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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ELIZABETH WEISS,

Plaintiff,

vs.

STEPHEN PEREZ, in his official capacity as President of San Jose State University; *et al*.,

Defendants.

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

NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT UNDER FED. R. CIV. P. 12(B)(7) AND 12(B)(6); MEMORANDUM OF POINTS AND AUTHORITIES

[Declarations of Michael Wilcox and Charlotte Sunseri filed concurrently herewith]

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

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on June 30, 2022, at 9:00 a.m., Defendants will and hereby do move for an order dismissing with prejudice Plaintiff's Complaint in its entirety.

This motion seeks dismissal of Plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(7) for failure to join at least one Native American tribe that is an indispensable party but cannot be joined due to tribal sovereign immunity; and Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In September 2020, the California Legislature enacted Assembly Bill 275 ("AB 275") to "[p]rovide a seamless and consistent state policy to ensure that all California Indian human remains and cultural items be treated with dignity and respect." Cal. Health & Safety Code § 8011(a). AB 275 amended the California Native American Graves Protection and Repatriation Act ("CalNAGPRA") effective January 1, 2021. CalNAGPRA requires SJSU to "minimiz[e] handling" of such human remains and cultural items, to consult with the relevant California Indian Tribes throughout the inventory and repatriation process, and "defer to tribal recommendations for appropriate handling and treatment." *Id.* § 8013. The Act expressly does not authorize either the initiation or completion of study of remains. *Id*. Defendant officials at SJSU (collectively, "the University") adopted a policy, applicable to all members of the SJSU community, which restricts access to Native American remains and cultural items in SJSU's possession that are to be repatriated to local Native American Tribes. That policy was adopted to bring the University into compliance with the requirements of CalNAGPRA and AB 275 by deferring to the recommendations of affected Tribes as to the proper handling and treatment of remains. Plaintiff Elizabeth Weiss, a Professor of Anthropology at San José State University ("SJSU"), claims that Defendants adopted this policy to retaliate against her in violation of the First Amendment.

Plaintiff has been a vocal critic of both CalNAGPRA and its federal counterpart, the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 et seq. ("NAGPRA"), arguing that scientific research must take precedence over preservation and repatriation of Native

American remains and cultural items—a position rejected by both the California Legislature and Congress. In this lawsuit, Plaintiff effectively claims that, because she wants to do scientific research on the human remains and cultural items, the law may not be enforced to restrict her access to them. Thus, Plaintiff seeks an order enjoining the University from enforcing its policy and granting Plaintiff access to and permission to photograph the remains and cultural items without regard to tribal recommendations.

Plaintiff's claims must be dismissed for two reasons. First, Plaintiff has failed to join at least one Native American tribe, the Muwekma Ohlone Tribe ("the Tribe") that is an indispensable party under Federal Rule of Civil Procedure 19. The Tribe is a "necessary" party for two reasons. First, evaluating Plaintiff's claim to access the human remains and cultural items for research purposes without the Tribe's participation would deprive the Tribe of the opportunity to defend its statutory interests in appropriate handling and treatment of the remains and cultural items. Under controlling Ninth Circuit authority, the University cannot adequately defend those interests for a number of reasons, including that it is duty-bound to operate in the interests of the People of California, as distinct from the narrower interests of the Tribe. Second, proceeding with the action in the absence of the Tribe would subject the University to a substantial risk of inconsistent obligations because the Tribe would not be bound by this Court's ruling and so could seek elsewhere a contrary ruling—such as that the University must enforce its policy in order to comply with CalNAGPRA.

But Plaintiff cannot join the Tribe, which is immune from suit. Under controlling Ninth Circuit authority, the Tribe is "indispensable," and therefore the claims against the University may not proceed without them. The Court should dismiss those claims with prejudice.

Second, on its face Plaintiff's Complaint fails to state a claim for First Amendment retaliation or unconstitutional conditions. Plaintiff alleges that Defendants retaliated against her because of their disagreement with "her viewpoint on repatriation laws." Compl. ¶ 36; *see also id.* ¶¶ 1, 87, 88, 97, 103. But her Complaint shows that Defendants took no action for years after Plaintiff had expressed that viewpoint and had been widely and publicly criticized for it, other than to praise her scholarship and defend her right to express her viewpoint. Defendants adopted

SJSU's more restrictive CalNAGPRA policy only *after* Plaintiff posted on social media a picture of herself grinning and holding, without gloves, a Native American skull that is shortly to be repatriated to a tribe, and the University received protests about that tweet and demands for tighter restrictions from both the affected Tribes and California's Native American Heritage Commission (NAHC). Indeed, Plaintiff affirmatively alleges that the University stated it adopted its policy concerning access to the remains as the "direct result of … consultation that SJSU had with the affected tribe[.]" Compl. ¶ 40. That is precisely what is required by CalNAGPRA: "The [University] shall engage in consultation with California Indian tribes . . . and shall defer to tribal recommendations for appropriate handling and treatment." Cal. Health & Safety Code § 8013(c)(2).

Thus, the Complaint establishes on its face, together with documents referenced in the Complaint and submitted to the Court by Plaintiff simultaneously, that Defendants' actions were motivated by compliance with the law (albeit a law with which Plaintiff disagrees), not retaliation against Plaintiff. This obvious alternative explanation renders Plaintiff's claim of retaliatory motive implausible. Moreover, mere statements by Defendants disagreeing, even vehemently, with Plaintiff's viewpoint did not constitute either adverse employment actions or unconstitutional conditions. For these additional reasons, all of Plaintiff's claims should be dismissed with prejudice.

