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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ELIZABETH WEISS,

Plaintiff,

v.

STEPHEN PEREZ, in his official capacity as Interim President of San Jose State University; VINCENT J. DEL CASINO, in his official capacity as Provost of San Jose State University; WALT JACOBS, in his official capacity as Dean of the College of Social Sciences at San Jose State University; ROBERTO GONZALES, in his official capacity as Chair of the Department of Anthropology at San Jose State University, CHARLOTTE SUNSERI, in her official capacity as NAGPRA Coordinator at San Jose State University, and ALISHA MARIE RAGLAND, in her official capacity as Tribal Liaison at San Jose State University,

Defendants.

No. 5:22-cv-00641-BLF

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date: April 28, 2022
Time: 9:00 a.m.
Location: Location: Courtroom 3, 5th Floor
Judge: Hon. Beth Labson Freeman

Date Action Filed: January 31, 2022
Trial Date:

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INTRODUCTION

Defendants seek to shield their unconstitutional retaliatory actions by claiming this case must be dismissed with prejudice since the Muwekma Ohlone Tribe must and cannot be joined. But Defendants should not be allowed to evade accountability for their unconstitutional behavior by claiming that a tribe made them do it. This effort to evade review for a violation of Professor Weiss's First Amendment rights is manifestly against "equity and good conscience" and in no way required by Rule 19. The Tribe has no legally protected interest in this lawsuit since Professor Weiss does not challenge the validity of CalNAGPRA or the Tribe's right to the eventual repatriation of the remains in SJSU's collection. And the Tribe has no interest in preventing her from conducting pre-repatriation research which CalNAGPRA expressly allows. Even if the Tribe has some marginal interest in Professor Weiss's research, any prejudice to the Tribe would be miniscule. The Tribe's interests are also adequately represented in this case because Defendants have vigorously argued that CalNAGPRA requires total deference to the Tribe. Defendants also claim that they may be subject to inconsistent rulings if this lawsuit proceeds, but Defendants are entitled to immunity from suit so long as they repatriate in good faith.

Defendants' arguments on the merits fare no better. Professor Weiss's complaint adequately alleges all the elements required to establish that Defendants unconstitutionally retaliated against her and threaten to do so again. Defendants admit that Professor Weiss spoke on matters of public concern related to repatriation and the handling of Native American remains. And Professor Weiss clearly alleges that her speech motivated Defendants' actions against her in light of the proximity of Defendants' actions to her speech, their repeated hostile remarks, and the pretextual nature of Defendants' outrage over her tweet given similar images located on the anthropology department's own website. And there is every reason to believe that additional evidence will come out in discovery. Defendants repeatedly urge the Court to improperly weigh the evidence in their favor at the motion-to-dismiss stage. Professor Weiss states a viable claim, and her case must proceed.

BACKGROUND

Professor Elizabeth Weiss is an Anthropology Professor specializing in the study of bones and the coordinator of San Jose State University's collection of skeletal remains. In response to

Professor Weiss's speech, including the publication of a book and op-ed against repatriation and a tweet sharing a photograph of her smiling while holding a skull from the collection, Defendants adopted a restrictive directive which completely bars Professor Weiss's access to the curational facility and severely limits or eliminates her ability to conduct her research. Professor Weiss alleges that this policy was retaliatory in light of the timing of the University's actions and Defendants' ongoing threats against Professor Weiss if she continues to share her views on repatriation and the disposition of Native American remains.

Professor Weiss recognizes the fact that many of the remains in SJSU's collection are subject to CalNAGPRA and that these remains may soon be repatriated. Professor Weiss merely seeks access to these remains to conduct research that will neither harm the remains nor delay repatriation.

ARGUMENT

I. This Case Should Not Be Dismissed Under Rule 19

Rule 19 "dismissal is a drastic and disfavored remedy," *Lovell v. GEICO Gen. Ins. Co.*, No. 12-CV-00546V, 2016 WL 3892868, at *4 (W.D.N.Y. July 13, 2016) (internal quotations omitted) (citing *Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 111–12 (1968)), for which "the moving party has the burden of persuasion." *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992). A case should be dismissed for nonjoinder only if the absent party is (1) necessary, (2) infeasibly joinable, and (3) indispensable. Fed. R. Civ. Pro. 19. The Muwekma Ohlone Tribe meets none of these elements.

The Tribe is not a necessary party because it lacks a legally protected interest in the subject of this case, and if the Tribe does have such an interest, the existing Defendants adequately represent its interest without risk of incurring inconsistent obligations. It is not infeasibly joinable because its sovereign immunity does not extend to the subject matter of this lawsuit. It is not indispensable because equity and good conscience require this case to proceed to allow Professor Weiss to vindicate her constitutional rights.

