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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO/OAKLAND DIVISION

TIMOTHY WHITE, an individual; ROBERT L. BETTINGER, an individual; and MARGARET SCHOENINGER, an individual,

Petitioners and plaintiffs,

vs.

THE UNIVERSITY OF CALIFORNIA; THE REGENTS OF THE UNIVERSITY OF CALIFORNIA; MARK G. YUDOF, in his individual and official capacity as President of the University; MARYE ANNE FOX, in her individual and official capacity as Chancellor of the University of California, San Diego; GARY MATTHEWS, in his individual and official capacity as Vice Chancellor of the University of California, San Diego; KUMEYAAY CULTURAL REPATRIATION COMMITTEE; and DOES 1-50, inclusive,

Respondents and defendants.

Case No. C12-01978 RS

CORRECTED NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT UNDER FED. R. CIV. P. 12(B)(7), 12(B)(1), AND 12(B)(6); MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF STEVEN BANEGAS

[Request for Judicial Notice and Declaration of John M. Rappaport filed concurrently herewith]

Date: August 23, 2012
Time: 1:30 p.m.
Judge: Hon. Richard Seeborg

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on August 23 at 1:30 p.m., in Courtroom 3, 17th Floor, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, Defendants The Regents of the University of California, Mark G. Yudof, Marye Anne Fox, and Gary Matthews (collectively, "the University"),[1] will and hereby do move for an order dismissing with prejudice Plaintiffs' claims against the University in Plaintiffs' First Amended Complaint.

This motion seeks dismissal of Plaintiffs' claims pursuant to Federal Rules of Civil Procedure 12(b)(7) for failure to join Native American tribes that are indispensable parties but cannot be joined due to tribal immunity; 12(b)(1) for lack of subject-matter jurisdiction over Plaintiffs' public-trust and First Amendment claims on ripeness grounds, and Plaintiffs' NAGPRA claims on standing grounds; and 12(b)(6) for failure to state a claim upon which relief can be granted because University officials may not be sued for declaratory and injunctive relief in their individual capacities. This motion is based on this notice, the accompanying memorandum and declaration of Steven Banegas, the concurrently filed Request for Judicial Notice and Declaration of John M. Rappaport, the record in this matter, oral argument, and such other matters as may be presented in connection with the hearing on this motion.

[1] Plaintiffs also named "The University of California," which is not a proper defendant. *See* note 3 *infra*.

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18A Charles Alan Wright, et al., *Federal Practice & Procedure* § 4456 (2d ed. 2012) 11, 14

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs challenge the University's decision to transfer a pair of human remains in accordance with the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 et seq. ("NAGPRA"). Plaintiffs' claims must be dismissed because Plaintiffs have failed to join 12 Native American tribes ("the Tribes") that are indispensable parties under Federal Rule of Civil Procedure 19. The Tribes are "necessary" parties for two reasons. First, evaluating Plaintiffs' claim to the human remains without the Tribes' participation would deprive the Tribes of an opportunity to defend their own interests in the remains. Neither the Kumeyaay Cultural Repatriation Committee ("KCRC"), which Plaintiffs have also sued, nor the University can adequately defend those interests for a number of reasons, including that KCRC is immune from and has not consented to suit. Second, proceeding with the action would subject the University to a substantial risk of inconsistent obligations because the Tribes would not be bound by this Court's ruling and so could seek a contrary ruling elsewhere. Yet Plaintiffs cannot join the Tribes, because the Tribes are immune from suit. Because there are no protective measures that would avert the prejudice to the Tribes or render adequate a judgment issued in their absence, the Tribes are "indispensable," and the claims against the University cannot proceed without them. The Court should dismiss those claims with prejudice.

Plaintiffs' public-trust and First Amendment claims also must be dismissed for the independent reason that they are not ripe. Plaintiffs contend that, if a transfer is not required by NAGPRA, the University would violate their rights if it nonetheless transferred the remains. The University, however, has not considered or decided what to do with the remains if NAGPRA does not control.

Plaintiffs' NAGPRA claim—that the University misinterpreted NAGPRA in determining that the statute requires transfer of the remains to the Tribes—also should be dismissed for lack of standing. Plaintiffs' alleged injury is deprivation of the opportunity to study the remains. A ruling that NAGPRA does not compel the transfer of the remains would not redress that injury because it would leave the University free to transfer the remains in any event.

In addition, clearly established law forbids Plaintiffs' claims for declaratory and injunctive relief against University officials in their individual capacities.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. FACTUAL AND LEGAL OVERVIEW

In 1976, Professor Gail Kennedy led an archaeological field excavation on University property in San Diego. Professor Kennedy's team discovered a pair of human remains, now known as the "La Jolla Remains" (or, herein, "the Remains"), as well as a set of objects including stones and shells. (First Amended Complaint ("FAC") ¶¶ 13, 28.) The Remains are currently housed at the San Diego Archaeological Center on behalf of the University. (FAC ¶ 14.)

In 1990, Congress passed NAGPRA as a reflection of the "unique relationship between the Federal Government and Indian tribes." 25 U.S.C. § 3010. As its name suggests, NAGPRA was designed to safeguard and return to Native American tribes certain human remains and funerary objects. The interests NAGPRA recognizes in the Native American community are evident from the face of the statute and its implementing regulations. For example, NAGPRA vests in tribes and their members ownership or control of cultural items discovered on federal lands, § 3002(a); requires repatriation of remains and objects to tribes in many circumstances, § 3005(a)(1); calls for consultation with tribes regarding repatriation, *e.g.*, §§ 3005(a)(3), 3006(c)(6); and authorizes grants to tribes to assist in the repatriation of cultural items, § 3008(a). Only Native American tribes, officials, and individuals have standing to make a claim to cultural objects under the regulations implementing NAGPRA. *See* 43 C.F.R. § 10.2(b).

NAGPRA imposes various requirements on state government agencies and institutions of higher learning that receive federal funds and that hold "Native American" human remains or cultural items. For example, entities subject to NAGPRA must compile an inventory of Native American remains and cultural items, 25 U.S.C. § 3003, many of which must be "repatriated" or returned to a requesting Native American tribe, § 3005. The Act also contains a savings clause stating that "[n]othing in this chapter shall be construed to . . . limit the authority of any . . . museum to . . . return or repatriate Native American cultural items to Indian tribes."

§ 3009. Because it receives federal funding, the University is bound by NAGPRA's provisions. *See* § 3001(8).

