Defendants.

Case No. 5:22-cv-00641-BLF

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

[Declarations of Vincent Del Casino, Walt
Jacobs, Roberto Gonzalez, Charlotte Sunseri,
and Michael Wilcox filed concurrently
herewith]

Date: June 2, 2022
Time: 9:00 a.m.
Judge: Hon. Beth Labson Freeman

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In September 2020, the California Legislature enacted Assembly Bill 275 (“AB 275”) to
4 “[p]rovide a seamless and consistent state policy to ensure that all California Indian human
5 remains and cultural items be treated with dignity and respect.” Cal. Health & Safety Code
6 § 8011(a). AB 275 amended the California Native American Graves Protection and Repatriation
7 Act (“CalNAGPRA”) effective January 1, 2021, and accelerated the timeline for repatriation of
8 human remains and cultural artifacts to California Indian Tribes. In addition, amended
9 CalNAGPRA requires museums and universities, such as San José State University (“SJSU” or
10 “the University”), to “minimiz[e] handling” of such human remains and cultural items, consult
11 with the relevant California Indian Tribes throughout the inventory and repatriation process, and
12 “defer to tribal recommendations for appropriate handling and treatment.” *Id.* § 8013. The Act
13 does not authorize either the initiation or the completion of any study of remains. *Id.* Defendant
14 officials at SJSU (collectively, “the University”), adopted a policy, applicable to all members of
15 the SJSU community, that restricts access to Native American remains and cultural items in
16 SJSU’s possession. The policy was adopted to ensure the University’s compliance with
17 CalNAGPRA and specifically to defer to the recommendations of both the affected Tribes and
18 California’s Native American Heritage Commission (“NAHC”) as to the proper handling and
19 treatment of human remains.

20 Plaintiff Elizabeth Weiss, a Professor of Anthropology at SJSU, falsely claims that
21 Defendants adopted this policy to retaliate against her in violation of the First Amendment.
22 Plaintiff has for years been a vocal critic of both CalNAGPRA and its federal counterpart, the
23 Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 et seq. (“NAGPRA”),
24 arguing that scientific research must take precedence over preservation and repatriation of Native
25 American remains and cultural items—a position rejected by both the California Legislature and
26 Congress. Defendants have never taken any action against Plaintiff because of her opinions about
27 repatriation. To the contrary, they have consistently and vigorously defended her rights of free
28 speech and academic freedom.

1 Plaintiff effectively claims that, because she wants to do scientific research on the human
2 remains and cultural artifacts, California law may not be enforced to restrict her access to them.
3 Claiming, falsely, that Defendants have “retaliated” against her for her viewpoints about
4 repatriation, Plaintiff seeks an order enjoining the University from enforcing its policy and
5 granting her access to and permission to photograph the remains and cultural artifacts, in direct
6 contravention of tribal recommendations and CalNAGPRA. In substance, she seeks to substitute
7 her judgment for that of the California Legislature.

8 Plaintiff’s motion must be denied for two reasons. First, as explained in detail in
9 Defendants’ Rule 12(b)(7) motion, Plaintiff has failed to join at least one Native American tribe
10 (“the Tribe”) that is an indispensable party under Federal Rule of Civil Procedure 19. Second,
11 even if the Complaint survives Defendants’ motion to dismiss on these and 12(b)(6) grounds,
12 Plaintiff has failed to present evidence sufficient to support a preliminary injunction. The evidence
13 establishes that Defendants’ actions were taken in order to comply with CalNAGPRA, not to
14 retaliate against Plaintiff for exercise of her First Amendment rights or to condition her teaching or
15 employment on withholding her viewpoints; Plaintiff is not likely to suffer irreparable harm in the
16 absence of an injunction; the balance of equities tips decidedly in favor of Defendants; and entry
17 of the requested preliminary injunction would be contrary to the public interest.

18 **II. BACKGROUND**

19 **A. Legal Overview**

20 Enacted in 1990, federal NAGPRA was designed to safeguard and return certain human
21 remains and funerary objects to federally recognized Native American Tribes. CalNAGPRA was
22 enacted in 2001 to facilitate implementation of NAGPRA and to allow California Tribes that are
23 not federally recognized to file repatriation claims. Cal. Health & Safety Code § 8011. State
24 agencies and museums that receive state funding are subject to CalNAGPRA, including SJSU
25 (which is both an “agency” and a “museum”). § 8012(a), (i).

26 AB 275, effective January 1, 2021, sets new deadlines and provides detailed guidance as to
27 how repatriation must be accomplished, including new obligations for agencies to consult with
28 and defer to Tribes. It provides that “on or before January 1, 2022,” agencies were to complete an

1 inventory of all the remains and objects in their possession and “consult . . . with affiliated
 2 California Indian tribes on any protocols to be used in the inventory process, including . . .
 3 [m]inimizing handling[.]” Cal. Health & Safety Code § 8013(b)(1)(B)(i). Agencies must complete
 4 a preliminary summary of any associated cultural objects “in lieu of an object-by-object inventory
 5 *to limit unnecessary handling and damage to the items*,” and in so doing agencies must “*defer to*
 6 *tribal recommendations* for appropriate handling and treatment.” *Id.* § 8013(c)(1), (2) (emphases
 7 added). The Act expressly provides that it “does not authorize the initiation or completion of any
 8 academic, museum, or scientific study of human remains or cultural items.” *Id.* § 8013(g)(1).

9 **B. Factual Background¹**

10 Since 2004, Plaintiff has been a Professor at SJSU and has served for years as the
 11 Collections Coordinator for the Anthropology Department. Compl. ¶¶ 15-16. Plaintiff has also
 12 made arguments against repatriation of Native American remains and the merits of NAGPRA and
 13 CalNAGPRA for years, and her recent book on the subject, published in September 2020, led to
 14 renewed controversy. *Id.* ¶¶ 19-20, 23; Weiss Decl. Ex. 4. Although there was discussion among
 15 University faculty about how to deal with the controversy, *see* Weiss Decl. Ex. 5, Plaintiff was not
 16 subjected to discipline, the conditions of her employment did not change, and no restrictions were
 17 placed on her work or teaching. Compl. ¶¶ 23-31. Indeed, Dean Jacobs promoted the book on the
 18 College of Social Sciences Facebook page. Jacobs Decl. ¶ 4 & Ex. A.

19 SJSU has worked continuously since passage of AB 275 to ensure that it would be able to
 20 comply with that law. Sunseri Decl. ¶¶ 3, 4 & Ex. B; *see also id.* ¶ 10 & Ex. H (timeline of “SJSU
 21 Actions on NAGPRA/CalNAGPRA/AB-275”). As the Collections Coordinator, Plaintiff
 22 undoubtedly had and has a thorough understanding of what NAGPRA and CalNAGPRA require

23
 24 ¹ Defendants object to the following paragraphs of Plaintiff’s Declaration: 11 (legal conclusion),
 25 17 & Ex. 5 (foundation, hearsay), 18 (foundation), 19 (foundation, hearsay), 24 (hearsay,
 26 relevance, foundation), 25 & Ex. 7 (hearsay, relevance, foundation), 30 (foundation), 35 (hearsay,
 27 relevance, foundation), 36 & Ex. 12 (hearsay, relevance, foundation) 64 (legal conclusion), 74 &
 28 75 (foundation, speculation).