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A. The Tribe Is Not a Necessary Party

i. Defendants cannot establish that the Tribe, under CalNAGPRA, can claim a legally protected interest in the subject of this action

As a threshold issue, a necessary party must claim a legally protected interest relating to a lawsuit's subject. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983). The "legally protected interest" inquiry is "practical and fact-specific." *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 970 (9th Cir. 2008) (quotations omitted). A "legally protected" interest has more than "merely some stake in the outcome of the litigation." *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 996 (9th Cir. 2020). The Tribe's interest must be "substantial." *Cachil Dehe Band*, 547 F.3d at 970. A decision should "have 'retroactive effects' on rights already enjoyed by a tribe," not merely an impact on a hypothetical future interest. *Jamul*, 974 F.3d at 997. *See also Ward v. Apple Inc.*, 791 F.3d 1041, 1052 (9th Cir. 2015). Mere concern over "compliance with administrative procedures" cannot suffice. *Cachil Dehe Band*, 547 F.3d at 971.

Defendants argue that this Court should presume the Tribe has a legally protected interest without examining the "merit of the absent party's claim" so long as their claim is not "patently frivolous." Motion to Dismiss (MTD) at 9. But "Rule 19 cannot be applied in a vacuum, and it may require some preliminary assessment of the merits of certain claim[ed interests]." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 868 (2008). *See also Moore's Federal Practice* § 19.03[3][b] (3rd ed. 2006) ("This interest must be 'legally protected, not merely a financial interest or interest of convenience.'"). And recent Ninth Circuit cases, such as *Jamul*, have reemphasized that the term "legally protected interests" excludes claims with merely "some stake in the outcome of the litigation," *Jamul*, 974 F.3d at 996, not only "patently frivolous" claims.

Defendants rely on cases where determining whether an absent party had a legally protected interest required examination of "the underlying merits of the litigation." *Davis ex rel. Davis*, 343 F.3d 1282, 1291 (10th Cir. 2003). *See Shermoen*, 982 F.2d at 1317–18 (plaintiffs challenged a statute as unconstitutional, absent tribe claimed an interest in the challenge, and court dismissed because plaintiffs argued the tribe had no interest due to the statute's unconstitutionality), *Quileute*

Indian Tribe v. Babbitt, 18 F.3d 1456, 1458–59 (9th Cir. 1994) (same), *White v. Univ. of California*, 765 F.3d 1010, 1026–27 (9th Cir. 2014) (plaintiffs argued skeletal remains were not "Native American" under NAGPRA, absent tribes claimed an interest in resolving this issue, and court dismissed for failure to join necessary parties). *See also Washington v. Daley*, 173 F.3d 1158, 1167 n.10 (9th Cir. 1999) (refusing to resolve a question of treaty interpretation that was "the central dispute in these cases"). In that context, a cursory look at the validity of the legal claim makes sense because resolving the threshold question of whether the tribe has a legally protected interest requires resolution of the underlying legal dispute, which would prejudice the absent tribe. In other words, "[t]he prejudice to the [absent party] if the plaintiffs are successful stems from the same legal interests that makes the [absent party] a necessary party to the action." *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991).

By contrast, in *Cachil Dehe Band*, the Ninth Circuit rejected the government's proffered interpretation of a gaming compact and therefore concluded that other tribes had no legally protected interest in the lawsuit. 536 F.3d at 1043. In doing so, the Court emphasized that the plaintiff "does not seek to invalidate compacts to which it is not a party" and that therefore its lawsuit "may affect other tribes only incidentally." *Id.*

Similarly, Professor Weiss does not challenge the legality of CalNAGPRA or the validity of the Tribe's interest in repatriation. Rather, she challenges the constitutionality of the University's interim directive as applied to her. A decision in her favor would not "invalidate" any tribal agreement and would impact the tribe "only incidentally." Accordingly, determining the nature and extent of the Tribe's legally protected interests under CalNAGPRA would not "render the Rule 19 analysis an adjudication on the merits." *Wach v. Byrne, Goldenberg & Hamilton, PLLC*, 910 F. Supp. 2d 162, 170 (D.D.C. 2012). In any event, Defendants' claim that the Tribe has a legally protected interest in the subject of this case is also "patently frivolous."

Under CalNAGPRA's plain text, the Tribe's interest in handling and treatment of remains relates only to the inventory and repatriation process, not scientific research. *See* Cal. Health & Safety Code § 8013(a), (b)(1)–(2), (c)(1)–(2); § 8016(a), (d); § 8018. CalNAGPRA requires universities to consult with tribes regarding the process of returning remains to the tribes, but it

does not give the Tribe an interest in blocking ongoing research. Although CalNAGPRA itself "does not authorize the initiation or completion of . . . scientific study of human remains," Cal. Health & Safety Code § 8013(g)(1), it does not prohibit such study. To the contrary, the law recognizes that scientific research will continue even after the inventory is completed and that once a request for repatriation is made "[s]cientific research shall be concluded within a reasonable period of time." *Id.* § 8016(a)(4). CalNAGPRA also incorporates federal regulations which create a further exemption for remains that are "indispensable to the completion of a specific scientific study, the outcome of which is of major benefit to the United States." 43 C.F.R. § 10.10(c)(1). If a university determines that remains in its collection fall under this exception, then the remains must only "be returned no later than ninety (90) days after completion of the study." *Id.*

Accordingly, CalNAGPRA does not give the Tribe any legally protected interest in preventing research at SJSU. Indeed, so long as SJSU complies in good faith with the requirements of CalNAGRPA regarding the inventory and consultation process, it is wholly immune from any claim regarding "the improper disposition of human remains or cultural items." Cal. Health & Safety Code § 8018. There is no room to read into CalNAGPRA a presumption that a university's decision to research remains before repatriation is an act of bad faith.