To comply with NAGPRA and its implementing regulations, University policy required campus and systemwide review of remains that were excavated on University property, including the La Jolla Remains. (FAC, Ex. A.) In October 2008, the University submitted a "Notice of Inventory Completion" and inventory to the United States Department of the Interior, which included the Remains and items found with the Remains. (FAC ¶ 20.) The inventory followed a 2008 report in stating that there was insufficient evidence to conclude that the Remains were culturally affiliated with the the Kumeyaay Nation, a coalition of the 12 Tribes[2] that historically occupied the site on which the Remains were found. (FAC ¶¶ 19, 21; *id.*, Ex. B.)

In 2010, the Department of the Interior promulgated a regulation governing the disposition of "culturally unidentifiable" remains that meet NAGPRA's definition of "Native American." 43 C.F.R. § 10.11. The regulation requires that institutions in possession of such remains consult with tribal representatives and transfer control of the remains to "(i) [t]he Indian tribe . . . from whose tribal land, at the time of excavation or removal, the human remains were removed; or (ii) [t]he Indian tribe or tribes that are recognized as aboriginal to the area from which the human remains were removed." § 10.11(c).

Also in 2010, a spokesperson for KCRC requested that the La Jolla Remains, along with the objects excavated with the Remains, be repatriated to the La Posta Band of Diegueno Mission Indians, a federally recognized tribe of Kumeyaay people. (FAC ¶¶ 23, 26, 27.) In December 2011, the University's final Notice of Inventory Completion appeared in the

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[2] The 12 Tribes are the La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California; Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California; Ewiiaapaayp Band of Kumeyaay Indians, California; Iipay Nation of Santa Ysabel, California (formerly the Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation); Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; San Pasqual Band of Diegueno Mission Indians of California; Sycuan Band of the Kumeyaay Nation; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California. (FAC ¶ 10.)

Federal Register. The Notice concluded, among other things, that the La Jolla Remains are "Native American"; that approximately 25 objects found at the same site are "reasonably believed to have been placed with or near" the La Jolla Remains "at the time of death or later as part of the death rite or ceremony"; that "the land from which the Native American human remains were removed is the aboriginal land of the Diegueno (Kumeyaay) Tribe"; that the "present-day descendants of the Diegueno (Kumeyaay) are The Tribes"; and that, pursuant to 43 C.F.R. § 10.11(c)(1), and based upon request from KCRC on behalf of the Tribes, if no one else came forward to claim the Remains by January 4, 2012, disposition of the Remains would be to the La Posta Band. (FAC ¶ 37; *id.*, Ex. B.)

B. PROCEDURAL HISTORY

Plaintiffs are University of California professors of Anthropology and Integrative Biology. (FAC ¶¶ 2-4.) Plaintiffs allege that they requested but were not granted permission to study the La Jolla Remains, and that each hopes to study the Remains in the future if the Remains are not transferred to the Tribes. (FAC ¶¶ 33-35.) Seeking to stop the transfer, on April 16, 2012, Plaintiffs filed the instant action in Alameda Superior Court. (Notice of Removal, Ex. 1, ECF 1-1.) On April 20, the University removed the case to this Court. (Notice of Removal, ECF 1.) On May 23, Plaintiffs filed their First Amended Complaint. (ECF 25.) Plaintiffs sued the University of California, The Regents of the University of California, and three University officials in their individual and official capacities; they also named KCRC as a defendant. (*Id.*)[3]

In their First Amended Complaint, Plaintiffs contend that the University has violated NAGPRA by erroneously concluding that the Remains are "Native American." (FAC ¶¶

[3] The "University of California" is not a proper defendant. The Ninth Circuit has explained that, "[u]nder Rule 17(b) of the Federal Rules of Civil Procedure, [a governmental entity's] capacity to be sued in federal court is to be determined by the law of [the State]." *Streit v. County of Los Angeles*, 236 F.3d 552, 565 (9th Cir. 2001) (internal quotation marks omitted). Under section 945 of the California Government Code, "[a] public entity may sue and be sued." Cal. Gov't Code § 945. Section 811.2 of the Government Code defines a "public entity" to include "the state, the Regents of the University of California, the Trustees of the California State University and the California State University, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State." § 811.2. Under article IX, § 9(f) of the California Constitution, The Regents is the entity authorized to "sue and to be sued" on behalf of the University of California. Cal. Const. art. IX, § 9(f).

51-58.) Transfer of the Remains, Plaintiffs further urge, would breach the University's duties to administer the University as a public trust and in the public interest. (FAC ¶¶ 59-69.) And it would violate Plaintiffs' First Amendment rights, Plaintiffs submit, by depriving them of the opportunity to "receive information" by studying the Remains. (FAC ¶¶ 70-76.) Plaintiffs also bring a claim for a writ of mandamus, seeking, *inter alia*, to compel the University "to make a formal determination whether or not the La Jolla Remains are 'Native American' within the meaning of NAGPRA, before repatriating them under the alleged authority of 43 C.F.R. § 10.11." (FAC ¶¶ 39-50.) Plaintiffs request, in substance, a declaration that the Remains are not "Native American" and an injunction prohibiting the University from transferring possession of the Remains to the La Posta Band or any other Native American tribe. (FAC, Prayer for Relief.)

Meanwhile, on April 13, 2012, KCRC sued the University in the United States District Court for the Southern District of California. *Kumeyaay Cultural Repatriation Committee v. University of California, et al.*, Case No. 3:12-cv-00912-H-BLM. KCRC contends that the University's failure to consummate the transfer of the Remains violates NAGPRA regulations. (Decl. of John M. Rappaport, Ex. A, ¶ 29.)[4] KCRC seeks an order compelling the University to effect the transfer forthwith. (*Id.*, Prayer for Relief.) On May 11, 2012, the University filed a motion to dismiss that action, which is currently pending.

III. ARGUMENT

A. PLAINTIFFS' CLAIMS CANNOT PROCEED WITHOUT THE TRIBES

Federal Rule of Civil Procedure 19 addresses required joinder of parties. Determining whether claims must be dismissed because of a required party's absence involves a three-step inquiry. First, the Court must determine whether the absent party is, in the traditional terminology, a "necessary" party under the standards of Rule 19(a). If it is, the Court must decide, second, whether it is feasible to join the absent party. Third, if joinder is not feasible, the

[4] In ruling on the University's motion to dismiss, the Court is permitted to consider "matters of public record," including filings in other litigation. *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1016 n.9 (9th Cir. 2012). And in considering a motion to dismiss for failure to join an indispensable party, the Court may consider evidence outside the pleadings. *First Fin. Ins. Co. v. Butler Chamberlain-Neilsen Ranch Ltd.*, No. C 10-2004 SBA, 2010 WL 4502151, *2 (N.D. Cal. Nov. 2, 2010).