1 with regard to SJSU’s collections, *id.* ¶ 2, including the requirements to consult with and defer to
2 Tribes about handling and treatment of human remains. On April 29, 2021, the Standing
3 Committee of the SJSU Department of Anthropology, of which Plaintiff is a member,
4 unanimously approved a “NAGPRA Statement” affirming its commitment to “helping the
5 University fully comply with [NAGPRA and CalNAGPRA], including California Assembly Bill
6 275” and stating that “[o]ur department supports efforts to repatriate Native American human
7 remains, artifacts, and other objects of cultural patrimony.” Sunseri Decl. ¶ 5 & Ex. D.

8 On June 22, 2021, SJSU received a letter from the NAHC, attaching consultation lists of
9 California Indian Tribes that may be culturally affiliated with SJSU’s collections of Native
10 American remains and cultural items from various archaeological sites. Sunseri Decl. ¶ 6 & Ex. E.
11 On August 20, 2021, SJSU sent letters to the Tribes inviting their consultation with respect to
12 “phases of the NAGPRA process.” *Id.* ¶ 7 & Ex. F. Based on those consultations, SJSU
13 determined that the Muwekma Ohlone Indian Tribe of the SF Bay Area is culturally affiliated with
14 nearly all of the sites, because the Tribe “provided unambiguous and specific genealogical,
15 documentary, and oral history ties to this ancestral site.” *Id.* & Ex. E-1.

16 In the summer of 2021, the Anthropology Department obtained approval for funding to
17 hire a full-time Tribal Liaison to assist in complying with CalNAGPRA’s new requirements.
18 Gonzalez Decl. ¶ 20; Sunseri Decl. ¶ 15. As part of obtaining that approval, the Department
19 needed to reallocate “assigned time”—teaching credit—for *both* Plaintiff, the Collections
20 Coordinator, *and* Professor Charlotte Sunseri, who has been the NAGPRA Coordinator since
21 2011. *Id.* Professors Weiss and Sunseri had, beginning in the 2019-2020 academic year, each
22 received 0.2 assigned time, equivalent to 8 hours/week of teaching credit. Gonzalez Decl. ¶¶ 4-6;
23 Sunseri Decl. ¶ 15. That time was reallocated as of August 2021. Gonzalez Decl. ¶ 20; Sunseri
24 Decl. ¶ 15.

25 In August, 2021, Plaintiff published an op-ed criticizing AB 275, and “the University
26 received multiple vitriolic emails from members of the public and academic critics with demands
27 for discipline or termination.” Compl. ¶ 31. No action was taken against Plaintiff; instead, Dean
28 Jacobs promoted her article. Jacobs Decl. ¶ 5 & Ex. B.

1 On September 18, 2021, nearly a year after Plaintiff’s controversial book was published,
2 Plaintiff tweeted a photo of herself smiling and holding, without gloves, a human skull from the
3 SJSU collection of Native American remains, captioned with the words, “So happy to be back
4 with some old friends.” Compl. ¶ 32; Weiss Decl. Ex. 9. Plaintiff’s tweet “evoked shock and
5 disgust from [SJSU’s] Native and Indigenous community on campus and from many people
6 within and outside of SJSU.” Compl. ¶ 33; Weiss Decl. Ex. 11. A Professor of American Indian
7 studies at California State University, Long Beach, described Plaintiff’s tweet as “utterly
8 dehumanizing and completely unethical, violating all of the principles and values that serve as the
9 foundation for NAGPRA and CalNAGPRA.” Weiss Decl. Ex. 13; *see* Compl. ¶ 35. SJSU received
10 many communications about Plaintiff’s tweet from culturally affiliated Tribes. Sunseri Decl. ¶ 9 &
11 Ex. G. The Tribes requested and recommended that SJSU adopt stricter requirements with regard
12 to the handling and treatment of the collections, including minimizing handling and requiring that
13 it be respectful, banning photography and study of the collections, and restricting access to the
14 facility where the collections are stored. *Id.*

15 On September 29, 2021, Defendant Provost Del Casino published a letter expressing
16 disapproval of Plaintiff’s handling of the remains, noting that, in his view, her actions were not
17 consistent with AB 275’s requirement to “consult . . . with affiliated California Indian tribes on []
18 protocols” to “minimiz[e] handling [§ 8013(b)(1)(B)(i)].” Del Casino Decl. ¶ 8 & Ex. B. In that
19 same letter, the Provost unequivocally *defended* Plaintiff’s right “to express her views,” “advocate
20 against laws like NAGPRA, CalNAGPRA, and AB 275,” “present [her] work at academic
21 conferences and post on social media,” and “teach on these topics in [her] classes.” *Id.* At
22 Plaintiff’s request, Provost Del Casino also published Plaintiff’s response to his letter. *Id.* & Ex. C.

23 On October 6, 2021, SJSU President Dr. Mary A. Papazian issued an Interim Protocol for
24 Curation Spaces in Alignment with NAGPRA, CalNAGPRA, and AB 275 (“Interim Presidential
25 Directive” or “Directive”) restricting access to and handling of the remains in its collection. Del
26 Casino Decl. ¶ 11 & Ex. F. As the Directive states, “[d]uring initial consultations, [the Tribes]
27 have asked SJSU to prescribe a stricter set of protocols to gain access to the remains and artifacts
28 housed on our campus.” *Id.* SJSU transferred exclusive management over and control of access to

1 the collections to SJSU’s long-time NAGPRA Coordinator, Professor Sunseri, and its recently
2 appointed Tribal Liaison, Alisha Marie Ragland. *Id.* Photography and videography of the remains
3 and associated objects are prohibited under the Directive. *Id.*

4 As SJSU informed Plaintiff’s counsel, the Directive was the “direct result of the legally-
5 required consultations that SJSU had with the affected tribes” and was “requested by the [Native
6 American Heritage] Commission, pending further consultation with California Indian tribes.”
7 Compl. ¶ 40; Weiss Decl. Ex. 22. “The October 6, 2021, Directive was issued for the purpose of
8 ensuring compliance by SJSU with NAGPRA and CalNAGPRA, as amended by AB 275, in
9 deference to the recommendations of the tribes, and in order to prevent any further disrespectful or
10 otherwise inappropriate handling or treatment of human remains and cultural items.” Del Casino
11 Decl. ¶ 12; *see also* Jacobs Decl. ¶¶ 9-10; Gonzalez Decl. ¶ 22; Sunseri Decl. ¶ 12.

12 The day that the Directive was issued, Plaintiff sent an email to then-President Papazian
13 and Professor Gonzalez, stating, “[because the Native American collections at SJSU are being
14 repatriated], I will be *switching my research activities* to [] collections [that “are not Native
15 American and do not fall under NAGPRA or CalNAGPRA requirements”],” including what is
16 known as the “Carthage Collection.” Gonzalez Decl. ¶ 24 & Ex. I; Sunseri Decl. ¶ 13 & Ex. K
17 (emphasis added). To facilitate that, SJSU moved the Carthage Collection from the facility that
18 houses the NAGPRA and CalNAGPRA collections to a classroom adjacent to the Integrative
19 Anthropology Laboratory, in which anthropologists at the University, including Plaintiff, have
20 studied the collections, including the NAGPRA and CalNAGPRA collections, for many years.
21 Gonzalez Decl. ¶¶ 25, 33 & Exs. J-L; Sunseri Decl. ¶ 14; *see also* Weiss Decl. Ex. 10 (in which
22 “[a]ll but one of the photographs showing human remains or cultural items . . . appear to have
23 been taken in that laboratory.” Sunseri Decl. ¶ 14).