Defendants allege CalNAGPRA vests the Tribe with an interest in "minimizing handling" and that allowing Professor Weiss to conduct research would violate this provision. But this argument contradicts the statutory text and is therefore "patently frivolous." *See Quality Jeep Chrysler, Inc. v. Chrysler Grp., LLC*, No. 110CV00900PJKRHS, 2011 WL 13289843, at *3 (D.N.M. Mar. 22, 2011) (plaintiff's assertion that party it sought to join as necessary defendant had sufficient interest was patently frivolous where "[n]othing in the plain language of the statute . . . implicates the [party's] interests"). The regulation on "minimizing handling" only applies to the "protocols" for "new or additional inventory work" related to repatriation, not research. Cal. Health & Safety Code § 8013(b)(B). In contrast, CalNAGPRA does require the "Regents of the University of California" to adopt policies "regarding the respectful and culturally appropriate treatment of Native American human remains and cultural items" which includes "policies regarding research requests." *Id.* § 8025. But this section only applies to the UC system and not to SJSU. And the

existence of Section 8025 shows that where CalNAGPRA was intended to apply to research, the legislature said so with specificity.

The only way research of remains could implicate the Tribe's interests is if the research will damage or delay repatriation of remains. Defendants allege, without evidence, that Professor Weiss's access to remains "could . . . result in damage" and will "potentially delay repatriation." MTD at 9. But Professor Weiss has worked with these remains for 18 years, and there is no evidence that she has ever damaged the remains or unduly delayed repatriation. *See* Suppl. Weiss Decl. ¶¶ 5, 6, 45, Ex. 2 (providing examples where Professor Weiss has helped to facilitate the repatriation of remains). Without more, these allegations are "speculation about a future event," *Cachil Dehe Band*, 547 F.3d at 970, which cannot support a claim to a legally protected interest. *Id.*

Professor Weiss does not ask the court to enjoin the inventory protocol that the University has set in consultation with the Tribe. Granting her relief would not delay the inventory, which is already complete anyway. Weiss Suppl. Decl. ¶ 44. Instead, Professor Weiss wishes to conduct research that CalNAPGRA allows, and which she will conclude "within a reasonable period of time," Cal. Health & Safety Code § 8016(4), without causing "delay [to] the repatriation of items." *Id.* at § 8013(j)(4).

The University went far beyond the requirements of CalNAGPRA when it adopted a requirement that any research "will require written approval of the NAGPRA Coordinator and Tribal Liaison after consultation and required affirmation by Tribal leaders." Ortner Suppl. Decl. ¶¶ 2–5. The Tribe has no statutory entitlement to this policy and a narrow injunction to prevent Defendants from engaging in unconstitutional retaliation will not impinge on any legally protected interest that CalNAGPRA vests with the Tribe.

ii. The Tribe is or could be adequately represented

If the Rule 19(a)(1)(B) threshold issue is met, the absent party is necessary if it "is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). "An absent party with an interest in the action is not a necessary party . . . if the absent party is adequately represented in the suit." *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1180 (9th

Cir. 2012) (internal quotation omitted). When an absent party shares "the same ultimate objective" with the existing parties, "a presumption of adequate representation applies." *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011). This presumption has particular force "when the representative is a governmental body or officer charged by law with representing the interests of the absentee." *United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 401 (9th Cir. 2002). These cases concerning "adequate representation" arise in the context of intervention under Rule 24. But there is no reason that the same presumption should not apply to Rule 19. Indeed, since the consequence of finding inadequate representation is far more severe (dismissal of the case rather than allowing intervention), any presumption should have greater force in the context of Rule 19.

Defendants' actions and their stated positions in this lawsuit demonstrate complete alignment of interests. Defendants have concluded that they will defer to tribal interests in every respect, even going so far as adopting inventory protocols that accord with tribal religious practices by discriminating against menstruating women. Sunseri Decl. ¶ 8, Ex. E. And in this lawsuit, Defendants have adopted an extraordinarily expansive interpretation of CalNAGPRA, arguing that it bars all research unless expressly authorized by the Tribe. This is not a case where the Tribe's interest and the Defendants' interest serendipitously line up but may diverge at a future point. Instead, Defendants' position is that it is bound by statute to adopt the Tribe's policies as its own, showing the University "is capable of and willing to make [the Tribe's] arguments." *Lee*, 672 F.3d at 1180. Thus, there is no daylight between the Tribe's and the Defendants' interests, so the University "will undoubtedly make all of the [Tribe's] arguments." *Id.*

Defendants speculate about a potential future conflict. For instance, Defendants speculate that the University might not appeal a judgment in Professor Weiss's favor. But Defendants can point to no evidence showing that they are "less than enthusiastic" about defending the interim directive. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997). To the contrary, the facts of this case indicate "forceful, persistent, and proactive support" for the interim directive and the Tribe's alleged interests under CalNAGPRA. *Id.* Defendants therefore fail to rebut the presumption of adequate representation, and even if this presumption did not apply

Defendants fail to clear even the "minimal" burden of establishing inadequate representation. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972).