Court must determine whether the absent party is "indispensable" under Rule 19(b); that is, whether "in equity and good conscience" the claims may proceed without it. Fed. R. Civ. P. 19(b).[5]

The Tribes are necessary parties here because adjudicating this dispute in their absence would impair their rights and leave the University subject to a substantial risk of inconsistent obligations. The Tribes' joinder is not feasible because they enjoy immunity from suit. And because there are no protective measures that would avert the prejudice to the Tribes or render adequate a judgment issued in their absence, the Tribes are "indispensable," and the claims against the University cannot proceed without them. This conclusion finds support in a long line of Ninth Circuit authority dismissing claims and cases under Rule 19 where an Indian tribe's interests are at stake, because tribes in such circumstances are indispensable parties but have tribal immunity from suit and so cannot be joined. *See, e.g., Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456 (9th Cir. 1994) (dismissing for failure to join tribe in suit against federal government challenging decision that certain fractional property interests escheated to tribe); *Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992) (dismissing for failure to join Hoopa and Yurok tribes in suit against United States challenging Hoopa-Yurok Settlement Act, which partitioned a communal reservation).[6]

1. The Tribes Are "Necessary" Parties

An absent party is "necessary" and must (if feasible) be joined if, *inter alia*:

> that person claims an interest relating to the subject of the action

[5] In 2007, Rule 19 was amended, and the words "necessary" and "indispensable" were eliminated. These changes were "stylistic only," however. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 855 (2008). Because most of the precedents on which this Motion relies employ the traditional terminology, the traditional terminology is used herein as well.

[6] *See also Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002); *Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000); *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999); *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996); *Pit River Home & Agricultural Cooperative Ass'n v. United States*, 30 F.3d 1088 (9th Cir. 1994); *Confederated Tribes v. Lujan*, 928 F.2d 1496 (9th Cir. 1991); *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990); *McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989); *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975); *Enterprise Mgmt. Consultants, Inc. v. United States*, 883 F.2d 890 (10th Cir. 1989); *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537 (10th Cir. 1987); *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986).

> and 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; *or*
>
> **(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) (emphasis added). The Tribes are necessary parties under both Rule 19(a)(1)(B)(i) and (ii), either of which would be sufficient.

a. Disposing of Plaintiffs' Claims in the Tribes' Absence Would Impair the Tribes' Ability To Protect Their Asserted Interest in the Remains

(i) This Litigation Threatens the Tribes' Interests

Under Rule 19(a)(1)(B)(i), absent parties must be joined if they assert an interest in the subject of the action and disposing of claims in their absence may, as a practical matter, impair their ability to protect that interest. The absent parties need not actually *possess* an interest relating to the subject of the action; it is sufficient that they *claim* such an interest and that the claim is not patently frivolous. *See Shermoen*, 982 F.2d at 1317-18; *see also Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir. 2001). In other words, the determination whether an absent party is necessary does not require a "preliminary factual inquiry" into the merits of the absent party's claim. *Quileute*, 18 F.3d at 1459.

As the designated recipients of the Remains in the University's Notice of Inventory Completion, the Tribes have an obvious interest in the La Jolla Remains, "the subject of the action" before the Court. Fed. R. Civ. P. 19(a)(1)(B). It is beyond dispute that the Tribes have, at the very least, *claimed* such an interest. (FAC ¶¶ 19, 27.) Absent this lawsuit, the University would have transferred the Remains to the La Posta Band, who, acting on behalf of the Tribes, could have handled them according to their custom and practice. (FAC ¶ 57.) Disposing of these claims in the Tribes' absence, therefore, certainly "may" impair the Tribes' ability to protect their interest in the Remains, given that Plaintiffs have requested a permanent injunction forbidding that transfer. "That conclusion is entirely consistent with other decisions where courts have concluded that Indian tribes are necessary parties to actions affecting their legal interests."

Confederated Tribes, 928 F.2d at 1499; *see Pimentel*, 553 U.S. at 870 (conflicting claims to common property "present a textbook example of a case where one party may be severely prejudiced by a decision in his absence" (internal quotation marks omitted)).

(ii) Neither KCRC Nor the University Can Adequately Represent the Tribes' Interests

The Ninth Circuit has held that, even if an absent party's interests are at risk, joinder may not be required if those interests are adequately represented by one of the existing parties. *See, e.g.*, *Shermoen*, 982 F.2d at 1318 (tying this inquiry to "adequate representation" analysis under Fed. R. Civ. P. 24(a) for permissive intervention). Even a "minimal" showing that representation is *not* adequate, however, renders this exception inapplicable. *See Trbovich v. United Mine Works of Am.*, 404 U.S. 528, 538 n.10 (1972).

KCRC Cannot Adequately Represent the Tribes' Interests. KCRC cannot adequately represent the Tribes' interests for at least three reasons. First, KCRC is not a proper party because, like the Tribes, it is immune from suit. KCRC is a tribal entity that represents the 12 Kumeyaay Tribes of San Diego County. (FAC ¶ 23; *id.* ¶ 10 (KCRC "is a California corporation that represents" the 12 Tribes); *see also* Decl. of John M. Rappaport, Ex. A, ¶ 4 (KCRC "is a tribal consortium consisting of tribal representatives from" the 12 Tribes)). All of the constituent Tribes are federally recognized and thus enjoy tribal immunity from suit. (FAC ¶ 26); *see* 75 Fed. Reg. 60,810 (Oct. 1, 2010) (list of federally recognized tribes); *Pit River*, 30 F.3d at 1100. As Judge Canby's leading hornbook on Indian law explains, tribal sovereign immunity extends as well to "intertribal councils" such as KCRC. William C. Canby, *American Indian Law* 95 (4th ed. 2004). This is true whether or not such councils choose to incorporate. *See Am. Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1099 (9th Cir. 2002) ("A tribe that elects to incorporate does not automatically waive its tribal sovereign immunity by doing so.").

For example, in *Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680 (2011), the Eighth Circuit held that a corporation incorporated by three tribes to administer a self-insurance risk pool for Indian housing authorities was entitled to tribal sovereign immunity. *Id.* at 685. And in *Taylor v. Alabama Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032 (2001), the

Eleventh Circuit accorded sovereign immunity to an "intertribal consortium, with a Board dominated by tribal chiefs and tribe members, organized to promote business opportunities for and between tribes." *Id.* at 1034-36; *see also J.L. Ward Assoc., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, __ F. Supp. 2d __, No. CIV 11-4008-RAL, 2012 WL 113866 (D.S.D. Jan. 13, 2012) (nonprofit corporation formed under South Dakota law by 16 federally recognized tribes to provide Indian people with a single entity through which to communicate with federal agencies on health matters enjoys immunity).