24 Following issuance of the Directive, SJSU continued to receive complaints, requests, and
25 recommendations from both culturally affiliated Tribes and the NAHC concerning access to,
26 handling of, and photography of the University’s NAGPRA and CalNAGPRA collections. Sunseri
27 Decl. ¶ 9 & Ex. G; *see also id.* ¶ 11 & Ex. I (October 9, 2021, article by Chairwoman of the
28 Muwekma Ohlone Tribe, stating, “the recent post by . . . Professor Elizabeth Weiss . . . dredges up

1 the worst memories of our painful history—a time when we were labeled soulless savages with no
2 right to the land we inhabited, children we bore or freedoms inherent to all people”).

3 On October 11, 2021, SJSU received a letter from the NAHC concerning “Mishandling of
4 California Indian Human Remains at San Jose State University in Violation of CalNAGPRA.” Del
5 Casino Decl. ¶ 13 & Ex. H. In the letter, the NAHC stated that, “[t]o the Commission’s
6 knowledge, Professor Weiss failed to consult with any affiliated California tribes on proper
7 protocols to be used in the handling of the remains, including their handling without gloves,
8 photographing, distribution, and depiction on a social network.” *Id.* Ex. H at p. 2.

9 With respect to the October 6 Directive, the NAHC stated, “[a]lthough the Commission
10 believes this stricter set of protocols is a step in the right direction, SJSU must do more to ensure
11 compliance with CalNAGPRA.” Del Casino Decl. ¶ 13 & Ex. H. The NAHC requested that
12 “[*m*]ore stringent policies and procedures be permanently implemented governing access to and
13 handling of California Indian remains and cultural items.” *Id.* (emphasis added). The NAHC added
14 that, “[i]n particular, SJSU should not be allowing its California Indian collections to be used for
15 further research and teaching unless the affiliated California Indian tribe or lineal descendant gives
16 express written consent . . . and prescribes proper protocols to be used for these purposes.” *Id.*

17 Noting Professor Weiss’s “disregard for state law,” the NAHC also requested that SJSU
18 take further actions concerning her, including disciplinary action. Del Casino Decl. ¶ 13 & Ex. H.
19 But SJSU has taken none of those actions concerning Professor Weiss; it has only adopted
20 university-wide protocols that restrict *everyone’s* access to the NAGPRA and CalNAGPRA
21 collections. *Id.* Indeed, Defendants’ declarations establish that they have not taken and do not plan
22 to take any actions to retaliate against or otherwise penalize Plaintiff for her viewpoints, teaching,
23 speech, or publications or to limit her freedom in the classroom. *See* Del Casino Decl. ¶¶ 12, 16;
24 Jacobs Decl. ¶¶ 9, 11-12; Gonzalez Decl. ¶¶ 29-30.

25 On November 15, 2021, President Papazian issued a memorandum titled “NAGPRA/
26 CalNAGPRA/AB-275 Collections Management.” Del Casino Decl. ¶ 14 & Ex. I. The
27 memorandum states that “all NAGPRA and CalNAGPRA-related collections will now be held and
28 curated by the University and will no longer be the responsibility of the Department of

1 Anthropology.” *Id.* This decision was made because, given the requirements of NAGPRA and
 2 CalNAGPRA, these collections are no longer academic collections held by SJSU for the purposes
 3 of research and teaching, but collections that are to be expeditiously prepared for repatriation to
 4 culturally affiliated Tribes. *Id.*; *see also* Gonzalez Decl. ¶ 2.

5 On January 18, 2022, SJSU Interim President Dr. Stephen Perez issued an amended
 6 version of the October 6, 2021, Directive. Del Casino Decl. ¶ 15 & Ex. J. The January 18, 2022,
 7 amended Directive was issued for the purpose of ensuring compliance by SJSU with NAGPRA
 8 and CalNAGPRA, as amended by AB 275, and particularly to take account of the additional
 9 recommendations of the culturally affiliated Tribes and the NAHC. *Id.* ¶ 16. The primary change
 10 was to make it clear that, consistent with the Tribes’ and NAHC’s recommendations, access for
 11 research and teaching are no longer permitted. Del Casino Decl. ¶¶ 15-17 & Exs. J, K. The
 12 amended Directive was likewise not issued in order to retaliate against or otherwise penalize
 13 Professor Weiss for her views, speech, teaching, or publications. *Id.*; *see also* Jacobs Decl. ¶ 9;
 14 Gonzalez Decl. ¶ 23; Sunseri Decl. ¶ 12.

15 On January 19, 2022, Provost Del Casino sent a letter to the members of the NAHC,
 16 updating them on SJSU’s work to comply with NAGPRA and CalNAGPRA. Del Casino Decl.
 17 ¶ 17 & Ex. K. As the Provost states in the letter, “[t]he actions we have taken have resulted from
 18 collaboration with consulting California Native American Tribes to ensure that we are treating
 19 Native American ancestors and their cultural items with respect.” *Id.*

20 Also on that date, NAHC attorney Vanessa Racehorse provided the Commission with a
 21 memorandum titled, “Action Item: Mishandling of California Indian Human Remains at San Jose
 22 State University.” Del Casino Decl. ¶ 18 & Ex. M. Ms. Racehorse stated “SJSU is required to
 23 consult with affiliated California Indian tribes on protocols to be used during the inventory process
 24 for remains and cultural items, including ‘minimizing handling.’” *Id.* Ex. M at p. 2.

25 **III. ARGUMENT**

26 **A. Legal Standard**

27 A plaintiff seeking the “extraordinary remedy” of a preliminary injunction “must establish
 28 that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence

1 of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the
 2 public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22 (2008); *see Earth Island*
 3 *Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (noting plaintiffs’ “difficult task in proving that
 4 they are entitled to this extraordinary remedy” (internal quotations omitted)).

5 **B. Plaintiff’s Claims Are Not Likely to Succeed on the Merits**

6 **1. The Complaint Must Be Dismissed Due to Failure to Join the**
 7 **Muwekma Ohlone Tribe**

8 Under Federal Rule of Civil Procedure 19, when an absent party is a “necessary” party,
 9 joinder of that party is not feasible, and the absent party is “indispensable,” the plaintiff’s claims
 10 may not proceed without it. Fed. R. Civ. P. 19(b). The Muwekma Ohlone Tribe is a necessary
 11 party here because adjudicating this dispute in its absence could both impair its rights and leave
 12 the University subject to a substantial risk of inconsistent obligations. *See White v. Univ. of Cal.*,
 13 765 F.3d 1010, 1026-27 (9th Cir. 2014) (affirming dismissal of NAGPRA claims by anthropology
 14 professors). The Tribe’s joinder is not feasible because it enjoys sovereign immunity from suit.
 15 *See Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992); Wilcox Decl. Ex. A
 16 § IV. And, because the Tribe has sovereign immunity, the Tribe is “indispensable” and the claims
 17 against Defendants may not proceed without it. *See, e.g., Deschutes River All. v. Portland Gen.*
 18 *Elec. Co.*, 1 F.4th 1153 (9th Cir. 2021); *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984 (9th
 19 Cir. 2020); *White*, 765 F.3d 1010.

20 Even were any of Plaintiff’s claims to survive dismissal under Rule 19, issuance of the
 21 preliminary injunction that Plaintiff seeks, prohibiting enforcement of SJSU’s Directive and
 22 giving her access to and the right to photograph SJSU’s NAGPRA and CalNAGPRA collections,
 23 would be barred by Rule 19. Such an injunction would directly impair the Tribe’s legal interests in
 24 prompt repatriation and minimal and respectful handling of its ancestors’ remains and cultural
 25 artifacts and leave the University at risk of inconsistent legal obligations.