Even if Defendants do not adequately represent the Tribe's interests, there are other parties that could be joined that would, including the Commissioner or other officers of the California Native American Heritage Commission, or officers of the Muwekma Ohlone Tribe who could be sued in their official capacities. As shown in its October 11, 2021, letter, the NAHC has vigorously advocated for the Tribe's interests, including calling for even more draconian actions to be taken against Professor Weiss. Del Casino Decl. Ex. H. And it is well established that "[w]hen tribal officers are properly sued in their official capacities under *Ex parte Young*, their interests align with those of the [absent] tribe, and they may adequately represent the tribe's interests." *Jamul*, 974 F.3d at 997. Accordingly, if the Court rules for Defendants it should allow Professor Weiss to amend her complaint to add such Defendants.

iii. Defendants are not at risk of incurring double, multiple, or otherwise inconsistent obligations

If the Rule 19(a)(1)(B) threshold issue is met, the absent party is necessary if it "is so situated that disposing of the action in the person's absence may . . . (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1)(B)(ii). Defendants have not shown the University faces such risk if this case proceeds without the Tribe.

CalNAGPRA provides the Tribe with "no legal entitlement to any given set of procedures." *N. Alaska Env't Ctr. v. Hodel*, 803 F.2d 466, 469 (9th Cir. 1986). Instead, the law merely mandates that a university will consult with the tribes as part of completing or updating an inventory for repatriation. Consultation is defined as "the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, achieving agreement." Cal. Health & Safety Code § 8012(e). In other words, the University must carefully consider the tribes' views regarding the inventory process, but it is not bound by those views. Indeed, AB 275 recognizes that agreements will not always be feasible. *See* Cal. Health & Safety Code § 8012(e). By consulting with the tribe, Defendants have

fulfilled any obligation under CalNAGPRA.

Even if the Tribe were aggrieved by the policy that the University adopted, it would have no further legal recourse. The Tribe is entitled to mediation and a review by the Native American Heritage Commission for disputes that arise over the proper cultural attribution of artifacts. Cal. Health & Safety Code §§ 8016(d)(7), 8029(a), (c). But the law does not give tribes a mechanism to challenge policies regarding research. And as already mentioned, SJSU is immune from any lawsuits concerning repatriation so long as it has followed CalNAGPRA in good faith, and the statute provides no basis to conclude that researching remains before repatriation is per se bad faith (quite the contrary). This "statutory scheme . . . specifically precludes civil liability for . . . particular conduct [and] accords . . . absolute immunity, [such that] the [tribes] may not sue . . . by challenging the way the [University] performed the immunized act." 1A Cal. Jur. 3d Actions § 68 (citing *Harris v. Verizon Commc'ns*, 46 Cal. Rptr. 3d 185 (Cal. Ct. App. 2006)). And as already discussed, any claim that Professor Weiss would damage the remains or delay repatriation is baseless speculation. Defendants have therefore not met their burden to show the University is at risk of inconsistent obligations.

B. If the Tribe Is a Necessary Party, It Does Not Enjoy Sovereign Immunity

Tribal sovereign immunity "concern[s] activities affecting tribal self-governance and economic development, not activities affecting the governance and development of another sovereign." *Fair Political Practices Comm'n v. Agua Caliente Band of Cahuilla Indians*, No. 02AS04545, 2003 WL 733094, at *5 (Cal. Super. Ct. Feb. 27, 2003) (citing *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Oklahoma*, 493 U.S. 505 (1991), and *Puyallup Tribe, Inc. v. Dep't of Game of Washington*, 433 U.S. 165 (1977)). In this case, Defendants argue that a public university is required to defer to the demands of a Tribe even if the Tribe demands violation of the First Amendment. Granting tribal immunity here would improperly give tribes unreviewable control over the management of a state's personnel and property and undermine civil rights.

C. The Tribe Is Not an Indispensable Party under Rule 19(b)

Rule 19 was "designed to avoid" an "inflexible approach" that would require dismissal any time a necessary party could not be joined. *Provident Tradesmens*, 390 U.S. at 107. Thus, even

when a party is "necessary," dismissal is only appropriate if that party is "indispensable." *Id.* at 119. A party is indispensable only when the "party's absence leaves the controversy in such a condition that its final determination is wholly inconsistent with equity and good conscience." *Trans Pac. Corp. v. S. Seas Enters., Ltd.*, 291 F.2d 435, 436 (9th Cir. 1961). If a court can decide a case without causing prejudice "it will be done" and the court should "strain hard to reach that result." *Bourdieu v. Pac. W. Oil Co.*, 299 U.S. 65, 70 (1936).