The Ninth Circuit's decision in *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185 (1998), is also instructive. In *Pink*, a former employee brought suit against Modoc for alleged violations of Title VII. *Id.* at 1187. Modoc was a nonprofit corporation created by two federally recognized Indian tribes; Modoc contracted with the federal government to provide health services to tribal members. *Id.* The Ninth Circuit held that Modoc was a "tribe" for purposes of Title VII and was therefore exempt from Title VII's definition of a covered "employer." *Id.* "Modoc served as an arm of the sovereign tribes," the court explained, "acting as more than a mere business." *Id.* at 1188. "Modoc was organized to control a collective enterprise and therefore falls within the scope of the Indian Tribe exemption of Title VII." *Id.*; *see also Dille v. Council of Energy Res. Tribes*, 801 F.2d 373, 376 (10th Cir. 1986) (council of 39 Indian tribes joined together to manage their energy resources collectively exempt as "tribe" under Title VII). Several courts have found these Title VII precedents instructive on the tribal immunity question, *see, e.g.*, *Cash Advance & Preferred Cash Loans v. Colorado*, 242 P.3d 1099, 1109 (Colo. 2010), or have even equated the two inquiries, *see, e.g.*, *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000) (explaining that the Ninth Circuit in *Pink* "held that a nonprofit health corporation created and controlled by Indian tribes is entitled to tribal immunity").

These precedents compel the conclusion that KCRC enjoys the sovereign immunity of the Tribes it represents. KCRC "was formed in 1997 for the purpose of repatriating human remains, artifacts and objects of cultural patrimony to the twelve Kumeyaay tribes of San Diego County." (Decl. of John M. Rappaport, Ex. B at 3; *see also id.*, Ex. A, ¶ 4 ("KCRC has

been charged with protecting and preserving Kumeyaay human remains and objects and all human remains and objects found within Kumeyaay aboriginal lands that [are] held by federal agencies and museums and to seek repatriation of these items on behalf of the members respective Tribes [sic].").) It is clear from this purpose that KCRC "serves as an arm of the [Tribes] and not as a mere business and is thus entitled to tribal sovereign immunity." *Amerind*, 633 F.3d at 685 (internal quotation marks omitted); *see J.L. Ward*, 2012 WL 113866, at *13 (according immunity to an organization that promotes "tribal cultural autonomy" furthers purposes behind immunity doctrine). That tribal representatives to KCRC are appointed by and can be removed only by the respective tribes, and that KCRC's operating budget is funded exclusively from contributions by its member tribes (Decl. of Steven Banegas, ¶¶ 6, 9), reinforce this conclusion. *See J.L. Ward*, 2012 WL 113866, at *13 (according immunity to organization "governed almost exclusively by tribally-elected presidents or chairpersons who must 'relinquish their position when they fail to be re-elected by their Tribal or other related governing body to be an official delegate'" (citation omitted)); *see also Dille*, 801 F.2d at 376 (because council of tribes was "entirely comprised of the member tribes and the decisions of the council [were] made by the designated representatives of those tribes," the council was a "tribe" exempt from Title VII). Because KCRC is immune and has not consented to suit, it must be dismissed as a defendant and thus cannot adequately represent the Tribes in this litigation.

Any suggestion that KCRC has waived its immunity from Plaintiffs' claims by suing the University in the Southern District of California must be rejected. The Ninth Circuit's decision in *Pit River* addresses similar circumstances. In *Pit River*, a federally recognized tribe sued the federal government and other parties in a dispute regarding beneficial ownership of a piece of land. A group of Pit River Indians later sued the government for beneficial ownership of the same land. 30 F.3d at 1092-94. The Ninth Circuit determined that the tribe was a necessary party to the group's suit. *Id.* at 1099. The group argued that the tribe had waived its immunity by, *inter alia*, suing the government and thus could be made party to the group's action. *Id.* at 1100. The Ninth Circuit rejected this argument, holding that the tribe's suit "did not waive its sovereign immunity as to claims brought by the [group] against the government, since those

claims could not otherwise be brought against [the tribe]." *Id.* at 1101. As in *Pit River*, KCRC's suit against the University "did not waive its sovereign immunity as to claims brought by [Plaintiffs] against the [University], since those claims could not otherwise be brought against" KCRC. Additional authorities are in accord. *See McClendon*, 885 F.2d at 630 ("[A] tribe's waiver of sovereign immunity may be limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts."); *see also Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (tribe does not waive immunity from counterclaims, even compulsory ones, by bringing action); *Enterprise Mgmt. Consultants*, 883 F.2d at 891-92 (tribe immune from suit by company even though tribe had sued company over same subject).

Second, KCRC cannot necessarily represent all of the 12 Tribes adequately, because disagreements may develop among the Tribes, creating a conflict of interest for KCRC. *Cf., e.g., Shermoen*, 982 F.2d at 1318 (United States can adequately represent a single tribe absent a conflict of interest, but cannot represent *numerous* tribes because of "competing interests and divergent concerns of the tribes"); 18A Charles Alan Wright, et al., *Federal Practice & Procedure* § 4456 (2d ed. 2012) ("In cases dealing with the relative rights of members between themselves, however, it is particularly important to consider possible conflicts of interest. Neither an association nor its officers, for example, could represent all of the members in litigation that seeks to realign rights of control between different groups of members.").

Third, assuming, as Plaintiffs allege (FAC ¶ 10), that KCRC is a California corporation, KCRC cannot adequately represent the interests of the Tribes because KCRC's corporate status has been suspended for tax reasons. (Decl. of John M. Rappaport, Ex. C.) KCRC's suspended status renders it unable to sue or defend a suit, *Christian & Porter Aluminum Co. v. Titus*, 584 F.2d 326, 331 (9th Cir. 1978), and it is thus unable to represent the Tribes' interests in this action.

The University Cannot Adequately Represent the Tribes' Interests. Alternatively, Plaintiffs might argue that the Tribes' absence does not matter because the *University* will

adequately represent their interests. This argument would also fail, for at least three related reasons.

First, as Plaintiffs allege, the University is duty-bound to operate in the interests of the people of California, as distinct from the narrower interests of the Tribes. (*See, e.g.*, FAC ¶ 61.)[7] The Ninth Circuit has consistently found adequate representation lacking where a governmental entity is "required to represent a broader view than the more narrow, parochial interests" of the absent party. *Forest Conserv. Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1178 (9th Cir. 2011); *see, e.g., Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001) (even if companies and city share the same "ultimate objective," the city's "range of considerations . . . is broader," so the city cannot represent the companies' interests); *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) ("[B]ecause the employment interests of IBT's members were potentially more narrow and parochial than the interests of the public at large, IBT demonstrated that the representation of its interests by the named [government official] defendants-appellees may have been inadequate."); *see also Trbovich*, 404 U.S. at 538-39 (Secretary of Labor does not adequately represent union member's interests because "the Secretary has an obligation to protect the 'vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member'" (quoting *Wirtz v. Local 153*, 389 U.S. 463, 475 (1968)).