26 **2. Plaintiff Is Not Likely to Succeed on Her Claim for Retaliation**

27 To prove a First Amendment retaliation claim against a government employer, the plaintiff
 28 bears the burden on three questions: “(1) whether the plaintiff spoke on a matter of public concern;

1 (2) whether the plaintiff spoke as a private citizen or public employee; [and] (3) whether the
 2 plaintiff's protected speech was a substantial or motivating factor in the adverse employment
 3 action." *Greisen v. Hanken*, 925 F.3d 1097, 1108 (quoting *Eng v. Cooley*, 552 F.3d 1062, 1070
 4 (9th Cir. 2009)). If the employee meets this burden, the burden shifts to the employer to show "(4)
 5 whether the state had an adequate justification for treating the employee differently from other
 6 members of the general public; and (5) whether the state would have taken the adverse
 7 employment action even absent the protected speech." *Id.* "[A]ll the factors are necessary, in the
 8 sense that failure to meet any one of them is fatal to the plaintiff's case." *Dahlia v. Rodriguez*, 735
 9 F.3d 1060, 1067 n.4 (9th Cir. 2013) (en banc).

10 Plaintiff has not presented sufficient evidence either that her speech was a substantial or
 11 motivating factor for the adoption or amendment of the Directive or that Defendants' statements
 12 represent adverse employment actions or unconstitutional conditions on Plaintiff's speech. And,
 13 even if Plaintiff had presented evidence sufficient to meet her initial burden on all three elements
 14 (she has not), the Directive is a facially neutral policy that did not affect Plaintiff differently than
 15 her colleagues in the Department, and Defendants' evidence shows that the University would have
 16 adopted and amended the Directive even absent Plaintiff's speech in order to comply with
 17 CalNAGPRA.

18 **a. Plaintiff's Speech Was Not a Substantial or Motivating Factor**
 19 **for Adoption of the Interim Directive**

20 Assuming that the Directive modified the conditions of Plaintiff's employment by
 21 restricting her access to collections that she once curated, Plaintiff's speech was not a substantial
 22 or motivating factor for its promulgation. Rather, her mishandling of Native American remains,
 23 the resulting demands by the Tribes and the NAHC for more restrictions on access to and handling
 24 of the remains, and the need to ensure compliance with AB 275 were.

25 To show that retaliation for her speech was a substantial or motivating factor, Plaintiff may
 26 introduce evidence (1) "that the proximity in time between the protected action and the allegedly
 27 retaliatory employment decision was one in which a jury could logically infer that the plaintiff was
 28 [retaliated against] for [her] speech"; (2) "that "[her] employer expressed opposition to [her]

1 speech”; or (3) “that [Defendants’] proffered explanations for the adverse employment action were
 2 false and pre-textual.” *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 751 (9th Cir.
 3 2001) (as amended) (internal citations omitted). Plaintiff’s evidence of these propositions, viewed
 4 in light of Defendants’ declarations, does not support a finding that retaliation for Plaintiff’s
 5 speech—rather than compliance with CalNAGPRA—motivated the University’s actions.

6 **(i) Adoption of the Directive Was Proximate to Plaintiff’s**
 7 **Mishandling of Native American Remains, Not Plaintiff’s**
 8 **Speech**

9 Far from supporting Plaintiff’s claims, the timing of Defendants’ adoption of the Directive
 10 shows that it was adopted to comply with CalNAGPRA, not in retaliation for Plaintiff’s
 11 expression of her viewpoint about repatriation laws. Plaintiff’s mishandling of Native American
 12 remains without consulting with the relevant Tribes disregarded the requirements of CalNAGPRA
 13 in a way that demanded a response from the University. Posting on social media a photograph of
 14 oneself holding, without gloves, an ancient Native American skull unquestionably does not
 15 constitute “minimizing handling” of Native American remains, especially when one has not
 16 consulted with the relevant Tribes before doing so or deferred to their recommendations for
 17 “appropriate handling and treatment” of the remains. Cal. Health & Safety Code
 18 ¶ 8013(b)(1)(B)(i); (c)(2). Although Plaintiff asserts that she has “always complied strictly with
 19 NAGPRA and . . . CalNAGPRA,” Compl. ¶ 18, AB 275 updated the standards of compliance, and
 20 her September 18, 2021, tweet portrays blatant disregard for those standards. It is therefore not
 21 surprising that members of Native American and California Indigenous Tribes, the NAHC, and
 22 experts were shocked by Plaintiff’s conduct and demanded that SJSU adopt policies to ensure its
 23 compliance with CalNAGPRA going forward. *See* Weiss Decl. Ex. 13; Ex. 25; Sunseri Decl. ¶ 9-
 24 10, Exs. G-H; Del Casino ¶ 6. As Dr. Michael Wilcox, a professional anthropologist and
 25 archaeologist with vast practical and academic experience regarding the handling and repatriation
 26 of Native American remains, opines, Professor Weiss’s conduct—handling a Native American
 27 skull, without gloves, photographing yourself holding the skull, and posting that on social media
 28 with a joking caption—is inconsistent with both custom and practice and ethical standards in the
 anthropology profession. Wilcox Decl. Ex. A §§ I - III.

1 opinions” created a triable issue of fact); *Allen v. Iranon*, 283 F.3d 1070, 1077 n.6 (9th Cir. 2002)
 2 (noting that Defendant employer’s “complain[ing] of personnel ‘go[ing] to the media” would be
 3 evidence that Defendant expressed opposition to Plaintiff’s speech).

4 Here, Plaintiff points only to statements expressing disagreement with her views on
 5 repatriation and disapproval of her mishandling of Native American remains. She presents no
 6 evidence of statements expressing opposition to her *ability and freedom to express* her views,
 7 which is what she would need to meet the relevant standard. Provost Del Casino’s September 29,
 8 2021, statement expressed disapproval of the conduct pictured in Plaintiff’s tweet, stating that it
 9 was contrary to “the ethical guidelines of the social science disciplines that govern such practices
 10 and laws such as AB 275” and that SJSU “does not condone or endorse the practice of posing with
 11 the human remains of others.” Compl. ¶ 33; Weiss Decl. Ex. 11. But the Provost explicitly
 12 supported her freedom to express her viewpoint. *Id.* (“[D]oes a professor have a right to express
 13 their views on the matter? Do they have the right to advocate against laws like NAGPRA,
 14 CalNAGPRA, and AB 275 and present their work at academic conferences and post on social
 15 media? Do they have the right to teach on these topics in their classes? The answer to all these
 16 questions is yes.”). Professor Gonzalez’s November 17, 2021, letter similarly reflects disapproval
 17 of Plaintiff’s mishandling and photography of human remains and a recommitment to upholding
 18 the requirements of CalNAGPRA and AB 275. Compl. ¶ 79; Weiss Decl. Ex. 23. It contains no
 19 disapproval of, or even disagreement with, Plaintiff’s expression of her viewpoint.