Defendants claim Rule 19 "almost always favors dismissal" when a tribe is involved. MTD at 14. But the cases Defendants cite did in fact discuss the Rule 19 factors in detail and found the tribe's interest compelling due to that case's particular circumstances. For instance, in *Jamul*, 974 F.3d at 998, the Ninth Circuit emphasized that the "claims go directly to the [tribe's] most important interests" including the tribe's "status as a federally recognized tribe and its ownership of land" and that therefore it would be highly inequitable to proceed without the tribe. By contrast, in this case, not only does "equity and good conscience" allow the Court to proceed without the Tribe, but failing to do so would itself be "inconsistent with equity and good conscience" because it would allow Defendants to escape accountability under the First Amendment.

i. Neither the Tribe nor Defendants will be prejudiced by a judgment in Professor Weiss's favor

As already discussed above, the Muwekma Ohlone Tribe has no legal interest in preventing Professor Weiss's research. But even if the Tribe has some attenuated interest in whether research continues until repatriation, any prejudice will be minimal as the remains have already been inventoried and will soon be repatriated. This case is not at all like the cases which Defendants rely on where the prejudice to the tribe would be "enormous," *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002), "go directly to the [tribe's] most important interests," *Jamul*, 974 F.3d at 998, or "impair [the tribe's] . . . fundamental economic relationship with [the state] [and] . . . its economic well-being." *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002). Defendants similarly will not suffer undue prejudice because they will not be subject to inconsistent obligations, as already discussed above.

ii. Any prejudice is minimized by the narrow remedy sought

Moreover, relief could be crafted in such a way as to minimize any adverse impact on the Tribe. Professor Weiss seeks a limited injunction that would give her access to the University's curation facility to conduct research and photography. Professor Weiss is willing to abide by any reasonable policies or time limits that Defendants would put in place so long as those policies do not deprive her of her First Amendment rights. Weiss Suppl. Decl ¶ 19.

iii. Any judgment rendered without the Tribe would be adequate

Judgment rendered in this case would offer full relief without including the Tribe as a defendant. Unlike in many of the cases that Defendants cite, there is no need for an injunction against the Tribe. The remains are in the custody and control of Defendants, so only Defendants and the interim directive stand in the way of Professor Weiss's research. And Professor Weiss does not seek to prevent the University from consulting with the Tribe or working with the Tribe to repatriate the remains. She therefore neither needs nor wants an injunction against the Tribe. This weighs in favor of allowing Professor Weiss's claims to proceed. *See Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs.*, 932 F.3d 843, 858 (9th Cir. 2019) ("A judgment rendered in NTEC's absence would be adequate and would not create conflicting obligations, because it is Federal Defendants' duty, not NTEC's, to comply with NEPA and the ESA"). And as already discussed above, there is no serious threat of a lawsuit by the Tribe against the University in light of the statutory immunity that SJSU enjoys.

iv. Professor Weiss would not have an adequate remedy if the action were dismissed for nonjoinder

It would be manifestly against "equity and good conscience" to dismiss Professor Weiss's case for nonjoinder of the Tribe, thereby denying her the opportunity to seek relief for her well-pleaded claim of a First Amendment violation. Dismissal would leave Professor Weiss without any forum to vindicate her rights and therefore the Court should be "extra cautious" before adopting this extreme approach. *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996).

As the Ninth Circuit has noted, when fundamental constitutional rights are at stake, this factor weighs against dismissal and "[t]his factor is not a light one." *Manybeads v. United States*, 209 F.3d 1164, 1166 (9th Cir. 2000). If Professor Weiss's claim is dismissed, then SJSU and other

public universities could infringe fundamental rights with impunity so long as tribal interests are indirectly or tangentially implicated. Universities could bar researchers from accessing their collections based solely on the viewpoint that those researchers have expressed, limit access based on ethnicity or sex (as SJSU has done by barring menstruating researchers), and enshrine tribal religious traditions into law. Rule 19 does not require the creation of a constitution-free zone. Dismissing this case would also incentivize Defendants to take further retaliatory action against Professor Weiss, as they would know that they can evade review so long as a tribe requested it and had some ill-defined interest.

D. The Public Rights Exception Applies

The public rights exception applies even if the Tribe is deemed indispensable. This exception exists "because of the tight constraints traditional joinder rules would place on litigation against the government," which is precisely the consequence that strict application of Rule 19 would have in this case. *Conner v. Burford*, 848 F.2d 1441, 1459 (9th Cir. 1988). Because such lawsuits are "restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Nat'l Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 363 (1940).

To trigger this exception, "the litigation must transcend the private interests of the litigants and seek to vindicate a public right." *Kescoli*, 101 F.3d at 1311. In such a case, "[t]he litigation may adversely affect the absent parties' interests," *id.*, so long as it does "not destroy the legal entitlements of the absent parties." *Id.* Professor Weiss's case falls within this exception.

Professor Weiss's case is solely focused on "vindicat[ing] a public right," namely, Professors' right to academic freedom without fear of retaliation for their research, publications, and speech. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned"). This is also a case where relief does not "destroy the legal entitlements of the absent parties," as even if Professor Weiss prevails, the Tribe will still be able to repatriate the remains. That fact sets this case apart from other cases where the Ninth Circuit has refused to apply the public rights exception. For instance, in *White*, 765 F.3d at 1023, a ruling

against the tribe would have meant that the tribe's interest in having the skeletal remains be considered "Native American" under NAGPRA would have been "extinguished." By contrast, the Tribe in Professor Weiss's case will suffer no permanent deprivation if it is not joined.