Second, in light of the University's public mission, it cannot be said that the University's "ultimate objective" is the same as the Tribes'. Like a stakeholder in an interpleader action, *see* Fed. R. Civ. P. 22, the University's objective is to have the conflicting claimants'

[7] Courts have recognized that the *United States*, which bears a fiduciary relationship to Indian tribes, can adequately represent tribes unless there is a conflict among several tribes. *See, e.g., Sw. Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9th Cir. 1998). But the Ninth Circuit has specifically noted that a *state* does not owe a similar duty of trust to Indian tribes. *See Am. Greyhound*, 305 F.3d at 1023-24 & n.5.

claims to the Remains resolved in an orderly fashion according to the law. This is different from the Tribes' interest in actually obtaining the remains.

Third, even if the University's ultimate objective could be said to align with the Tribes', the University may not be in a position to represent the Tribes' interests as vigorously as the Tribes themselves would. For example, if Plaintiffs prevailed in this Court, the University might decide that it was not in the public interest, and not a wise use of public funds, to appeal the judgment. *See League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997) (holding that state officials adequately represented citizen group where officials "vigorously defended" the group's position "at every turn," and contrasting prior case in which state officials were "less than enthusiastic" about litigation and had announced decision not to appeal an adverse ruling); (*cf.* FAC ¶ 53 (alleging that the University has "expended public funds in support of their illegal efforts to repatriate" the remains)). Indeed, as noted above, even though the University has published its intention to transfer the Remains to the Tribes, KCRC has sued the University to compel an immediate transfer because of the University's perceived delay in doing so. This is evidence that the Tribes do not view the University as adequately representing their interests. The Tribes thus are necessary parties notwithstanding the University's defense against Plaintiffs' suit.

b. Disposing of Plaintiffs' Claims in the Tribes' Absence Would Subject the University to a Substantial Risk of Inconsistent Obligations

Under Rule 19(a)(1)(B)(ii), absent parties must also be joined where a judgment rendered in their absence would "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the [absent parties' claimed] interest." Fed. R. Civ. P. 19(a)(1)(B)(ii). Courts frequently order joinder under this subdivision of Rule 19 when there are multiple claims to a limited fund or if there are multiple and separate claims to real property. *See, e.g., Broussard v. Columbia Gulf Transmission Co.*, 398 F.2d 885, 887-89 (5th Cir. 1968) (finding joinder of owner of one-sixth interest in piece of real property required in dispute about removal of pipeline from property, and dismissing because joinder would defeat diversity jurisdiction); *cf. Confederated Tribes*, 928 F.2d at 1498 (adjudication of

suit by tribes against United States challenging Quinault's sovereignty over reservation, if allowed to proceed in Quinault's absence, would subject United States to risk of inconsistent legal obligations). The Plaintiffs' and Tribes' competing claims to the La Jolla Remains are analogous to these cases.

The risk of inconsistent obligations here is not merely theoretical. KCRC already has sued the University for immediate transfer of the remains. Although the University believes that litigation should be dismissed, how it will resolve is unknown. If KCRC is permitted to pursue its suit and prevails, and if Plaintiffs succeed here, the University will be simultaneously required and forbidden to transfer the Remains to the Tribes. Moreover, KCRC's suit does not address the question whether the Remains are subject to NAGPRA—it takes the University's conclusion to that effect as a given and contests only the timing of the transfer. Thus, if Plaintiffs here obtain an injunction prohibiting a transfer to the Tribes, the Tribes, or any one of them, might well sue the University in a second, broader suit seeking a substantive ruling contrary to this Court's.[8]

2. Joinder of the Tribes Is Not Feasible Because The Tribes Are Immune from Suit

Because the Tribes are necessary parties, the Court must next determine whether joinder of the Tribes is feasible. The answer to this question is a straightforward "no." As noted, all of the Tribes are federally recognized and are therefore immune from suit. They therefore cannot be joined even when joinder would otherwise be required. *See, e.g.*, *Confederated Tribes*, 928 F.2d at 1499.

[8] This last point is true even if KCRC is determined, contrary to the University's arguments above, to be a proper party to this suit, because it is far from clear that a judgment against KCRC here would bind the individual Tribes. *See* 18A Charles Alan Wright, et al., *Federal Practice & Procedure* § 4456 (2d ed. 2012) ("The judgment in [an] action [against an association] ordinarily should have the same preclusion consequences as a judgment in an action by or against a corporation; the association is bound as an entity and its members are not bound." (footnote omitted)); *cf. id.* § 4460 ("Corporations are treated as entities separate from their officers, directors, and shareholders for purposes of preclusion just as for other purposes. Without more, a judgment entered in an action against any one of them is not binding on any other.").

3. The Tribes Are "Indispensable" Parties Without Which Plaintiffs' Claims Must Be Dismissed

The final and dispositive question is whether the Tribes are "indispensable." Another court to consider the question has held that groups requesting repatriation of remains under NAGPRA "are indispensable parties who must be joined before a repatriation claim may proceed." *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397, 1405 (D. Haw. 1995) (where one Native group sued the federal government for repatriation, 14 other groups who had also made claims to the remains were indispensable parties). As shown below, this conclusion is clearly correct under the governing standards and applies with equal force to this case.

The indispensability analysis generally is guided by a weighing of factors set forth in Federal Rule of Civil Procedure 19(b). "[W]hen the necessary party is immune from suit," however, "there may be 'very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.'" *Quileute*, 18 F.3d at 1460 (quoting *Confederated Tribes*, 928 F.2d at 1499); *see also Pimentel*, 553 U.S. at 867 ("A case may not proceed when a required-entity sovereign is not amenable to suit. . . . [W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action *must* be ordered where there is a potential for injury to the interests of the absent sovereign." (emphasis added)); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998) (linking tribal and foreign sovereign immunity). While, at least as a formal matter, courts still conduct the Rule 19(b) analysis when a necessary party is immune, immunity weighs strongly in favor of a finding that, "in equity and good conscience," the action may not proceed.

The Tribes' immunity therefore heavily favors dismissal here. Consideration of the Rule 19(b) factors only confirms that result. Rule 19(b) provides:

> If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
>
> **(1)** the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> **(2)** the extent to which any prejudice could be lessened or avoided

by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

As courts have frequently noted, the first factor, in Rule 19(b)(1), largely overlaps with Rule 19(a)'s necessary-party standards regarding prejudice. *See, e.g., Am. Greyhound*, 305 F.3d at 1024-25; *Confederated Tribes*, 928 F.2d at 1499. For the reasons given above in addressing Rule 19(a), adjudicating this action in the Tribes' absence would prejudice both the Tribes and the University. This factor therefore strongly favors an indispensability finding.