II. BACKGROUND

A. LEGAL OVERVIEW

In 1990, Congress passed NAGPRA as a reflection of the "unique relationship between the Federal Government and Indian tribes." 25 U.S.C. § 3010. 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); and calls for consultation with Tribes regarding repatriation, *e.g.*, §§ 3005(a)(3), 3006(c)(6). Native American Tribes have

standing to make a claim to human remains and cultural objects under the NAGPRA regulations. *See* 43 C.F.R. § 10.2(b). NAGPRA also 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. Because it receives federal funding, SJSU is bound by NAGPRA's provisions. *See* § 3001(8).

CalNAGPRA was enacted in 2001 to facilitate the implementation of NAGPRA in California and to allow California Tribes that are not federally recognized to file repatriation claims. Cal. Health & Safety Code § 8011. State agencies and museums that receive state funding are subject to CalNAGPRA, including SJSU. *Id.* § 8012(a), (i).[1] In 2020, the California Legislature passed AB 275, amending CalNAGPRA effective January 1, 2021. AB 275 created newly time-sensitive obligations for agencies. It provides that "on or before January 1, 2022," agencies were to complete an inventory of all the remains and objects in their possession and "consult . . . with affiliated California Indian tribes on any protocols to be used in the inventory process, including . . . [m]inimizing handling[.]" *Id.* § 8013(b)(1)(B)(i). Agencies were also to complete a preliminary summary of any associated cultural objects "in lieu of an object-by-object inventory *to limit unnecessary handling and damage to the items*," and in so doing agencies were to "defer to tribal recommendations for appropriate handling and treatment." *Id.* § 8013(c)(1), (2) (emphases added). The Act expressly provides that it "does not authorize the initiation or completion of any . . . study of human remains or cultural items." *Id.* § 8013(g)(1).

B. THE COMPLAINT[2]

Plaintiff Elizabeth Weiss is a tenured Professor of Anthropology at SJSU and has served as SJSU's Collections Coordinator since 2004. Compl. ¶¶ 15-16. This role gives her responsibility

[1] SJSU is both an "agency" and a "museum" within the meaning of AB 275.

[2] Defendants assume the truth of the Complaint's allegations, except where indicated otherwise, for purposes of this motion only.

over the curation, maintenance, and management of the Anthropology Department's human osteological collections, which previously included Native American remains covered by NAGPRA and CalNAGPRA. *Id.* ¶¶ 17-18. Plaintiff has made arguments against repatriation of Native American remains and the merits of NAGPRA and CalNAGPRA for some time, but her recent book on the subject, published in September 2020, led to renewed controversy. *Id.* ¶¶ 19-20. For example, "[a]bout a thousand professors and graduate students, including some of [Plaintiff's] colleagues, signed an open letter condemning the book as 'anti-indigenous' and 'racist,'" and there was "a social media campaign aimed at shaming the University for supporting [Plaintiff]." Complt. ¶¶ 20, 23; Weiss Decl. Ex. 4.[3] Although there was discussion among University faculty about how best to deal with the public's reaction, *see* Weiss Decl. Ex. 5, Plaintiff was not subjected to discipline and the conditions of her employment did not change. Compl. ¶¶ 23-31. In August, 2021, Plaintiff published an op-ed criticizing AB 275, and "the University received multiple vitriolic emails from members of the public and academic critics with demands for discipline or termination." Complt. ¶ 31. Again, no action was taken against Plaintiff.

Then, on September 18, 2021, nearly a year after Plaintiff's controversial book was published, Plaintiff tweeted a photo of herself smiling and holding, without gloves, a human skull from the SJSU collection of Native American remains, captioned with the words, "So happy to be back with some old friends." Compl. ¶ 32; Weiss Decl. Ex. 9. The tweet "evoked shock and disgust from [SJSU's] Native and Indigenous community on campus and from many people within and outside SJSU." Compl. ¶ 33; Weiss Decl. Ex. 11. For example, a professor of American Indian studies at California State University, Long Beach, described Plaintiff's tweet as "utterly dehumanizing and completely unethical, violating all of the principles and values that serve as the foundation for NAGPRA and CalNAGPRA." Weiss Decl. Ex. 13; *see* Compl. ¶ 35.

[3] As discussed below, on Defendants' Rule 12(b)(6) motion, the Court may consider documents relied upon by Plaintiff in the Complaint and the authenticity of which is not in dispute. *See infra* at p. 17. Defendants therefore rely here upon certain exhibits to Plaintiff's and Plaintiff's counsel's declarations in support of her PI motion filed concurrently with the Complaint.

On September 29, 2021, Defendant Provost Del Casino, the chief academic officer at the University, published a letter to the University expressing disapproval of Plaintiff's handling of the remains, noting that, in his view, her actions were not consistent with AB 275's requirement to "consult . . . with affiliated California Indian tribes on [] protocols" to "minimiz[e] handling [§ 8013(b)(1)(B)(i)]." Compl. ¶ 33; Weiss Decl. Ex. 11. But in that same letter, the Provost vigorously *defended* Plaintiff's right to express her opinions. Compl. ¶ 33; Weiss Decl. Ex. 11. At Plaintiff's request, Provost Del Casino also published Plaintiff's response to his letter to the same recipients. Compl. ¶ 34; Weiss Decl. Ex. 12.

On October 6, 2021, SJSU enacted an Interim Presidential Directive ("Directive") restricting access to and use of the remains in its collection. Compl. ¶¶ 36, 37; Weiss Decl. Ex. 14. As the Directive states, "[d]uring initial consultations with several local Native American and Indigenous California tribes, [the Tribes] asked SJSU to prescribe a stricter set of protocols to gain access to the remains and artifacts housed on our campus." *Id*. In light of those requests, SJSU transferred exclusive management over and control of access to the collections to SJSU's long-time NAGPRA Coordinator, Defendant Charlotte Sunseri, and its recently appointed Tribal Liaison, Defendant Alisha Marie Ragland, assisted only by trained and supervised student assistants. *Id*. Photography and videography of the remains and associated objects are prohibited under the Directive. *Id.* As SJSU informed Plaintiff's counsel, the Directive was the "direct result of the legally-required consultations that SJSU had with the affected tribe" and was "requested by the [Native American Heritage] Commission, pending further consultation with California Indian tribes." Compl. ¶ 40; Weiss Decl. Ex. 22. And, as Defendant Sunseri informed Plaintiff, "based on formal consultations with the Tribes in accordance with AB-275, SJSU can no longer allow access to [the collection] for any research-related purposes . . . the Tribes have also requested no photography of any kind as well as very limited handling of all remains and artifacts." Compl. ¶ 51; Weiss Decl. Ex. 16.