E. Dismissal with Prejudice is Improper

Finally, if the Court were to find that the Tribe is an indispensable party, the proper remedy would still not be dismissal of Professor Weiss's claims as Defendants have requested. Professor Weiss argues that Defendants have taken or threatened to take a variety of retaliatory actions against her, including eliminating course release credit, tarnishing her academic standing and reputation, and threatening to retaliate against her if she teaches her views on repatriation in her classroom. The Tribe has no interest whatsoever in the resolution of any of those claims. Thus, even if the Court agrees with Defendants' joinder arguments, it should allow the case to proceed focused on the future threats against Professor Weiss. Alternatively, dismissal without prejudice could allow her to amend her complaint to eliminate any requests that implicate the Tribe's interest.

Another reason that dismissal at this point is improper is that there may be factual developments concerning "the practical effects of an adjudication upon [the tribe]" which make it "appropriate to defer decision until the action [h]as further advanced," rather than dismissing this case with prejudice. Advisory Committee Notes to the 1966 Amendment to Rule 19.

II. Professor Weiss has Stated a Plausible Claim of First Amendment Retaliation

Dismissal under Rule 12(b)(6) for failure to state a claim is only proper where there is either "a lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2 696, 699 (9th Cir. 1988). When reviewing a 12(b)(6) motion to dismiss, courts "accept all well-pleaded allegations of material fact as true and construe them in the light most favorable to the nonmoving party." *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 783 (9th Cir. 2012). The motion must be denied if the complaint contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted).

Professor Weiss's Complaint sets forth sufficient allegations to support a cognizable legal theory of First Amendment retaliation. Such retaliation can be shown by allegations that Professor

Weiss's protected expression was a substantial or motivating factor behind adverse action taken against her. *Demers v. Austin*, 746 F.3d 402, 417 (9th Cir. 2014). If she can make such a showing in later proceedings, Defendants would then face the burden of showing that they would have taken such adverse action absent the protected speech. *Id.*; *see also Anthoine v. N. Cent. Ctys. Consortium*, 605 F.3d 740, 752 (9th Cir. 2010).

Courts have repeatedly recognized that this inquiry is "a context-intensive, case-by-case balancing analysis," *Eng v. Cooley*, 552 F.3d 1062, 107 n.6 (9th Cir. 2009), so "the Court can rarely perform the *Pickering* balancing on a motion to dismiss." *Guadalupe Police Officer's Ass'n v. City of Guadalupe*, No. CV108061GAFFFMX, 2011 WL 13217672, at *10 (C.D. Cal. June 8, 2011). *See also Decotiis v. Whittemore*, 635 F.3d 22, 35 n. 15 (1st Cir. 2001) ("the *Pickering* balancing test ... does not easily lend itself to a dismissal on a Rule 12(b)(6) motion"). Accordingly, dismissal under 12(b)(6) is improper so long as plaintiffs "have met their burden as to establishing that the speech in question is protected based on the pleadings." *Montclair Police Officers' Ass'n v. City of Montclair*, No. CV126444PSGPLAX, 2012 WL 12888427, at *7 (C.D. Cal. Oct. 24, 2012).

Defendants do not dispute that Professor Weiss's speech is protected, instead only disputing whether the Complaint adequately alleges that the speech was a substantial or motivating factor behind Defendants' adverse action. But the Complaint contains sufficient factual allegations that, if true, show that Professor Weiss's protected speech was a substantial or motivating factor behind Defendants' adoption and enforcement of the interim directive as well as other retaliatory action such as her loss of course release credit.

Professor Weiss's complaint properly alleges retaliation in three ways. First, she alleges that her speech and the University's actions were "proximate in time." Second, she alleges that Defendants expressed opposition to her speech. Third, she alleges that the reasons Defendants claimed for their actions were false and pretextual. Professor Weiss also credibly alleges that Defendants have threatened to further punish her if she continues to teach her views on repatriation.

A. The Complaint Sufficiently Alleges that Events Were Proximate in Time

The Complaint alleges temporal proximity. Professor Weiss engaged in at least three specific instances of protected expression relevant to this dispute: her book critiquing repatriation

policies published in 2020, Complaint ¶ 20, her op-ed repeating those critiques on August 31, 2021 (which was also shared on Twitter), Complaint ¶ 31, and her tweet on September 18, 2021, which showed a picture of her holding a skull. Complaint ¶ 32. The Complaint alleges, and Defendants concede, that the University was aware of each of these instances and the controversy that each evoked. Complaint ¶¶ 23, 31, 33; *see Allen v. Iranon*, 283 F.3d 1070, 1076 (9th Cir. 2002) ("In order to retaliate against an employee for his speech, an employer must be aware of that speech").

Defendants claim that their actions could not have possibly been retaliatory since Professor Weiss has spoken about repatriation for years. MTD at 2, 19. But this ignores allegations regarding the firestorm of controversy that arose over the book, the op-ed, and the tweet, and the related pressure placed upon the University to act against Professor Weiss just before the Defendants did take action. The temporal proximity between the public controversy and the adverse action should be considered in determining whether Professor Weiss survives a motion to dismiss. *See Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 757 (9th Cir. 2001) (Fletcher, J., concurring in part) ("Nothing in our precedent compels us to measure from [the time of the protected speech] in every case. . . . [A] plaintiff should be able to demonstrate proximity by measuring the time between the employer's adverse action and the consequences of the employee's protected action").