The prejudice to the Tribes, moreover, could not be averted by protective provisions in a judgment by this Court or other measures—so the second factor, in Rule 19(b)(2), also cuts in favor of dismissal. "Any decision mollifying [Plaintiffs] would prejudice the [Tribes]." *Dawavendewa*, 276 F.3d at 1162; *see also Wichita*, 788 F.2d at 776. Even the research techniques employed by preeminent scientists have been viewed by the Tribes as "disrespectful" to the Tribes' ancestors (*see* Decl. of John M. Rappaport, Ex. A, ¶ 11), and any further delay in transfer is seen as a continued affront, as evidenced by KCRC's suit itself. And courts have consistently rejected the notion that absent parties possessing immunity can mitigate the prejudice by intervening in the action, so it is no response to suggest that each and every one of the Tribes should intervene. *See, e.g., Confederated Tribes*, 928 F.2d at 1500 ("the ability to intervene if it requires a waiver of immunity is not a factor that lessens prejudice"). Accordingly, the second Rule 19(b) factor also favors dismissal.

The third factor—whether a judgment rendered without the absent party would be adequate, Fed. R. Civ. P. 19(b)(3)—refers to the "public stake in settling disputes by wholes, whenever possible." *Pimentel*, 553 U.S. at 870 (internal quotation marks omitted). "This 'social interest in the efficient administration of justice and the avoidance of multiple litigation' is an

interest that has 'traditionally been thought to support compulsory joinder of absent and potentially adverse claimants.'" *Id.* (quoting *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 737-38 (1977)). "Going forward with the action without the [Tribes] would not further the public interest in settling the dispute as a whole because the [Tribes] would not be bound by the judgment in an action where they were not parties." *Id.* at 870-71. As noted above, KCRC's suit does not address the question whether the Remains are "Native American" and therefore subject to NAGPRA. If Plaintiffs prevail here, the Tribes could sue the University in a second suit seeking a contrary ruling. The third factor therefore favors dismissal.

The fourth factor—whether the plaintiff would have an adequate remedy if the action were dismissed, Fed. R. Civ. P. 19(b)(4)—is not enough to justify proceeding without the Tribes. Time and again, courts have held that, where an action must be dismissed for failure to join an absent party because of immunity, prejudice to the plaintiff is outweighed by the societal interests animating the immunity doctrine. *See, e.g.*, *Pimentel*, 553 U.S. at 872; *Am. Greyhound*, 305 F.3d at 1025; *Dawavendewa*, 276 F.3d at 1162. There is no room here for a contrary determination.

In sum, the NAGPRA indispensability holding in *Na Iwi O Na Kupuna O Mokapu*, the Tribes' immunity from suit, and the balance of the Rule 19(b) factors all point in the same direction—Plaintiffs' claims against the University cannot, "in equity and good conscience," proceed without the Tribes, and they must therefore be dismissed with prejudice.

B. PLAINTIFFS' PUBLIC-TRUST AND FIRST AMENDMENT CLAIMS ARE NOT RIPE

Plaintiffs' Second and Third Causes of Action—for breach of the public trust and violation of the First Amendment—are not ripe for adjudication.[9] The "basic rationale" of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect ... agencies from judicial interference until an administrative decision has been formalized and its

[9] In arguing that Plaintiffs' public-trust and First Amendment claims are not ripe, the University does not concede that the claims are viable on their merits.

effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977); *see Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 779 (9th Cir. 2000) ("It is well settled that 'injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy "ripe" for judicial resolution.'" (quoting *Abbott Laboratories*, 387 U.S. at 148)). "The problem is best seen in a twofold aspect," requiring courts "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. Plaintiffs' public-trust and First Amendment claims are best read to allege that transferring the La Jolla Remains to the Tribes *if not required to do so by NAGPRA* would violate the public trust and First Amendment, respectively.[10] Such claims are clearly unripe under *Abbott Laboratories* and related Supreme Court cases.

First, and most fundamental, "[a] claim is not ripe for adjudication if it rests upon '"contingent future events that may not occur as anticipated, or indeed may not occur at all."'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985) (quoting 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3532, p. 112 (1984))); *see id.* at 302 ("we find it too speculative whether the problem Texas presents will ever need solving"). There is no suggestion in the First Amended Complaint that the University has considered or determined whether to retain or transfer the Remains if NAGPRA does not apply. It *could* decide to transfer the Remains to the Tribes (*see* Standing, *infra*), but it could also decide to keep the remains and make them available for research, in which case Plaintiffs will have suffered no injury. The

[10] The only other way to read Plaintiffs' Complaint would be as asserting that a transfer required by NAGPRA would violate California's public-trust doctrine and the First Amendment. But an argument that California's public-trust doctrine would prohibit the transfer even if NAGPRA required it clearly would fail under the federal Constitution's Supremacy Clause. U.S. Const. art. VI, cl. 2; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). And any contention that the First Amendment would prohibit a transfer required under NAGPRA would be a claim that NAGPRA is unconstitutional as applied. Plaintiffs' Complaint does not challenge NAGPRA's constitutionality and Plaintiffs did not file a notice pursuant to Federal Rule of Civil Procedure 5.1 announcing their intention to do so.

University should not be forced to litigate about injuries that may never occur. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 736 (1998) ("[D]epending upon the agency's future actions . . . review now may turn out to have been unnecessary."); *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 163 (1967) (suit challenging administrative inspections not ripe where "we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order"); *Int'l Longshoremen's & Warehousemen's Union v. Boyd*, 347 U.S. 222, 224 (1954) ("Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.").

Second, in adjudicating Plaintiffs' claims, "the courts would benefit from further factual development of the issues presented." *Ohio Forestry*, 523 U.S. at 733. A proper evaluation of Plaintiffs' public-trust and First Amendment claims would depend on the reasons given for the University's transfer decision. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (considering the government's interests in evaluating First Amendment claim). Because, as noted, no decision has yet been made, it is impossible to evaluate reasons that have not yet been considered, let alone formally articulated.

Third, "to 'withhol[d] court consideration' at present will not cause the parties significant 'hardship.'" *Id.* (quoting *Abbott Laboratories*, 387 U.S. at 149) (alteration in original). This is not a case "in which primary conduct is affected." *Toilet Goods*, 387 U.S. at 164. Plaintiffs are "not required to engage in, or to refrain from, any conduct," *Texas*, 523 U.S. at 301, or to "modify [their] behavior in order to avoid future adverse consequences," *Ohio Forestry*, 523 U.S. at 734. Plaintiffs would "have ample opportunity later to bring [their] legal challenge at a time when harm is more imminent and more certain." *Id.*

This Court thus lacks jurisdiction to review Plaintiffs' public-trust and First Amendment claims unless and until they ripen into a "case or controversy" within the meaning of Article III.