Plaintiff alleges that, because the Directive eliminated her access to the remains in SJSU's collection, its adoption constitutes an adverse employment action "[i]n clear retaliation against [her] for her *viewpoint on repatriation laws*." Compl. ¶ 36. She alleges that the University's

statements that it based the Directive on "conversations with the tribes and the NAHC" (as it was required to do by CalNAGPRA) show that its actions were "retaliatory because members of those groups voiced opposition to [Plaintiff's] speech and pressured the University to act against her for the viewpoint she expressed." *Id.* ¶ 41. In addition, although no restrictions have been placed on Plaintiff's teaching, Plaintiff alleges that the University has "threatened to impose an unconstitutional condition" upon her continued employment at the University by "refus[ing] to retract or disavow" statements made prior to her tweet by Defendant Gonzalez, which she alleges constituted a "threat conditioning [her] continued ability to teach on her willingness to refrain from teaching students her views on repatriation." Compl. ¶¶ 103, 104.

III. ARGUMENT

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

The Muwekma Ohlone tribe is a necessary party here because adjudicating this dispute in its absence would impair its rights and leave the University subject to a substantial risk of inconsistent obligations. The Tribe's joinder is not feasible because it enjoys immunity from suit. And, because there are no protective measures that would avert the prejudice to the Tribe or render adequate a judgment issued in its absence, the Tribe is "indispensable," and the claims against the University cannot proceed without it. This conclusion is compelled by 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.*, *Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153 (9th Cir. 2021) (dismissing for failure to join tribe in suit against utility company alleging violation of Clean Water Act by project co-owned and co-operated by tribe); *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984 (9th Cir. 2020) (dismissing for failure to join tribe in suit against federal government to enjoin construction and operation of a casino on tribal land); *White v. Univ. of Cal.*, 765 F.3d 1010 (9th Cir. 2014) (dismissing for failure to join Tribes in suit challenging repatriation of human remains to Tribes under NAGPRA); *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).

1. The Tribe Is a "Necessary" Party

An absent party is "necessary" and must (if feasible) be joined if, *inter alia*, the party "claims an interest relating to the subject of the action," and disposing of the matter in the party's absence might "(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 Tribe is a necessary party under both Rule 19(a)(1)(B)(i) and (ii), either of which would be sufficient.

a. Disposing of Plaintiff's Claims in the Tribe's Absence Would Impair the Tribe's Ability To Protect Its Asserted Interest in the Remains

(i) This Litigation Threatens the Tribe's 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." *White*, 765 F.3d at 1026-27; *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 one of the Tribes with which the human remains and cultural items are affiliated and to which they are to be repatriated, the Tribe unquestionably has an interest in the University's policy concerning handling and treatment of them, "the subject of the action" before the Court. Fed. R. Civ. P. 19(a)(1)(B). The Complaint itself establishes that the Tribe has, at the very least, *claimed* such an interest. Compl. ¶¶ 43, 44. The California Native American Heritage Commission identified the Muwekma Ohlone as a Tribe with which SJSU must consult concerning its collections of remains. Sunseri Decl. ¶ 3 & Ex. A. After consultation, SJSU concluded that the Tribe is culturally affiliated with nearly all of the ancestral sites where the remains in SJSU's collection were discovered. *Id*. ¶ 4 & Ex. B. The Tribes who have laid claim to the remains for repatriation, and to whom Defendants must defer with respect to the handling and treatment of the remains under CalNAGPRA, including the Muwekma Ohlone, have made clear that the Directive reflects their preferences. *See id*. ¶¶ 6-8 & Exs. C, D; Weiss Decl. Ex. 16 ("Based on formal consultations with the Tribes in accordance with AB-275, SJSU can no longer allow access to [the remains] for any research-related purposes [and] the Tribes have also requested no photography of any kind as well as very limited handling of all remains and artifacts."); *id*. Ex. 25 ("Muwekma Ohlone are currently undergoing return of their ancestors at SJSU.").

If Plaintiff prevailed in this lawsuit, the University would be required to give her access to and allow her to photograph the human remains and cultural items, thereby acting directly contrary to the interests of the Tribe. Such handling and treatment could both offend the Tribe's desire that the remains and items be treated with dignity and respect, *see* Cal. Health & Safety Code § 8011(a) (stating the intent of the Legislature "to ensure that all California Indian human remains and cultural items be treated with dignity and respect"), result in damage to the remains and items prior to their repatriation to the Tribe, and potentially delay repatriation.

Disposing of Plaintiff's claims in the Tribe's absence, therefore, certainly "may" impair the Tribe's ability to protect its interests, given that Plaintiff has requested a preliminary and permanent injunction requiring that she be given access to and allowed to photograph the remains and cultural items. "If this action were to proceed in the [Tribe's] absence, the [Tribe] would be in no position to file motions or take discovery to protect [its interests]." *See Rosales v. Dutschke*, 279 F. Supp. 3d 1084, 1093 (E.D. Cal. 2017). Should Plaintiff prevail in obtaining an injunction and be granted access, the claims of the Tribe with respect to handling and treatment of the human remains and cultural items "will be extinguished without the opportunity for them to be heard." *See White*, 765 F.3d at 1027. Such a judgment would be highly prejudicial to the Tribe, which would be deprived of an opportunity to protect against mishandling or mistreatment of human remains and cultural items to which it is entitled to ownership. *See Rosales*, 279 F.Supp.3d at 1093 ("the judgment would be highly prejudicial to the [Tribe], who would be deprived of an opportunity to govern activities on its property if determined to be the proper owner").