The interim directive was adopted on October 6, 2021, one week after Defendant Del Casino published a letter castigating Weiss for the tweet, three weeks after the tweet itself, and six weeks after the controversial op-ed. Complaint ¶ 36. The directive likewise came closely on the heels of multiple letters and emails calling for Professor Weiss to be disciplined in response to her op-ed and tweet. Complaint ¶¶ 31–32. It also came about four months after Defendant Gonzalez had expressly threatened to take action against her. Complaint ¶ 26. It is reasonable to infer from these allegations that the University's actions were a response to these recent events.

The time periods between the directive and the tweet, the op-ed, and the publication of Professor Weiss's book are well within the time range considered adequate to show retaliation. The Ninth Circuit has said that "three to eight months is easily within a time range that can support an inference of retaliation," *Coszalter v. City of Salem*, 320 F.3d 968, 977 (9th Cir. 2003), and has previously inferred retaliatory motive from an eleven-month gap between the speech and the

adverse action in one case, *Allen*, 283 F.3d at 1078, and three years in another. *Schwartzman v. Valenzuela*, 846 F.2d 1209, 1212 (9th Cir. 1988).

At minimum, the question whether the public controversy and the ensuing pressure on the University motivated the Defendants' actions is a factual one, improper to resolve at the 12(b)(6) stage. *See Coszalter*, 320 F.3d at 978 ("Whether an adverse employment action is intended to be retaliatory is a question of fact that must be decided in the light of the timing and the surrounding circumstances").

Defendants also argue that the directive was proximate in time to "mishandling" of remains, not her expression regarding repatriation. This argument disputes the truthfulness of the Complaint's factual allegations regarding the proper handling of remains, and the propriety of the photograph which at this stage in the proceedings, this Court must accept as true. Professor Weiss alleged that "[s]he and other renowned anthropologists and journalists have frequently posted similar images of scientists holding skeletal remains without controversy" and that SJSU professors had previously taken and displayed similar photographs without any uproar. Complaint ¶ 32. Defendants also claim that AB 275 changed the norms regarding proper handling of remains. But Professor Weiss has alleged that "her handling of the remains and her photograph was consistent with University practice and was not inconsistent with either NAGPRA or CalNAGPRA." Complaint ¶ 34. And in her preliminary injunction declaration, which Defendants ask this Court to consider in assessing their 12(b)(6) motion, *see* MTD at 17:4–7, Professor Weiss explained in detail why her handling and photograph were not improper. *See* Weiss Decl. ¶¶ 30, 35, Ex. 10, 12. Defendants improperly ask this Court to throw off the 12(b)(6) standard and assess the truthfulness of the Complaint.

Even if it were true that only Professor Weiss's tweet prompted the directive, and not the book or the op-ed, the allegations regarding the directive and the response to the tweet still give rise to a reasonable inference that Professor Weiss's speech was a substantial or motivating factor behind the directive. An image on social media is undoubtedly protected by the First Amendment, and "posing" for a captioned photograph for social media is, at minimum, expressive conduct because it intends to convey a message and that message is likely to be understood by social media

viewers. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974). Furthermore, Defendant Del Casino's letter, which is referenced expressly in the Complaint, links the image directly to the broader conversation about repatriation and how to properly treat human remains. *See* Weiss Decl. ¶ 33, Ex. 11. The Complaint therefore adequately alleges that the interim directive was a response to her speech.

The question of whether mishandling occurred is a mixed question of fact and law, and thus should not be resolved at the motion-to-dismiss stage. However, to the extent that alleged mishandling is a legal question dependent on the meaning of CalNAGPRA, Defendants' argument that Professor Weiss's conduct violated CalNAGPRA by failing to consult or minimize handling is without merit. As discussed at length in Professor Weiss's Reply in support of her Motion for Preliminary Injunction, her handling did not occur as part of the repatriation process, so consultation requirements and deference to tribal preferences on handling were not required. *See* Pl.'s Reply in Support of Mot. for Prelim. Inj. at 1–3, 8–9. And the declarations of four anthropologists with decades of experience studying remains submitted with Plaintiff's reply in support of her motion for preliminary injunction show that at the very least the standards for proper handling are a contested fact and not fit for a motion to dismiss.

Defendants also dispute the allegation that Professor Weiss lost course release credit claiming that Professor Weiss was going to lose this credit regardless of her speech. But Professor Weiss disputes this contention, and this is once again precisely the type of factual dispute that necessitates discovery. Weiss Suppl. Decl ¶ 37–38.

B. The Complaint Sufficiently Alleges that Defendants Opposed Professor Weiss's Speech

The Complaint contains sufficient allegations to establish that Defendants opposed Professor Weiss's speech. Opposition to speech supports an inference of retaliatory motive, whether that opposition was expressed to the plaintiff directly or to others. *Keyser*, 265 F.3d at 744. *See also Allen v. Scribner*, 812 F.2d 426, 434 (9th Cir. 1987) (denying a motion for summary judgment where a plaintiff submitted the affidavits of two co-workers showing that he had been removed from a particular project "because of the way in which he expressed his opinions").