C. PLAINTIFFS LACK STANDING TO PURSUE CLAIMS BASED ON NAGPRA

Plaintiffs also lack Article III standing to pursue their First Cause of Action, for violations of NAGPRA. To demonstrate standing, Plaintiffs must show that (1) they have been or will imminently be injured, (2) the injury is caused by the challenged conduct, and (3) there is a "substantial likelihood" the injury would be redressed by a favorable ruling. *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010) (internal quotation marks omitted); *see Allen v. Wright*, 468 U.S. 737, 751 (1984). Even assuming *arguendo* that Plaintiffs can satisfy the first two elements, they fail on the third prong, redressability.

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), illustrates the controlling redressability principles. The plaintiffs in *Simon* were indigent citizens who sued the federal government, alleging that the Internal Revenue Service had violated federal law by issuing a revenue ruling allowing favorable tax treatment to a nonprofit hospital that offered only emergency-room services—and not comprehensive treatment—to indigents. *Id.* at 28. The Court assumed that the plaintiffs had been denied hospital services due to their indigency and thus had been injured. *Id.* at 41. The plaintiffs nevertheless lacked standing, the Court concluded, because it was "speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability . . . of such services. So far as the complaint sheds light, it is just as plausible that the hospitals to which [the plaintiffs] may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services." *Id.* at 43. The Court relied on earlier decisions requiring plaintiffs to show "that prospective relief will remove the harm." *Id.* at 45 (internal quotation marks omitted); *see Warth v. Seldin*, 422 U.S. 490, 507 (1975) (low-income persons seeking invalidation of restrictive zoning ordinance lacked standing because they relied "on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation"—inability to obtain adequate housing—"might improve were the court to afford relief"); *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973) (plaintiff seeking injunction requiring district attorney to enforce criminal child-support statute against her child's father lacked standing because the

prospect that the requested prosecution would result in the payment of child support instead of jailing the father was "only speculative").

Recent Ninth Circuit decisions are also instructive. In *Glanton ex rel. Alcoa Prescription Drug Plan v. AdvancePCS, Inc.*, 465 F.3d 1123 (9th Cir. 2006), the court denied standing to prescription drug plan participants who sued a benefits management company for breach of fiduciary duty. The plaintiffs had argued that, if the court found in their favor, the plan's drug costs, contributions, and co-payments would decrease. *Id.* at 1125. The Ninth Circuit held that the alleged injury was not redressable because the court's judgment would not compel the defendants to increase their disbursement of benefits payments—"any prospective benefits," the court observed, "depend on an independent actor who retains broad and legitimate discretion the courts cannot presume either to control or predict." *Id.* (internal quotation marks omitted).

Similarly, in *Mayfield*, 599 F.3d 964, the Ninth Circuit dismissed for lack of standing the declaratory-relief claim of a plaintiff who had been wrongfully arrested and detained, and his home and office surveilled and searched, on suspicion of terrorist activity. The plaintiff contended that the federal statutes that authorized the government's actions against him violated the Fourth Amendment. The Ninth Circuit agreed that the plaintiff suffered an ongoing injury from the government's continued retention of material derived from the searches. The court determined, however, that the government "would not necessarily be required by a declaratory judgment to destroy or otherwise abandon the materials." *Id.* at 971. This defeated redressability: "If the statutes challenged by Mayfield were declared unconstitutional, there will be no direct consequence to him. The government will not be required to act in any way that will redress Mayfield's past injuries or prevent likely future injuries." *Id.* at 972. In such a case, "redressability depends upon the actions of the government in response to the court's judgment," and "such actions . . . are not within the control of the court." *Id.*

In their NAGPRA claim, Plaintiffs contend that the La Jolla Remains are not "Native American" within the meaning of NAGPRA and that the University is therefore not required by NAGPRA to transfer the remains to the Tribes. Success on this claim would justify a declaration that the Remains are not Native American. But Plaintiffs do not allege what the

University would do if not *compelled* by NAGPRA to transfer the Remains. It is possible that the University would retain the Remains and permit Plaintiffs to study them; but it is "just as plausible" that the University would decide to transfer the Remains in any event, leaving Plaintiffs with the same alleged injury. *Simon*, 426 U.S. at 43. The University's Human Remains Policies that Plaintiffs attach to their First Amended Complaint certainly do not prohibit the University from transferring remains that are not Native American. Thus, like the plaintiffs in *Warth*, Plaintiffs rely only on the "possibility, unsubstantiated by allegations of fact, that their situation . . . might improve were the court to afford relief." 422 U.S. at 507. This is not the "substantial likelihood" of redress necessary to establish standing. *Cf. DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345, 346 (2006) (no redressability in taxpayer challenge to state tax credits because state's decision of how to allocate any increased revenue stemming from elimination of credits "is the very epitome of a policy judgment" and "[f]ederal courts may not assume a particular exercise of this state fiscal discretion in establishing standing").[11]

Contrasting this case with *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004), further illustrates the point. As in this case, the plaintiffs in *Bonnichsen* were scientists who sought to block a transfer of human remains, pursuant to NAGPRA, to a Native American tribe. *Id.* at 868-69, 872. But unlike this case, the remains in *Bonnichsen* were found on federal property and were excavated pursuant to a permit issued under the Archaeological Resources Protection Act of 1979 ("ARPA"), 16 U.S.C. §§ 470aa-770mm. 367 F.3d at 869. Crucially, neither party disputed "that ARPA gives Plaintiffs the opportunity to study [the] remains if NAGPRA does not apply." 367 F.3d at 873. Therefore, the court concluded, "it is likely that Plaintiffs' injury will be redressed by a favorable decision on the NAGPRA issue." *Id.* In contrast, Plaintiffs here have no statutory right to study the Remains if NAGPRA does not apply.