(ii) The University Cannot Adequately Represent the Tribe's 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). Plaintiff might argue that the Tribe's absence does not matter because the University will adequately represent its interests. But even a "minimal" showing that representation is *not* adequate renders this exception inapplicable. *See Trbovich v. United Mine Works of Am.*, 404 U.S. 528, 538 n.10 (1972). Plaintiff's argument thus fails for at least three related reasons.

First, the University "has a broad obligation to serve the interests of the people of California, rather than any particular subset, such as the people of [Native American] tribes." *White*, 765 F.3d at 1027. 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 have such a fiduciary relationship with Indian Tribes. *See Am. Greyhound Racing v. Hull*, 305 F.3d 1015, 1023-24 & n.5. (2002). Even if the University's and the Tribe's interests are now aligned, "the different motivations of the two parties could lead to a later divergence of interests." *White*, 765 F.3d at 1027. 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); *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." (internal quotations omitted)).

Second, in light of the University's public mission, it cannot be said that the University's "ultimate objective" is the same as the Tribe's. The University's objective is to ensure that it is complying with state and federal law concerning handling and disposition of the human remains and cultural items in its possession. This is different from the Tribe's interest in ensuring that those remains and items are handled, or not handled, in a particular way.

Third, even if the University's ultimate objective could be said to align with the Tribe's, the University may not be in a position to represent the Tribe's interests as vigorously as the Tribe itself would. For example, if Plaintiff 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). The Tribe is therefore a necessary party notwithstanding the University's current defense.

b. Disposing of Plaintiff's Claims in the Tribe's 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). Here, were a judgment entered in favor of Plaintiff, the University would be prohibited from enforcing the Directive. But the Tribe would not be bound by that judgment and could file a separate lawsuit seeking a judgment that the University's failure to enforce the Directive violates CalNAGPRA's requirement that the University "defer to tribal recommendations for appropriate handling and treatment" of human remains and cultural items. Cal. Health & Safety Code § 8013(c)(2).

2. Joinder of the Tribe Is Not Feasible Because It Is Immune from Suit

Because the Tribe is a necessary party, the Court must next determine whether joinder of the Tribe is feasible. The answer to this question is a straightforward "no." Because the Tribe has sovereign immunity, it cannot be joined even when joinder would otherwise be required. *See, e.g.*, *Deschutes River All.*, 1 F.4th at 1163 ("Joinder of the Tribe is infeasible because of its sovereign immunity."); *Jamul Action Comm.*, 974 F.3d at 998 (holding that the tribe there was "protected by tribal sovereign immunity" and "its joinder in this action is therefore infeasible").

It does not matter that the Tribe may not be federally recognized as such. As the Ninth Circuit has held, an Indian community constitutes a Tribe, with sovereign immunity, if *either* (1) it is recognized as a Tribe by the federal government *or* (2) it is "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometime ill-defined territory," and that it is the "modern-day successor[]" to a "historical sovereign entity that exercised at least the minimal functions of a governing body." *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992); *see also State of Alaska, ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie*, 856 F.2d 1384, 1387 (9th Cir. 1988)

(federal recognition not required for tribal status and sovereign immunity); *Masayesva for and on behalf of Hopi Indian Tribe v. Zah*, 792 F. Supp. 1178, 1182-83 (D. Az. 1992) ("The Ninth Circuit also does not require official federal recognition in order that an Indian tribe can assert sovereign immunity.").

In deciding whether the Tribe satisfies this test on Defendants' Rule 12(b)(7) motion for failure to join a party, the Court may consider evidence extrinsic to the complaint. *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs., and Prod. Liab. Litig.*, 826 F. Supp. 2d 1180, 1197 (C.D. Cal. 2011) ("A court may consider extraneous evidence when deciding a Rule 12(b)(7) motion without converting it into a motion for summary judgment."); *Hammons v. Wells Fargo Bank, N.A.*, No. 15-cv-04897-RS, 2015 WL 9258092, at *7 (N.D. Cal. Dec. 18, 2015) ("In order to determine whether Rule 19 requires the joinder of additional parties, the court may consider evidence outside of the pleadings.").

The Tribe qualifies for sovereign immunity under this test. Though the Muwekma Ohlone are not federally recognized, they are a "body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometime ill-defined territory." Wilcox Decl. Ex. A at p. 10. Dr. Michael Wilcox, who has extensive academic and personal knowledge of the history and current circumstances of the Muwekma Ohlone Tribe, supports this conclusion with extensive evidence and analysis concerning both the present-day Tribe and its history. *Id.* at pp. 10-15. Additionally, Dr. Wilcox opines that the Muwekma Ohlone Tribe is the "modern-day successor" to the Verona Band, which was previously acknowledged by the federal government from 1914 to 1927 as "a historical sovereign that exercised at least the minimal functions of a governing body." *Id*. *See also Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 176 (D.D.C. 2011), *aff'd*, 708 F.3d 209 (D.C. Cir. 2013); Sunseri Decl. Ex. B at 1 ("the CA-ALA-329 site is culturally affiliated with the descendants of the historic (and previously federally recognized) Verona Band of Alameda County, including the formally organized Muwekma Ohlone Tribe of the San Francisco Bay Area.").

Because the Muwekma Ohlone Tribe meets the requirements under federal law, it has sovereign immunity and cannot be joined in this action.