20 Gonzalez’s statements regarding the controversy around Plaintiff’s book during the faculty
 21 panel discussion he co-hosted in June, 2021, expressed his personal disagreement with Plaintiff’s
 22 academic conclusions. But in the same conversation, he strongly supported her academic freedom.
 23 Compl. ¶ 23; Weiss Decl. Ex. 5 at 10 (“She writes a controversial book . . . this is . . . at the heart
 24 [] of the idea of academic freedom[,] that even ideas that are . . . unpopular, [] need to be . . .
 25 given their . . . chance [] to be expressed.”); Weiss Decl. Ex. 5 at 15 (“I sent this out on our
 26 departmental listserv . . . a reminder that this is what academic freedom is.”). To the extent that
 27 Gonzalez suggested any problem with Plaintiff’s teaching her viewpoint in her classroom, he did
 28 so expressly because he “might make the argument that this is academic incompetence because

1 [he] think[s] the arguments are so scientifically shaky.” *Id.* at 39. As Chair of the Department of
 2 Anthropology, Gonzalez is entitled to express his professional opinion about the merits of
 3 scientific arguments, no matter by whom they are made. *See Skidmore v. Gilbert*, 5:20-cv-06415-
 4 BLF, at *20 (N.D.C.A. Feb. 15, 2022) (“While [Plaintiff] may have found the manner of
 5 [Defendants’] comments ‘unmeasured . . . and even distinctly unpleasant,’ that does not mean that
 6 those comments were not protected speech or that [Plaintiff] has the right to stifle comments made
 7 in direct reaction to her [speech].” (quoting *Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir.
 8 1975)).

9 **(iii) The Evidence Shows that Defendants’ Proffered**
 10 **Explanations Are Not False or Pretextual**

11 In an effort to show that Defendants’ proffered reason for promulgating the Directive was
 12 pretextual, Plaintiff simply asserts the legal conclusion that the University “faced no legal duty to
 13 implement the directive.” Compl. ¶ 38. This is false. Under CalNAGPRA, the University was
 14 required to consult with the Tribes and defer to their recommendations with respect to handling
 15 and treatment of the remains. Cal. Health & Safety Code § 8013. Plaintiff herself emphasizes that
 16 members of affected Tribes and the NAHC “pressured the University to act,” and that the
 17 University’s actions were the “direct result of . . . consultation that SJSU had with the affected
 18 tribe [and the NAHC].” Compl. ¶ 40. But the University *did not* take targeted action against
 19 Plaintiff, despite calls to discipline her. The University deferred to the Tribes and NAHC on only
 20 those matters over which those entities have authority under CalNAGPRA: who may access
 21 Native American remains to be repatriated and in what manner. Del Casino Decl. ¶ 13 & Ex. H.

22 Plaintiff asserts SJSU’s adoption of the Directive came “much later” than other California
 23 universities’ policies, Compl. ¶ 38, and that this somehow shows it was adopted in retaliation
 24 against Plaintiff. The assertion is specious. The policies are attached to Plaintiff’s counsel’s
 25 declaration. Ortnier Decl. Exs. 27-35. The SFSU policy (Ex. 27) bears no date; the CSULB policy
 26 (Ex. 28) was adopted in 1996, long before enactment of CalNAGPRA and AB 275; the CSU
 27 Chico (Ex. 35) policy was again adopted before enactment of AB 275; and the University of
 28 California policy (Ex. 34) was issued on December 27, 2021, more than two months *after* SJSU’s.

1 Plaintiff repeatedly suggests that retaliation should be inferred because SJSU's Directive is
2 somehow more restrictive than other California universities' policies. Compl. ¶¶ 56, 64, 66, 96.
3 But the suggestion is misplaced. The undated SFSU policy, which does not reference and
4 therefore may pre-date CalNAGPRA and AB 275, provides that "culturally affiliated tribal
5 members will be consulted to the fullest extent possible before [a] research project is approved"
6 and that "[r]esearchers must submit a letter from culturally-affiliated tribes or individuals,
7 approving the research, to the NAGPRA Coordinator." Ortner Decl. Ex. 27. The CSULB policy,
8 which on its face pre-dates CalNAGPRA and AB 275, provides that "[r]esearch and teaching
9 involving Native American human remains and artifacts will only be conducted with the
10 documented permission of the living descendants or . . . the tribal authorities . . ." *Id.* Ex. 28.
11 Sacramento State's forms for field collection and requesting access to research its collections state
12 that "[c]ollections known to contain human remains or cultural items subject to NAGPRA will not
13 be accepted" and that "[m]aterials subject to NAGPRA are not available for study, including
14 known human remains . . ." *Id.* Exs. 31, 32. The University of California policy provides that
15 "UC campuses may not authorize research . . . , instructional use, or other use of any identified or
16 potential Human Remains and Cultural Items," with only two exceptions: "Lineal Descendants
17 and Tribal Representatives" are permitted access; and research may be permitted if the relevant
18 Tribes "provide explicit written authorization." *Id.* Ex. 34 at 43-45. Nowhere does Plaintiff claim
19 that she had or has authorization from the relevant Tribes to do research on the remains, far less to
20 handle a skull without gloves and post a picture of herself holding it on social media.

21 Finally, Plaintiff's suggestion that the University's reaction to her tweeted photograph was
22 somehow pretextual, *see* Compl. ¶ 32, is unfounded. Plaintiff asserts that, at the time of her
23 controversial tweet, "the Department of SJSU had several similar pictures up on its website."
24 Compl. ¶ 32. But all of the purportedly "similar" pictures pre-date enactment of AB 275's
25 requirement to consult with and defer to Tribes as to handling and treatment of remains. In any
26 event, the only photographs that include someone holding a skull are pictures of Plaintiff, and
27 those are also the only entries that do not on the face of the website establish prior consultation
28 with the relevant Tribes. Compl. ¶ 32; Weiss Decl. Ex. 10. The March 30, 2021, article Plaintiff

1 references, Compl. ¶ 32, includes a picture of Professor Mary Juno “holding a *model* of a modern
2 forensic skull,” not an actual human skull. Weiss Decl. Ex. 10 at p. 72.

3 **b. Defendants’ Statements Disagreeing with Plaintiff’s Viewpoints**
4 **Are Not Adverse Employment Actions or Unconstitutional**
5 **Conditions**

6 Plaintiff’s assertions that various statements made by Defendants concerning her viewpoint
7 on repatriation laws constitute adverse employment actions with retaliatory motives, and that they
8 are threats to unconstitutionally condition her ability to teach at the University upon surrender of
9 her right to express her views on repatriation, are wrong. The statements either reflect disapproval
10 of Plaintiff’s mishandling of Native American remains or are merely the opinions of SJSU faculty
11 members, which are themselves protected by the First Amendment. No benefit has been denied
12 Plaintiff on a retaliatory basis, and there is no credible reason to think any will be.

13 An adverse employment action is defined as an action taken by Defendants that would be
14 “reasonably likely to deter employees from engaging in constitutionally protected speech.”
15 *Coszalter v. City of Salem*, 320 F.3d 968, 970 (9th Cir. 2003). But “[m]ere threats and harsh words
16 are insufficient.” *Nunez v. City of Los Angeles*, 147 F.3d 867, 875 (9th Cir. 1998). Being “bad-
17 mouthed” or even “verbally threatened” does not alone constitute an adverse employment action.
18 *Coszalter*, 320 F.3d at 975. *See also Skidmore*, 5:20-cv-06415-BLF, at *12 (holding that “de facto
19 discipline in the form of shunning by the university community and threatening to deprive
20 [Plaintiff] of her Ph.D. and future career opportunities . . . arising not from any actual alleged
21 disciplinary action but from Defendants’ own statements in response to [Plaintiff]’s Facebook
22 posts” does not clearly establish that Defendants violated her rights).