In their Prayer for Relief, Plaintiffs request a permanent injunction forbidding the University from transferring the Remains to any Native American tribe at any point in the future. (FAC, Prayer for Relief #2(d).) But success on their NAGPRA claim—that is, a determination

[11] Plaintiffs' reliance on California Code of Civil Procedure section 526a, California's taxpayer-injunction act, does not help them establish standing in federal court. *See Cantrell v. City of Long Beach*, 241 F.3d 674, 683-84 (9th Cir. 2001).

that the Remains are not "Native American"—would in no way justify that relief. Indeed, NAGPRA contains a savings clause admonishing that "[n]othing in this Act shall be construed to—(1) limit the authority of any Federal agency or museum to—(A) return or repatriate Native American cultural items to Indian tribes." *See* 25 U.S.C. § 3009. Plaintiffs' theory inverts this clause, essentially inferring from the (alleged) fact that NAGPRA does not *require* the transfer that the statute somehow supports relief *forbidding* it. Plaintiffs may not manufacture standing by requesting relief that would theoretically redress their alleged injury, but to which success on their cause of action would not entitle them. *See, e.g., N.Y. Coastal P'ship, Inc. v. U.S. Dep't of Interior*, 341 F.3d 112, 117 (2d Cir. 2003) (no standing, because no redressability, where plaintiffs could "identify no duty in any of these statutes that would require defendant[s] to act in a manner that would likely redress the injury of which they complain"); *cf. Mayfield*, 599 F.3d at 972 (that plaintiff had standing to seek injunctive relief did not give him standing to seek declaratory relief where injunction was not available due to plaintiff's prior settlement).[12]

To the extent that Plaintiffs' public-trust claim depends on their NAGPRA claim, they lack standing to pursue the public-trust claim for the same reasons. That is, Plaintiffs' public-trust claim can be read as alleging that the University breached the public trust *by violating NAGPRA*. (*See* FAC ¶ 62 ("YUDOF and the REGENTS neglected to take reasonable steps to compel FOX and MATTHEWS to correct what defendants knew or should have known were violations of NAGPRA."); ¶ 65 ("Defendants breached their duty to plaintiffs and to the public to administer the public trust for the public interest by," for example, "(2) approving the transfer of the La Jolla Remains to the La Posta Band of Mission Indians, even though defendants lacked a reasonable or good faith belief that the remains are 'Native American' within the meaning of NAGPRA, or that they had any relationship to the tribe known as the La Posta Band of Mission Indians").) As explained above, even if Plaintiffs obtained an injunction prohibiting the University from breaching the trust by violating NAGPRA, that would not prohibit the University from transferring the Remains to the Tribe outside of NAGPRA, so Plaintiffs' injury would not

[12] For the same reason, the Court could hold that Plaintiffs' First Cause of Action fails to state a claim upon which the requested relief can be granted. Fed. R. Civ. P. 12(b)(6).

be redressed. In addition, Plaintiffs lack standing to pursue their mandamus claim to the extent that it rests upon alleged NAGPRA violations (FAC ¶¶ 40-41, 44, 46-47) or alleged violations of the public trust that themselves depend on alleged NAGPRA violations (FAC ¶ 43).

D. PLAINTIFFS CANNOT SEEK DECLARATORY AND INJUNCTIVE RELIEF AGAINST UNIVERSITY OFFICIALS IN THEIR INDIVIDUAL CAPACITIES

Because Plaintiffs seek only declaratory and injunctive relief, the claims against the individual Defendants in their "individual capacity" should be dismissed. *See Wolfe v. Strankman*, 392 F.3d 358, 360 n.2 (9th Cir. 2004) ("The individual defendants were also sued in their personal capacities, but the declaratory and injunctive relief [the plaintiff] seeks is only available in an official capacity suit."). The Supreme Court has made clear that where, as here, claims are targeted at the actions of a state entity, suit should be brought against officers of that entity in the officers' official capacities. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). Then, if any of the specific named defendants ceases to hold the same job, the new occupant of that office will automatically be substituted as a defendant so that the suit and/or any injunction obtained will continue to be effective against the holder of the office in question. *See id.* at 166 n.11; Fed. R. Civ. P. 25(d). In contrast, personal-capacity, or individual-capacity, suits against government officials are appropriate only where plaintiffs seek damages to be paid out of the official's personal assets or action by the individual personally, rather then as a government official. The Supreme Court explained in *Kentucky v. Graham*:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an officer is an agent. . . . [A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. . . . Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

473 U.S. at 165-66 (internal citations and quotation marks omitted); *see also Am. Civil Liberties Union of Miss., Inc. v. Finch*, 638 F.2d 1336, 1341-42 (5th Cir. 1981) (concluding that claims for

declaratory and injunctive relief must be against the defendant officials in their official capacity and that claims for damages must be against the defendants in their individual capacities).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' claims against the University in their First Amended Complaint should be dismissed with prejudice.

DATED: June 6, 2012

MUNGER, TOLLES & OLSON LLP
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MICHELLE FRIEDLAND
JOHN M. RAPPAPORT

By: */s/ Bradley S. Phillips*
BRADLEY S. PHILLIPS

Attorneys for Defendants
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA; MARK G. YUDOF; MARYE ANNE FOX; GARY MATTHEWS

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I, Marivic Alvarez, undersigned, declare that I am over the age of 18 and not a party to the within cause. I am employed by Munger, Tolles & Olson LLP in the County of Los Angeles, State of California. My business address is 355 South Grand Avenue, 35th Floor, Los Angeles, California 90071-1560.

On June 6, 2012, I served upon the party listed on the following page the foregoing documents described as:

1. **CORRECTED NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF STEVEN BANEGAS; [PROPOSED] ORDER**

☒ By placing ☐ the original(s) ☒ true and correct copies thereof, as set out below, in addressed, sealed envelopes clearly labeled to identify the parties being served at the addresses set forth on the attached service list.

☐ **BY MAIL (AS INDICATED ON THE ATTACHED SERVICE LIST)** I caused such envelope(s) to be placed in interoffice mail for collection and deposit in the United States Postal Service at 355 South Grand Avenue, 35th Floor, Los Angeles, California, on that same date, following ordinary business practices. I am familiar with Munger, Tolles & Olson LLP's practice for collection and processing correspondence for mailing with the United States Postal Service; in the ordinary course of business, correspondence placed in interoffice mail is deposited with the United States Postal Service with first class postage thereon fully prepaid on the same day it is placed for collection and mailing.

☒ **BY FEDEX PRIORITY OVERNIGHT DELIVERY** I delivered the sealed FedEx envelope(s) to an employee authorized by FedEx to receive documents, with delivery fees paid or provided for.

☐ **BY MESSENGER** Messenger service caused to be delivered as indicated on Service List

☐ **(STATE)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

☒ **(FEDERAL)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on June 6, 2012 at Los Angeles, California.

/s/ Marivic Alvarez
Marivic Alvarez

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Counsel for KUMEYAAY CULTURAL REPATRIATION COMMITTEE

GENERAL ORDER 45 ATTESTATION

In compliance with General Order 45, X.B., I, Bradley S. Phillips, the filer of this document, hereby attest that Marivic Alvarez concurs in this filing.

DATED: June 6, 2012

By: */s/ Bradley S. Phillips*
BRADLEY S. PHILLIPS