3. The Tribe Is an "Indispensable" Party Without Which Plaintiff's Claims Must Be Dismissed

The final and dispositive question is whether the Tribe is "indispensable." Controlling Ninth Circuit authority holds that it is. While the indispensability analysis generally is guided by a weighing of factors set forth in Federal Rule of Civil Procedure 19(b), "when the necessary party is immune from suit," "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 v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991)); *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).

In *Jamul Action Committee*, the Ninth Circuit held that Tribes were indispensable parties, writing that Rule 19(b) balancing "almost always favors dismissal when a tribe cannot be joined due to tribal sovereign immunity," *Jamul Action Comm.*, 974 F.3d at 998 (citing to *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996)); *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs.*, 932 F.3d 843, 857 (9th Cir. 2019)). The Ninth Circuit in *Dine Citizens* noted that "[T]here is a 'wall of circuit authority' in favor of dismissing actions in which a necessary party may not be joined due to tribal sovereign immunity—'virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether [an alternate] remedy is available, if the absent parties are Indian tribes invested with sovereign immunity.'" *Dine Citizens Against Ruining Our Env't*, 932 F.3d at 857 (quoting *White*, 765 F.3d at 1028). *Accord*: *Deschutes River All.*, 1 F.4th at 1163; *White*, 765 F.3d at 1028.

The Tribe's immunity, by itself, therefore mandates dismissal here. Consideration of the Rule 19(b) factors, is therefore unnecessary, but only confirms that dismissal is required.

The Rule 19(b) factors ask the court to "determine whether, in equity and good conscience," the action should proceed notwithstanding that "a person who is required to be joined

if feasible cannot be joined." Fed. R. Civ. P. 19(b). The first factor asks the court to consider "the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties." Fed. R. Civ. P. 19(b)(1). As courts have frequently noted, this factor 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 Tribe's absence would prejudice both the Tribe and the University. This factor therefore strongly favors an indispensability finding.

The second factor requires the court to consider "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." Fed. R. Civ P. 19(b)(2). Prejudice to the Tribe in this case could not be averted by protective provisions in a judgment by this Court or other measures—so this factor also cuts in favor of dismissal. "Any decision mollifying [Plaintiff] would prejudice the [Tribe]." *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1162 (9th Cir. 2002); *see also Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986). And courts have consistently rejected the notion that absent parties possessing immunity can be required to mitigate the prejudice by intervening in the action, so it is no response to suggest that the Tribe should intervene. *See, e.g.*, *Confederated Tribes*, 928 F.2d at 1500 ("the ability to intervene if it requires 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 in the person's absence 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 (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968)). "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 [Tribe] would not further the public interest in settling the dispute as a whole because the [Tribe] would not be bound by the judgment in an action where [it was] not [a] part[y]." *Id.* at 870-71. As noted

above, if Plaintiff prevails here, the Tribe could sue the University in a second suit seeking a ruling that CalNAGPRA requires enforcement of the University's policy restricting access to the human remains and cultural items. The third factor therefore favors dismissal.

The fourth factor—"whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder," Fed. R. Civ. P. 19(b)(4)—is not enough to justify proceeding without the Tribe. As the Ninth Circuit has stated, "virtually all the cases to consider the question appear to dismiss under Rule 19, *regardless of whether [an alternate] remedy is available,* if the absent parties are Indian tribes invested with sovereign immunity." *White*, 765 F.3d at 1028 (emphasis added). 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.

B. PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF

To survive a motion to dismiss, a pleading must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007) (*Twombly*); *see also Lazy Y Ranch Ltd. v. Behrens,* 546 F.3d 580, 588 (9th Cir. 2008). The alleged facts, taken as true, must "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). An "obvious alternative explanation" may render otherwise conceivable claims implausible and thus subject to dismissal. *Id.* at 682.

While the Court may generally consider only the allegations of the complaint on a Rule 12(b)(6) motion, "a court may consider 'material which is properly submitted as part of the complaint' on a motion to dismiss without converting the motion to dismiss into a motion for summary judgment." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (quoting *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994)). Importantly here, "[i]f the documents are not physically attached to the complaint, they may be considered if the documents' authenticity . . . is not contested and the plaintiff's complaint necessarily relies on them." *Lee*, 250 F.3d at 688

(internal quotations omitted); *see also Johnson v. Fed. Home Loan Mortg. Corp.*, 793 F.3d 1005, 1007 (9th Cir. 2015) ("[O]n a Rule 12(b)(6) motion, we may consider extrinsic evidence not attached to the complaint if the document's authenticity is not contested and the plaintiff's complaint necessarily relies on it."). Here, Plaintiff cannot dispute the authenticity of the documents attached to her and her counsel's declarations in support of her motion for a preliminary injunction. Where those documents are relied upon in the Complaint, the Court may consider them on this motion to dismiss.

Failure to make "either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory" will lead to dismissal of a claim. *Twombly*, 550 U.S. at 562. To plead a First Amendment retaliation claim against a government employer, an employee must plausibly allege three factors to avoid dismissal: "(1) that he or she engaged in protected speech; (2) that the employer took adverse employment action; and (3) that his or her speech was a substantial or motivating factor for the adverse employment action." *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003) (internal quotations omitted); *see also Turner v. City and County of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015).

Plaintiff has not plausibly alleged either that her speech was a substantial or motivating factor for the promulgation of the Directive or that Defendants' actions constituted an "adverse employment action" or imposition of an "unconstitutional condition." Lacking plausible allegations as to these material elements of a First Amendment retaliation claim, her claims should be dismissed. First, even assuming that the Interim Directive modified the conditions of Plaintiff's employment by restricting her access to the collections she once curated, Plaintiff's speech was not a substantial or motivating factor for its promulgation; rather, her mishandling of Native American remains and the resulting demands by the Tribes and the NAHC for more restrictions on access to and handling of the remains were. Contrary to Plaintiff's allegation that the University "has no other compelling justification" for its actions "other than its disagreement with [her] viewpoints," Compl. ¶ 97, this "obvious alternative explanation" for the Directive—which is established by the allegations of the Complaint and the documents to which it refers—renders Plaintiff's claims of retaliation implausible and subject to dismissal. *Iqbal*, 556 U.S. at 682.