23 The statements that Defendants have made disagreeing with Plaintiff’s views on
24 repatriation and disapproving of her mishandling of Native American remains are not threats, let
25 alone adverse employment actions. As discussed above, statements made by Provost Del Casino
26 and Professor Gonzalez in the aftermath of Plaintiff’s mishandling of Native American remains
27 reflect the disapproval of the Tribes and NAHC, to whom the Defendants are legally required to
28 defer as to the propriety of handling remains. Both parties have simultaneously assured Plaintiff of

1 her continued right to express her views, and Plaintiff’s job duties and ability to express herself
2 have not changed. Del Casino Decl. ¶ 8 & Ex. B; Gonzalez Decl. ¶¶ 29, 31; Jacobs Decl. ¶¶ 11-12.

3 Professor Gonzalez’s statements, prior to Plaintiff’s tweet, about the views expressed in
4 Plaintiff’s book, *see* Weiss Decl. Ex. 5, were the expression of his own opinions, which he is just
5 as entitled to express as Plaintiff. “It would be the height of irony, indeed, if mere speech, in
6 response to speech, could constitute a First Amendment violation.” *Nunez*, 147 F.3d at 875.
7 Plaintiff should not be permitted to use the First Amendment as both a “shield (to protect her own
8 statements) and a sword (to silence the First Amendment rights of professors to respond).”
9 *Skidmore*, 5:20-cv-06415-BLF, at *22.

10 Plaintiff mischaracterizes Gonzalez’s statements as threatening the imposition of
11 unconstitutional conditions, but the transcript of his remarks shows a reasoned discussion among
12 faculty about how to balance ethics and student comfort with academic freedom. *See* Weiss Decl.
13 Ex. 5 at p. 9 (Gonzalez emphasizes his personal opinion of Plaintiff’s viewpoint that “in my mind,
14 personally, it’s a really flawed argument[,] I think it borders on incompetence – professional
15 incompetence”); at p. 13 (“I’m not going to call her a racist”); at p. 40 (notes he “might make the
16 argument that this is academic incompetence because [] the arguments are so scientifically shaky”;
17 someone else (“Hannah”), not Gonzalez, says “*if* this person holds deeply [] held white
18 supremacist values”; Gonzalez responds that *if* that were the case, exposing students to *that* in the
19 classroom “certainly *would*” cause an ethical barrier). *See also* Gonzalez Decl. ¶¶ 12-14, 16
20 (explaining his remarks).

21 The notion that these were “threats” upon which her future employment or teaching could
22 be conditioned is further belied by Gonzalez’s subsequent email to Plaintiff in which he assured
23 her that “SJSU policy . . . ensures the preservation of academic freedom for both faculty and
24 students, and I’ll continue upholding it as long as I’m affiliated with the University.” Weiss Decl.
25 Ex. 6 at 3; Gonzalez Decl. ¶ 17. Plaintiff’s speculation that Gonzalez will take “further retaliatory
26 actions,” such as “attempting to remove her from the classroom, take away her tenure, and
27 terminate her employment,” Compl. ¶ 105, is not admissible; is unequivocally contradicted by
28 Professor Gonzalez, Gonzalez Decl. ¶ 29; and cannot support her claims.

1 **c. Defendants’ Evidence Shows Plaintiff Was Not Treated**
 2 **Differently and That SJSU Would Have Adopted the Directive**
 3 **Absent Plaintiff’s Protected Speech**

4 Even if Plaintiff were somehow able to shift the burden to Defendants, Defendants would
 5 still be likely to prevail on the merits. The first of two factors that Defendants would need to
 6 address is “the *Pickering* balancing test,” which asks “whether the relevant government entity had
 7 an adequate justification for treating the employee differently from any other member of the
 8 general public.” *Eng v. Cooley*, 552 F.3d 1062, 1071 (9th Cir. 2009) (quoting *Garcetti v. Ceballos*,
 9 547 U.S. 410, 418 (2006)). In this case, the Directive that Plaintiff seeks to enjoin is neutral on its
 10 face; it bars everyone at SJSU—including nearly everyone in the Anthropology Department—
 11 from accessing the curational facilities, except for two individuals charged with managing the
 12 inventory and repatriation process.

13 Plaintiff claims that she alone has been affected by this change, but that is incorrect.
 14 Several other members of the Anthropology Department faculty who were previously granted
 15 access to the collections were also excluded by the Directive. Gonzalez Decl. ¶ 23. Three or four
 16 others were shut out of the facility without warning, and one other had to make arrangements to
 17 retrieve materials from the facility for his research. *Id.* Thus, Defendants did not “treat [Plaintiff]
 18 differently from any other member of the general public.” To the contrary, she is now more like
 19 every other member of the public, and of the SJSU community, than she was before. Even if there
 20 is some incidentally different effect on Plaintiff, restricting access to the remains is “necessary for
 21 [the University] to operate efficiently and effectively” with regard to its duty under CalNAGPRA
 22 to comply with the Tribes’ and NAHC’s recommendations. *Garcetti*, 547 U.S. at 419.

23 Finally, even if Defendants were not to prevail on this test, they may “alternatively . . .
 24 demonstrat[e] that [they] would have reached the same [adverse employment] decision even in the
 25 absence of the [employee’s] protected conduct.” *Eng*, 552 F.3d at 1072 (internal citations
 26 omitted). The record is replete with evidence that this is the case. As Provost Del Casino and
 27 Professors Gonzalez and Sunseri have all testified, the Directive was adopted to ensure
 28 compliance with AB 275, defer to the recommendations of the Tribes and the NAHC, and protect
 against further mishandling and disrespectful treatment of the human remains. Sunseri Decl. ¶ 12;

1 Gonzalez Decl. ¶ 22; Del Casino Decl. ¶¶ 12, 14, 16. Plaintiff’s mishandling of the human remains
 2 portrayed in her tweet, not her expression of her views on repatriation, demonstrated that a formal
 3 policy was needed to ensure that the requirements of AB 275 were followed, and thereby hastened
 4 the process of adopting a formal policy on access to the remains. Del Casino Decl. ¶¶ 4, 7.

5 **C. Plaintiff Cannot Show A Likelihood of Irreparable Harm in the Absence of**
 6 **Injunctive Relief**

7 **1. Allowing the University to Enforce the Directive Will Not Lead to**
 8 **Irreparable Harm to Plaintiff**

9 Plaintiff claims that, absent an injunction enjoining Defendants from enforcing the
 10 Directive, she will be irreparably harmed by the loss of a few months’ access to the University’s
 11 collection of skeletal remains. But the California Legislature, in adopting CalNAGPRA and AB
 12 275, has already determined that the interests of Native American Tribes in having their ancestors’
 13 remains minimally handled with respect and promptly repatriated to the Tribes outweigh any harm
 14 that researchers such as Plaintiff may suffer from the inability to do research on those remains.

15 Moreover, any injury is of Plaintiff’s own making. “[S]elf-inflicted wounds are not
 16 irreparable injury.” *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) (holding
 17 government’s claim of irreparable harm resulting from its own past failure to keep records
 18 “severely undermines its claim for equitable relief”); *see also Epic Games, Inc. v. Apple Inc.*, 493
 19 F. Supp. 3d 817, 847 (N.D. Cal. 2020) (finding no irreparable harm when “harm flows from
 20 [Plaintiff’s] own actions” because its “predicament is of its own making.”). Plaintiff undoubtedly
 21 knew by September 2020, when AB 275 passed, that the law, which specifies a timeline, would
 22 require the remains upon which she was conducting research to be repatriated and that she would
 23 then lose access to them. Plaintiff was also aware that, notwithstanding COVID-19, she could
 24 have requested access to SJSU’s campus and curational spaces at any time between September
 25 2020 and October 2021 to conduct her research. *See* Gonzalez Dec. ¶ 19 & Ex. F. Yet at no time
 26 did Plaintiff request access to the collections to do this research. *Id.* This Court should not enjoin
 27 the enforcement of the legal rights of the Tribes to determine the manner in which their ancestors’
 28 remains are handled because Plaintiff failed to complete her research in a timely manner at an
 earlier date, knowing full well that she had limited time in which to do so.