Here, the Complaint concretely alleges that Defendant Gonzalez opposed Professor Weiss's speech. In a Zoom meeting among college administrators specifically focused on Professor Weiss and "what to do" with situations like hers, he agreed with a colleague that allowing her to teach the views expressed in her book would be unethical. Complaint ¶¶ 23–25. After expressing regret that he could do nothing about her tenured status, he said he would "have a very different approach" if she tried to teach her views on repatriation in the classroom. Complaint ¶ 26. Indeed, he brainstormed during the meeting about how he might do so, such as by limiting "her capacity to do things or demand resources from the department or anybody else." Weiss Decl. Ex. 5 at 33:6–17. When asked to retract the threats made against her during this meeting, Defendant Gonzalez refused. Complaint ¶ 28. These allegations raise a reasonable inference that Professor Gonzalez opposed her speech and wanted to act against her based on that speech.

Defendants acknowledge that the Zoom meeting was about Professor Weiss. They simply choose to interpret these remarks differently or focus on remarks that allegedly support Professor Weiss's academic freedom. But the existence of such statements does not negate factual allegations establishing that he also threatened to take adverse action based on Professor Weiss's speech. A motion to dismiss is not the appropriate stage to characterize evidence. Defendants cannot prevail on a motion to dismiss by simply asking this Court to side with Defendants' reading of what transpired.

C. The Complaint Sufficiently Alleges that Claims of Mishandling Remains or Deferring to Tribal Consultations Are False and Pretextual

The Complaint adequately alleges that Defendants' justifications for the interim directive are false and pretextual. For instance, Defendant Del Casino's claim that Professor Weiss mishandled remains is shown to be pretextual by the fact that SJSU's website had several similar pictures at the time of her tweet. Complaint ¶ 32. Similarly, Defendants' claims that they were required to adopt the interim directive and enforce it against Professor Weiss is shown to be pretextual in light of the breadth of the policy in contrast to the policies adopted by other universities in California. Complaint ¶ 66.

Defendants claim that whether Defendants were legally required to adopt the interim

directive and enforce it against Professor Weiss is a legal question dependent on the meaning of CalNAGPRA. MTD at 21. This is not accurate. The Complaint alleges that the tribes were motivated to advocate for the interim directive and its subsequent enforcement because the tribes disapproved of Professor Weiss's viewpoint. *See* Complaint ¶¶ 40–46. This is evidenced by the letter from the Native American Heritage Commission calling for aggressive sanctions against Professor Weiss for her speech. Del Casino Decl. Ex. H. It is also shown by the letter from the California State University East Bay Indigenous Acknowledgment Collective, which applauded the University for acting against Professor Weiss because of her "rhetoric" expressing "harmful and distorted notions of science and academic freedom." Complaint ¶¶ 43–46. That letter was signed by two tribal authorities of the Muwekma Ohlone Tribe, one of the main tribes that called for the interim directive. *See id.* Since Defendants cannot reasonably argue that they have a statutory duty to defer to the tribes' demand to violate the First Amendment, these allegations support a valid claim for relief.

Even absent these allegations, however, the Defendants did not have a legal duty under AB 275 to adopt the interim directive or enforce it in the harsh manner that it has by barring all research, photography, and x-ray access. As discussed above, AB 275 does not bar ongoing research of Native American remains, even after the tribes have initiated the repatriation process. And Professor Weiss alleges that Defendants' retaliatory actions go well beyond anything that could possibly be required by AB 275, such as barring her access to x-rays that the law does not apply to at all. *See* Cal. HSC § 8012(g) (incorporating the federal NAGRPA's definition of "cultural items" subject to repatriation); 25 U.S.C. § 3011(3) (defining "cultural items").

Defendants also argue that the other orders that Professor Weiss points to may predate AB 275 or restrict similar research endeavors. But Professor Weiss alleges several ways that SJSU's policy was crafted or has been applied to target her research and curational activity in ways distinct from other university policies, such as totally banning her access to the research laboratory or gratuitously not allowing her to access x-rays. The Complaint's allegations establish that claims of mishandling and required deference to tribal authority are false and pretextual.

D. The Complaint Sufficiently Alleges the Threat of Future Acts of Retaliation

In addition to alleging that Defendants' issuance and enforcement of the Interim Protocol was unconstitutional, Professor Weiss alleges that Defendants have threatened to take further action against her if she continues to express her views on repatriation, especially in the classroom. Complaint ¶¶ 23–28. Defendants once again argue about how to construe the facts. For instance, they argue that Gonzalez's speech was merely an academic discussion with colleagues and not a threat of further action. MTD at 24. But Plaintiff reasonably construed his remarks as a threat, especially when seen in light of the actions that Defendants have since taken against her. *See LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985) ("The likelihood that class members will suffer prospective injury is buttressed not only by the defendants' past conduct but also by the defendants' avowed future intent."). And in light of the email exchange between Defendants Ragland and Gonzalez that Defendants include with their preliminary injunction opposition, which shows the two conspiring to block Professor Weiss from conducting research, Sunseri Decl., Ex. K, discovery will likely produce additional evidence that Defendants continue to target Weiss. Her case must be allowed to proceed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2022, Opposing Counsel received the foregoing PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS via CM/ECF service.

s/ Daniel M. Ortner
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