Second, Plaintiff alleges that Defendants' statements disagreeing with Plaintiff's views indicate that the University has punished or threatened to punish her. But those statements—the content of which are not subject to dispute because Plaintiff has submitted a transcript of them—do not constitute adverse employment actions sufficient to support a claim of retaliation. To the contrary, they comprise statements of opinion by SJSU faculty members, which are themselves protected by the First Amendment. For that same reason, Plaintiff has failed to plead an unconstitutional-conditions claim.

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

Plaintiff may show that retaliation for her speech was a substantial or motivating factor behind Defendants' alleged adverse employment action in three ways. She may introduce evidence (1) "that the proximity in time between the protected action and the allegedly retaliatory employment decision was one in which a jury could logically infer that the plaintiff was [retaliated against] for [her] speech"; (2) "that "[her] employer expressed opposition to [her] speech"; or (3) "that [Defendants'] proffered explanations for the adverse employment action were false and pre-textual." *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741 (9th Cir. 2001) (as amended) (internal citations omitted) Plaintiff attempts to allege evidence of each of these propositions, but her allegations cannot support a plausible inference that retaliation for Plaintiff's speech—rather than compliance with CalNAGPRA—motivated the University's actions.

a. Adoption of the Directive Was Proximate to Plaintiff's Mishandling of Native American Remains, Not Plaintiff's Speech

Far from supporting Plaintiff's claims, the timing of Defendants' adoption of the Directive shows that it was adopted to comply with CalNAGPRA, not in retaliation for Plaintiff's expression of her viewpoint about repatriation laws. Plaintiff's mishandling of Native American remains without consulting with the relevant Tribes disregarded the requirements of CalNAGPRA in a way that demanded a response from the University. Posting on social media a photograph of oneself holding, without gloves, an ancient Native American skull to be repatriated under CalNAGPRA unquestionably does not constitute "minimizing handling" of Native American

remains when one has not consulted with the relevant Tribes before doing so or deferred to their recommendations for "appropriate handling and treatment" of the remains. Cal. Health & Safety Code ¶ 8013(b)(1)(B)(i); (c)(2). Although Plaintiff asserts that she has "always complied strictly with NAGPRA and . . . CalNAGPRA," Compl. ¶ 18, AB 275 updated the standards of compliance, and her September 18, 2021, tweet portrays blatant disregard for those standards. It is therefore not surprising that members of Native American and California Indigenous Tribes as well as experts were shocked by Plaintiff's conduct and demanded that SJSU adopt policies to ensure its compliance with CalNAGPRA going forward. *See* Weiss Decl. Ex. 13; Ex. 25.

The timing of the Directive followed immediately upon Plaintiff's mishandling of Native American remains and demands from the affected Tribes and the NAHC. As Plaintiff alleges, the policy did indeed come "on the heels of the controversy surrounding [Plaintiff]'s tweet," Compl. ¶ 96, because the act depicted in Plaintiff's tweet made it apparent that more stringent protocols were required. By contrast, Defendants had taken no action against Plaintiff for years and many months following her extensive, repeated, and public expression of her viewpoints about repatriation laws. As Plaintiff alleges, she published her book on the subject in 2020, had "made similar arguments about repatriation for years," and published an op-ed on the subject in August, 2021. Compl. ¶¶ 19, 21, 31. No adverse employment action was taken against her on any of those occasions; on the contrary, she was "commended" for "boost[ing] the department's national reputation" as one that promotes "unorthodox viewpoints." *Id.* ¶ 21. Despite this long history of controversial speech by Plaintiff, it was only after she mishandled a Native American skull, on September 18, 2021, *id.* ¶ 32, that Defendants took any action: on October 6, 2021, the Directive was promulgated. *Id.* ¶ 36. To the extent anything may be inferred from the timing here, it is that Defendants adopted the Directive in order to comply with CalNAGPRA, not to retaliate against Plaintiff for her viewpoints about repatriation laws.

b. Statements Made by the Defendants Expressed Disagreement with Plaintiff's Viewpoint and Disapproval of Her Mishandling of Native American Remains, Not Opposition to Her Speech

An employer's expressed opposition to a plaintiff's speech will support a claim of retaliatory motive when the employer has stated opposition to the speech itself, rather than only

the opinion expressed therein. *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 751 (9th Cir. 2001). The Ninth Circuit has held, for example, that a memorandum written by a superior warning the plaintiff that he is not authorized to speak out on a particular matter may suffice as expressed opposition under this standard. *Schwartzman v. Valenzuela*, 846 F.2d 1209, 1212 (9th Cir. 1988). *See also Allen v. Scribner*, 812 F.2d 426, 434-35 (9th Cir.), *amended*, 828 F.2d 1445 (9th Cir. 1987) (holding affidavits from coworkers saying superiors told them officials were looking for an excuse to have the plaintiff removed because of "the way in which he expressed his opinions" created a triable issue of fact); *Allen v. Iranon*, 283 F.3d 1070, 1077 n.6 (9th Cir. 2002) (noting that Defendant employer "complain[ing] of personnel 'go[ing] to the media'" would be evidence that Defendant expressed opposition to Plaintiff's speech).