1 Finally, “[a]n injunction is a drastic and extraordinary remedy, which should not be
 2 granted as a matter of course . . . [i]f a less drastic remedy . . . [i]s sufficient to redress [Plaintiff’s]
 3 injury, no recourse to the additional and extraordinary relief of an injunction [i]s warranted.”
 4 *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010). Here, a less drastic and
 5 burdensome remedy has already been identified, *by Plaintiff*. Of her own volition, Plaintiff
 6 determined, on the very day the Directive was issued, that she would “switch” her research to an
 7 alternate part of SJSU’s osteological collections—the Carthage Collection. Weiss Decl. Ex. 18 (“I
 8 will be switching my research activities to these [non-Cal-NAGPRA] collections—most
 9 specifically the Carthage Collection.”). Plaintiff received full access to the Carthage Collection on
 10 November 17, 2021. Gonzalez Decl. ¶ 24 & Ex. L. For all of Plaintiff’s claims about the
 11 importance to her studies of Native American remains in particular, it hardly seems that she would
 12 suffer irreparable harm without access to those collections, given that she was able to make an
 13 immediate decision to simply continue her research on some other collection.

14 **2. Plaintiff Has Not Shown that the University Is Likely to Take**
 15 **Retaliatory Action in the Absence of Injunctive Relief**

16 Plaintiff’s remaining complaints of irreparable harm pertain primarily to her request that
 17 this Court “enjoin[] Defendants from engaging in any further retaliatory actions in response to the
 18 exercise of her academic freedom such as removing [Plaintiff] from the classroom, altering her
 19 courses, or preventing her from expressing her views[].” Compl. at p. 23. Yet nothing in the record
 20 suggests that Defendants are likely to take any of these actions. Plaintiff merely speculates with no
 21 basis that Defendants might one day retaliate against her, so Defendants should be affirmatively
 22 enjoined from doing so. But “[s]peculative injury does not constitute irreparable injury.” *Goldie’s*
 23 *Bookstore, Inc. v. Superior Ct. of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984).

24 “Our frequently reiterated standard requires plaintiffs seeking preliminary relief to
 25 demonstrate that irreparable injury is *likely* in the absence of an injunction.” *Winter*, 555 U.S. at
 26 22. “A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a
 27 plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive
 28 relief.” *Caribbean Marine Services Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). It is not

1 likely that the retaliatory acts feared by Plaintiff will occur. Defendants have had ample
 2 opportunity to retaliate against Plaintiff for her viewpoint in the years during which she has
 3 expressed her unpopular opinions on repatriation, and they have not taken any retaliatory action.
 4 Jacobs Decl. ¶¶ 11-12; Gonzalez Decl. ¶ 7. On the contrary, Plaintiff’s own evidence shows that
 5 Defendants have promoted her ability to express her views and defended her right to take this
 6 stance at every turn. *See, e.g.*, Weiss Decl. Ex. 5 at 10 (Gonzalez: “She writes a controversial book
 7 . . . this is . . . at the heart [] of the idea of academic freedom[,] that even ideas that are . . .
 8 unpopular, . . . need to be given their . . . chance [] to be expressed.”); *id.* at 15 (“I sent this out on
 9 our departmental listserv . . . a reminder that this is what academic freedom is.”). *See also* Jacobs
 10 Decl. ¶¶ 4-6 & Exs. A-D (promoting Plaintiff’s controversial book and op-ed on College social
 11 media; encouraging Plaintiff with feedback). Even after Plaintiff’s tweet, Defendants have
 12 continued to defend her academic freedom. *See* Weiss Decl. Ex. 11 (Del Casino: “[D]oes a
 13 professor have a right to express their views on the matter? Do they have the right to advocate
 14 against laws like NAGPRA, CalNAGPRA, and AB 275 and present their work at academic
 15 conferences and post on social media? Do they have the right to teach on these topics in their
 16 classes? The answer to all these questions is yes.”).

17 Finally, Defendants have testified unequivocally in their declarations that they have no
 18 plans to take any action against Plaintiff based on her viewpoint, speech, publications, or teaching,
 19 and Plaintiff has no credible reason to fear that they would. Jacobs Decl. ¶¶ 11, 12; Gonzalez Decl.
 20 ¶¶ 29-30, Del Casino Decl. ¶ 12.

21 3. Injunctive Relief Will Not Remedy the Harms Plaintiff Claims She Has 22 Already Suffered

23 The remaining harms that Plaintiff alleges are ones that she has already suffered, which
 24 neither enjoining the enforcement of the Directive nor enjoining Defendants from engaging in any
 25 “further retaliatory actions” would change. “The purpose of an injunction is not to remedy
 26 irreparable harm that has already occurred (plainly, it could not), but to prevent that harm from
 27 occurring in the first place.” *Illumina, Inc. v. Qiagen, N.V.*, 207 F. Supp. 3d 1081, 1094 (N.D. Cal.
 28

1 2016). “The injunctive relief must remedy the harm.” *U.S. Wechat Users All. v. Trump*, 488 F.
2 Supp. 3d 912, 930 (N.D. Cal. 2020).

3 Plaintiff alleges her “academic standing” has suffered due to “loss of her chief academic
4 position as the Department of Anthropology’s Collections Coordinator and being tarred as a racist
5 by Defendants.” PI Motion at 21. Even if these allegations were true, obtaining access to the
6 remains and a promise from Defendants not to retaliate against her would not “remedy the harm.”
7 *See Garcia v. Google, Inc.*, 786 F.3d 733, 748 (9th Cir. 2015) (Plaintiff had to prove “‘causal
8 connection’ between the irreparable injury she faces and the conduct she hopes to enjoin.”).

9 These allegations are also factually incorrect. Plaintiff retains her position as Collections
10 Coordinator, presiding over those collections that remain in the Anthropology Department’s
11 collection. Jacobs Decl. ¶ 11; Gonzalez Decl. ¶ 31. And if Plaintiff has been “tarred” a racist, it
12 has not been by Defendants: as she alleges, “[a]bout a thousand professors and graduate students,
13 including some of [Plaintiff’s] colleagues, signed an open letter condemning [her] book as ‘anti-
14 indigenous’ and ‘racist,’” and there was “a social media campaign aimed at shaming the
15 University for supporting [Plaintiff].” Compl. ¶¶ 20, 23; Weiss Decl. Ex. 4. Her publisher issued a
16 public apology, stating, “it was not [their] intent to publish a book that uses arguments and
17 terminology associated with scientific racism.” Gonzalez Decl. ¶ 8 & Ex. E. Indeed, the panel
18 Professor Gonzalez hosted entitled “What to Do When Your Colleague is *Branded* A Racist”
19 aimed to address the fact that, *prior* to any of the allegedly “retaliatory” actions Defendants are
20 alleged to have taken in this case, *others* had reacted to Plaintiff’s work by calling her a racist.
21 Gonzalez Decl. ¶ 11. The transcript submitted by Plaintiff shows that Gonzalez explicitly said,
22 “I’m not going to call her a racist.” Weiss Decl. Ex. 5 at 13. He went on to explain that “she’s
23 making some classic scientific racist arguments in her work,” *id.*, and that it’s “scientific racism,
24 so it’s a sort of racism that’s subtle and couched in the language of scientific research.” *Id.* at 38.
25 To whatever extent Plaintiff’s reputation has been damaged, Defendants have not contributed to it,
26 and enjoining them from enforcing the Directive or engaging in wholly speculative “further
27 retaliation” would not ameliorate it.