Plaintiff points only to statements expressing disagreement with her views on repatriation and disapproval of her mishandling Native American remains. She neither claims nor presents evidence of statements expressing the requisite opposition to her *ability to express* her views to satisfy the pleading standard. Provost Del Casino's September 29, 2021, statement expressed disapproval of the conduct pictured in Plaintiff's tweet, stating that it was contrary to "the ethical guidelines of the social science disciplines that govern such practices and laws such as AB 275" and that SJSU "does not condone or endorse the practice of posing with the human remains of others." Compl. ¶ 33; Weiss Decl. Ex. 11. But, far from expressing opposition to *Plaintiff's expression of her viewpoint*, the Provost explicitly supported it. *Id.* ("[D]oes a professor have a right to express their views on the matter? Do they have the right to advocate against laws like NAGPRA, CalNAGPRA, and AB 275 and present their work at academic conferences and post on social media? Do they have the right to teach on these topics in their classes? The answer to all these questions is yes."). Defendant Gonzalez's November 17, 2021, letter, published on behalf of SJSU's Anthropology Department, similarly reflects disapproval of Plaintiff's mishandling and photography of human remains and a recommitment to upholding the requirements of CalNAGPRA and AB 275. Compl. ¶ 79; Weiss Decl. Ex. 23. It contains no disapproval of, or even disagreement with, Plaintiff's expression of her viewpoint on repatriation laws.

Gonzalez's statements regarding Plaintiff's views on repatriation during the faculty panel discussion he co-hosted in June, 2021, prior to her tweet, simply expressed his personal disagreement with Plaintiff's academic conclusions. His exercise of his own First Amendment rights during this discussion does not plausibly render the passage of the Directive several months later retaliatory, just because he disagreed with Plaintiff's views on repatriation. In fact, in the same conversation, he supported her academic freedom. Compl. ¶ 23; Weiss Decl. Ex. 5 at 10 (Gonzalez: "She writes a controversial book . . . this is . . . at the heart [] of the idea of academic freedom[,] that even ideas that are . . . unpopular, [] need to be voiced or need to be given their . . . chance [] to be expressed."); *id.* at 15 ("I sent this out on our departmental listserv . . . the crux of the message was . . . a reminder that this is what academic freedom is."). To the extent that Gonzalez suggested any problem with Plaintiff's teaching her viewpoint in her classroom, he did so expressly because he "might make the argument that this is academic incompetence because [he] think[s] the arguments are so scientifically shaky." *Id*. at 39. As Chair of the Department of Anthropology, Gonzalez is entitled to express his professional opinion about the merits of scientific arguments, no matter by whom they are made. *See Skidmore v. Gilbert*, 5:20-cv-06415-BLF, at *20 (N.D.C.A. Feb. 15, 2022) ("While [Plaintiff] may have found the manner of [Defendants'] comments unmeasured . . . and even distinctly unpleasant, that does not mean that those comments were not protected speech or that [Plaintiff] has the right to stifle comments made in direct reaction to her [speech]." (internal quotations omitted)).

c. The Complaint Shows on Its Face that Defendants' Proffered Explanations Are Not False or Pretextual

Far from alleging *facts* supporting an inference that the University's proffered reason for promulgating the Directive was pretextual, Plaintiff simply asserts the legal conclusion that the University "faced no legal duty to implement the directive." Compl. ¶ 38. This is false. Under CalNAGPRA, the University was required to consult with the Tribes and defer to their recommendations with respect to handling and treatment of the remains in its possession. Cal. Health & Safety Code § 8013. Plaintiff herself emphasizes that members of affected Tribes and the NAHC "pressured the University to act," and that the University's actions were the "direct

result of . . . consultation that SJSU had with the affected tribe [and the NAHC]," *id*. ¶ 40. But the University *did not* take targeted action against Plaintiff despite calls to discipline her. The University deferred to the Tribes and NAHC on only those matters over which those entities retain ultimate authority under CalNAGPRA: who may access the Native American remains to be repatriated and in what manner. *See* Weiss Decl. Ex. 11; Ex. 16. This is evidenced by the continued absence of any targeted discipline against Plaintiff, despite calls from these entities for more serious consequences to follow her actions. *See, e.g.*, Weiss Decl. Ex. 13.

Plaintiff asserts SJSU's adoption of the Directive came "much later" than other California universities' policies, Compl. ¶ 38; *see also id*. ¶ 91 ("other California universities have older NAGPRA policies"), and that this somehow shows it was adopted in retaliation against Plaintiff. The assertion is specious. The policies referenced in the Complaint are attached to Plaintiff's counsel's declaration in support of her preliminary injunction motion. Ortner Decl. Exs. 27-35. The SFSU policy (Ex. 27) bears no date; the CSULB policy (Ex. 28) was adopted in 1996, long before enactment of CalNAGPRA and AB 275; the CSU Chico (Ex. 35) policy was again adopted before enactment of AB 275; and the University of California policy (Ex. 34) was issued on December 27, 2021, more than two months *after* SJSU's.

Plaintiff repeatedly suggests that retaliation should be inferred because SJSU's Directive is somehow more restrictive than other California universities' policies. Compl. ¶¶ 56, 64, 66, 96. But the suggestion is misplaced. The undated SFSU policy, which does not reference and therefore may pre-date CalNAGPRA and AB 275, provides that "culturally affiliated tribal members will be consulted to the fullest extent possible before [a] research project is approved" and that "[r]esearchers must submit a letter from culturally-affiliated tribes or individuals, approving the research, to the NAGPRA Coordinator." Ortner Decl. Ex. 27. The CSULB policy, which on its face pre-dates CalNAGPRA and AB 275, provides that "[r]esearch and teaching involving Native American human remains and artifacts will only be conducted with the documented permission of the living descendants or . . . the tribal authorities. . . ." *Id*. Ex. 28. Sacramento State's forms for field collection and requesting access to research its collections state that "[c]ollections known to contain human remains or cultural items subject to NAGPRA will not

be accepted" and that "[m]aterials subject to NAGPRA are not available for study, including known human remains . . ." *Id*. Exs. 31, 32. The University of California policy provides that "UC campuses may not authorize research . . ., instructional use, or other use of any identified or potential Human Remains and Cultural Items," with only two exceptions: "Lineal Descendants and Tribal Representatives" are permitted access; and research may be permitted if the relevant Tribes "provide explicit written authorization." *Id.* Ex. 34 at 45. Nowhere does Plaintiff allege that she had or has authorization from the relevant Tribes here to do research on the remains, far less to handle a skull and post a picture of her holding it on social media.

Finally, Plaintiff's suggestion that the University's reaction to her tweeted photograph was somehow pretextual, *see* Compl. ¶ 32, is unfounded. Plaintiff alleges that, at the time of her controversial tweet, "the Department of SJSU had several similar pictures up on its website." Compl. ¶ 32. But all of the purportedly "similar" pictures pre-date enactment of AB 275's requirement to consult with Tribes as to handling and treatment of remains. And, in any event, the only ones that include someone holding a skull are pictures of Plaintiff, and those are also the only entries that do not establish prior consultation with the relevant Tribes. Compl. ¶ 32; Weiss Ex. 10. The March 30, 2021, article Plaintiff references, Compl. ¶ 32, includes a picture of Professor Mary Juno "holding a *model* of a modern forensic skull," not an actual human skull. *Id*. at p. 72.

2. Defendants' Statements Disagreeing with Plaintiff's Viewpoints Are Not Adverse Employment Actions or Unconstitutional Conditions

Plaintiff's allegations that various statements made by Defendants concerning her viewpoint on repatriation laws constitute adverse employment actions with retaliatory motives will not save this case from dismissal. An adverse employment action is broadly defined as an action taken by Defendants that would be "reasonably likely to deter [an ordinary person] from engaging in protected activity [under the First Amendment]." *O'Brien v. Welty*, 818 F.3d 920, 933 (9th Cir. 2016) (citing to *Coszalter v. City of Salem*, 320 F.3d 968, 970 (9th Cir. 2003)). But "[m]ere threats and harsh words are insufficient." *Nunez v. City of Los Angeles*, 147 F.3d 867, 875 (9th Cir. 1998). Being "bad-mouthed and verbally threatened" alone does not constitute an adverse employment action. *Coszalter*, 320 F.3d at 975. *See also Skidmore*, 5:20-cv-06415-BLF, at *12 ("de facto

discipline in the form of shunning by the university community and threatening to deprive [Plaintiff] of her Ph.D. and future career opportunities . . . arising not from any actual alleged disciplinary action but from Defendants' own statements in response to [Plaintiff]'s Facebook posts" does not clearly establish that Defendants violated her rights).

The statements that Defendants have made concerning their disagreement with Plaintiff's views on repatriation and her mishandling of Native American remains are not even threats, let alone adverse employment actions. As discussed in Section III(B)(1)(b), *supra*, statements made by Provost Del Casino and Professor Gonzalez in the aftermath of Plaintiff's mishandling of Native American remains reflect the disapproval of the Tribes and NAHC, to whom the Defendants are legally required to defer as to the propriety of handling remains. And prior to Plaintiff's tweet, Professor Gonzalez's statements about the views expressed in Plaintiff's book, *see* Weiss Decl. Ex. 5, were the expression of his own opinions, which he is just as entitled to express as Plaintiff. "It would be the height of irony, indeed, if mere speech, in response to speech, could constitute a First Amendment violation." *Nunez*, 147 F.3d at 875. Plaintiff should not be permitted to simultaneously use the First Amendment as both a "shield (to protect her own statements) and a sword (to silence the First Amendment rights of professors to respond)." *Skidmore*, 5:20-cv-06415-BLF, at *22.

Moreover, Defendant Gonzalez's statements are benign. Plaintiff mischaracterizes Gonzalez's statements as threatening, while the transcript of his remarks shows a reasoned discussion among faculty about how to balance ethics and student comfort with academic freedom. *See* Weiss Decl. Ex. 5, at 9 (Gonzalez emphasizes his personal opinion of Plaintiff's viewpoint that "in my mind, personally, it's a really flawed argument[,] I think it borders on . . . professional incompetence"; at 13 ("I'm not going to call her a racist"); at 40 (notes he "*might* make the argument that this is *academic* incompetence because [] the arguments are so scientifically shaky"; someone else ("Hannah"), not Gonzalez, says "*if* this person holds deeply [] held white supremacist values"; Gonzalez responds that *if* that were the case, exposing students to that in the classroom "certainly *would*" cause an ethical barrier).

Gonzalez's statements were, at worst, "harsh words" from a colleague, not "threats" as Plaintiff alleges. That is especially true in light of Gonzalez's subsequent email to Plaintiff in which he assured her that "SJSU policy . . . ensures the preservation of academic freedom for both faculty and students, and I'll continue upholding it as long as I'm affiliated with the University," Weiss Decl. Ex. 6 at 3, and that regardless, he isn't in a "structural position to 'retaliate' against faculty, or even take disciplinary action." *Id.* at 4. Plaintiff's speculation on this basis that Defendants will take "further retaliatory actions," such as "attempting to remove her from the classroom, take away her tenure, and terminate her employment," Compl. ¶ 105, is not supported by the facts alleged and cannot support her claims.

For the same reasons explained above concerning Defendants' alleged "threats" and "plans," Plaintiff has failed to plead facts sufficient to support a claim that Defendants have conditioned or threatened to condition Plaintiff's employment or freedom to teach on relinquishment of her First Amendment rights. No benefit has been denied Plaintiff on an unconstitutionally retaliatory basis, and there is no credible reason to think any will be. Weiss Decl. Ex. 11 ("[D]oes a professor have a right to express their views on the matter? Do they have the right to advocate against laws like NAGPRA, CalNAGPRA, and AB 275 and present their work at academic conferences and post on social media? Do they have the right to teach on these topics in their classes? The answer to all these questions is yes.").

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Complaint should be dismissed with prejudice.

DATED: February 24, 2022

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