28

1 Plaintiff has also asserted that her loss of “assigned time” constitutes irreparable harm that
2 “will never be recovered.” PI Motion at 21. But even absent any injunction, Professor Gonzalez
3 has already indicated that he will look into assigned time for Plaintiff’s curational work on the
4 Carthage Collection. Gonzalez Decl. ¶ 26 & Ex. M. There is also no evidence that her assigned
5 time was cancelled in retaliation against her; rather, the evidence shows that *both Plaintiff and*
6 *Defendant Sunseri, the NAGPRA Coordinator*, lost their assigned time when the Anthropology
7 Department obtained funding for and hired a full-time Tribal Liaison. Gonzalez Decl. ¶ 6; Sunseri
8 Decl. ¶ 15. Plaintiff received assigned time for collections curation only for one semester each in
9 the 2019-20 and 2020-21 academic years. Gonzalez Decl. ¶ 6; Sunseri Dec. ¶ 15. And, when
10 Professor Gonzalez informed Plaintiff about the loss of her assigned time, Plaintiff said nothing in
11 her response to indicate that she was displeased with this change, much less that it would
12 irreparably harm her. Gonzalez Decl. ¶ 20 & Ex. G. In fact, Plaintiff previously indicated she did
13 not want to apply for assigned time on a regular basis, because she plans to retire soon. Gonzalez
14 Decl. ¶ 6 & Ex. D.

15 **D. The Balance of Equities and Public Interest Weigh Heavily Against Granting**
16 **Plaintiff’s Motion**

17 The final two factors in the preliminary injunction analysis—the balance of equities and
18 the public interest—weigh against Plaintiff’s request for injunctive relief. Courts “must balance
19 the competing claims of injury and must consider the effect on each party of the granting or
20 withholding of the requested relief.” *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987). Any
21 harm to Plaintiff is, as discussed above, minimal. She has already identified and begun research on
22 a suitable replacement collection. Any damage to her reputation has little to do with Defendants.
23 Her assigned time was never significant to begin with. And her speculative claims that she will be
24 irreparably harmed by retaliatory actions from Defendants in the future have no basis in fact.

25 Defendants, by contrast, would suffer substantial hardship were they to be enjoined from
26 enforcing the Directive. “[A]ny time a State is enjoined by a court from effectuating statutes
27 enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*,
28 567 U.S. 1301, 1303 (2012) (citation omitted). The Directive was duly enacted to effectuate

1 CalNAGPRA, as amended by AB 275. To be enjoined from enforcing the Directive would cause
2 irreparable injury to SJSU as a State entity. Plaintiff asserts that the government “cannot suffer
3 harm from an injunction that merely ends an unlawful practice.” PI Motion at 27 (citing *Rodriguez*
4 *v. Robbins*, 715 F.3d 1127, 1145–46 (9th Cir. 2013)). But, as the foregoing discussion shows, the
5 Directive is not unlawful; to the contrary, the relief Plaintiff requests would *require* Defendants to
6 engage in an unlawful practice by refusing to defer to the Tribes as required by CalNAGPRA.

7 The University’s dialogue with the NAHC illustrates the seriousness of the University’s
8 legal obligations and the imminence of harm to the University if it were to be enjoined from
9 enforcing its Directive. Provost Del Casino was engaged by the NAHC, a state regulatory board
10 with jurisdiction concerning compliance with CalNAGPRA, to explain the steps the University
11 would take to comply with CalNAGPRA following Plaintiff’s September 2021 tweet. Del Casino
12 Decl. ¶ 13. Del Casino testified before this body to assure NAHC of the University’s compliance
13 with CalNAGPRA, while also defending Plaintiff’s right to express her opinions. Del Casino
14 Decl. ¶ 17 & Ex. L. From the NAHC’s perspective, the University’s Directive encompassed the
15 bare minimum of what the University was required to do under CalNAGPRA. Del Casino Decl.
16 ¶¶ 13, 17 & Exs. H, L. To openly defy the NAHC could lead to lawsuits against the University
17 seeking to enforce its obligations under CalNAGPRA. Thus, to enjoin the University from
18 enforcing its lawful Directive could result in great hardship to it: inconsistent legal obligations and
19 costly litigation to reconcile them.

20 It is also in the public interest to comply with CalNAGPRA by enforcing the Directive as
21 the Tribes and NAHC have requested. The California Legislature, in passing AB 275, expressed
22 very clear intent that consultation with and deference to the Tribes prior to the repatriation of
23 remains was paramount and must be prioritized *over* research interests. *See supra* at 3. It “is in the
24 public interest that federal courts of equity should exercise their discretionary power with proper
25 regard for the rightful independence of state governments in carrying out their domestic policy.”
26 *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943). *See also Golden Gate Rest. Ass’n v. City & Cty.*
27 *of San Francisco*, 512 F.3d 1112, 1127 (9th Cir. 2008) (“We are not sure on what basis a court
28 could conclude that the public interest is not served by an ordinance adopted [via unanimous vote

1 by San Francisco Board of Supervisors and signature by the mayor].”). Enjoining the enforcement
 2 of the Directive would directly contravene the California Legislature’s intent by requiring that
 3 SJSU act contrary to the recommendations of the Tribes.

4 This Court must also take into account the harm to absent parties that would result from
 5 the granting of injunctive relief. If “an injunction is asked which will adversely affect a public
 6 interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court
 7 may in the public interest withhold relief until a final determination of the rights of the parties,
 8 though the postponement may be burdensome to the plaintiff.” *Yakus v. United States*, 321 U.S.
 9 414, 440 (1944). From the Tribes’ perspective, permitting Plaintiff access to the remains and
 10 allowing her to photograph them would irreparably harm them by permanently damaging the
 11 human remains to which they are entitled. Sunseri Decl. ¶ 16 (explaining Tribes’ view that “taking
 12 and use of conventional photographs, [is] disrespectful of and potentially damaging, in a spiritual
 13 sense, to their ancestors’ remains.”); *see also United States v. Jenkins*, 714 F. Supp. 2d 1213, 1222
 14 (S.D. Ga. 2008) (“Harming Native American artifacts would constitute an irreparable injury
 15 because artifacts are, by their nature, unique, and their historical and cultural significance make
 16 them difficult to value monetarily.”). Consultations with the Tribes reflect their uniform agreement
 17 that the provisions of the Directive are necessary to protect their ancestors’ remains. Sunseri Decl.
 18 ¶ 9 & Ex. G. The irreparable harm to the Tribes that would occur if Plaintiff’s requested relief
 19 were granted—intrusive, disrespectful, and potentially damaging handling of their ancestors’
 20 remains and possible delay in their repatriation, *see* Sunseri Decl. ¶ 17—further demonstrates why
 21 the Muwekma Ohlone Tribe is an indispensable party.

22 **IV. CONCLUSION**

23 Plaintiff’s Motion for a Preliminary Injunction should be denied.

24 DATED: February 24, 2022

MUNGER, TOLLES & OLSON LLP

25 By: /s/ Bradley S. Phillips

BRADLEY S. PHILLIPS

26 Attorneys for Defendants
 27
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