DANIEL M. ORTNER, No. 329866
DOrtner@pacificlegal.org
ETHAN W. BLEVINS, Wash. Bar No. 48219*
EBlevins@pacificlegal.org
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Attorneys for Plaintiff Elizabeth Weiss
**pro hac vice*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ELIZABETH WEISS,

Plaintiff,

v.

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

Defendants.

No. 5:22-cv-00641-BLF

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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

Date Action Filed: January 31, 2022
Trial Date: TBD

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

Defendants effectively concede that they retaliated against Professor Weiss for her speech. Their defense of their retaliatory campaign rests on two flawed arguments.

First, Defendants exaggerate the level of control and authority that the tribes hold under CalNAGPRA and AB 275. They claim that the tribes are pulling the University's strings and therefore Defendants are not accountable. But AB 275 does not grant tribal control over research. Even if AB 275 gave the Tribe some measure of control, the University cannot acquiesce to demands from the tribes to punish Professor Weiss for her speech. This is also the primary reason that Defendants' indispensable party argument fails.

Second, Defendants misrepresent the standards for handling human remains. Professor Weiss did not mishandle any remains or violate any law, rule, or policy governing her research. The four declarations submitted with this reply from esteemed scholars with long experience in handling remains, Professor Weiss's own statement, and the University's own practices all demonstrate that photographing oneself with remains and handling remains without gloves do not violate any known standards in Professor Weiss's field. Meanwhile, the Defendants' expert, whose expertise is not osteology or the handling of remains, vaguely asserts that the tweet was "disrespectful" and mischaracterizes the tweet as a joke. Moreover, nothing in AB 275 dictates treatment of remains outside the repatriation process.

Defendants' statements and actions also show that the viewpoints Professor Weiss expressed motivated the interim directive and its enforcement against her, not state law or sudden changes in ethical standards. For example, Defendant Gonzalez expressly threatened to penalize her for her expression regarding repatriation, and Defendant Ragland expressly stated that she wanted to cut off Professor Weiss from even the parts of the collection not covered by AB 275 because of Professor Weiss's views on repatriation. Defendant Del Casino's letter also confirms that the interim directive was not just directed at mishandling but was also a response in the broader public debate about repatriation and the proper treatment of remains. Statements from tribal authorities, likewise, show that Defendants and the tribes were of one mind—that Professor Weiss's views are unacceptable and warrant punishment.

ARGUMENT

I. Defendants Greatly Misread AB 275

Defendants' misreading of AB 275 pervades their arguments regarding joinder, the merits of Professor Weiss's claims, and the balance of the equities. Under Defendants' reading, AB 275 places complete control over whether and how Native American remains are researched into the hands of tribes. The University's mission and interests as well as the interests of its professors must be subservient to tribal traditions (including a ban on access for menstruating researchers that likely violates equal protection and Title IX). *See* Decl. of Charlotte Sunseri Ex. J. If the tribes demand that the University bar a researcher from accessing the collection because of her views on repatriation, then the University must comply—notwithstanding the First Amendment.

Contrary to Defendants' reading, AB 275 does not bar ongoing research. AB 275 sets out an orderly process for the inventorying and gradual repatriation of skeletal remains that does not disrupt ongoing research endeavors. The law recognizes that scientific research will continue even after the inventory is completed and that once a request for repatriation is made "[s]cientific research shall be concluded within a reasonable period of time." Cal. Health & Safety Code § 8016(a)(4). Professor Weiss can therefore continue her research until after a request for repatriation is made and then given "a reasonable period of time" to conclude her research. By contrast, there is nothing "reasonable" about the way that Defendants responded to Professor Weiss's speech by cutting off access overnight before there was a concrete request for repatriation or even a completed inventory.

The University is also required to "consult" with the tribes, but this consultation process is only required as part of completing or updating an inventory. *See* Decl. of Vincent Del Casino Ex. A (letter from NAHC noting agencies must "consult with culturally affiliated tribes *in creating or updating inventories*" (emphasis added)). Further, consultation is defined in CalNAGPRA as a conversation rather than a demand for blind deference. Consultation is "the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, achieving agreement." Cal. Health & Safety Code § 8012(e). In other words, the University must carefully consider the tribes' views

regarding the inventory process, but it is not bound by those views, especially if the tribes urge it to violate the First Amendment. *See Smith v. Allwright*, 321 U.S. 649, 664 (1944) (A state cannot slip constitutional restraints by allowing private organizations to dictate government action, as "[c]onstitutional rights would be of little value if they could be thus indirectly denied."). Indeed, AB 275 recognizes that agreements will not always be feasible. *See* Cal. Health & Safety Code § 8012(e). And the University is immune from any claims arising from the repatriation of human remains so long as it acts "in good faith." *Id*. § 8018.

In the specific context of "the completion of the preliminary summary" for inventory and repatriation purposes, the University is told to "defer to tribal recommendations for appropriate handling and treatment." *Id.* § 8013. But this provision only applies to the inventory process in preparation for repatriation and not to research endeavors. Similarly, the requirement to consult about "minimizing handling" only applies to "new or additional inventory work." *Id.* And Defendants admit that the inventory work on the Ca-Ala-329 collection that Professor Weiss wishes to study has been completed. Sunseri Decl. Ex. H. So AB 275 provides no legal basis for denying Professor Weiss access for research, let alone a requirement that SJSU do so.

And, of course, AB 275 does not and indeed cannot authorize SJSU or Defendants to violate the Constitution. Defendants' dangerous interpretation of AB 275 would subject fundamental rights to the veto power of tribes. It would also risk an establishment of religion by elevating tribal religious practices and beliefs (such as the belief that women who are menstruating are ritually impure and should not touch remains) above constitutional protections. *See McCreary Cty., Ky. v. ACLU*, 545 U.S. 844, 860 (2005) (It is an Establishment Clause violation "[w]hen the government acts with the ostensible and predominant purpose of advancing religion."). This expansive and extraordinary interpretation must be rejected.

II. The Muwekma Ohlone Tribe Is Not a Required Party Under Rule 19

Defendants argue that this case must be dismissed because the Muwekma Ohlone Tribe is an infeasibly joinable required party. This argument is primarily made in Defendants' Motion to Dismiss and only cursorily laid out in their opposition to the motion for preliminary injunction. Accordingly, Professor Weiss also will only respond to this argument briefly here and will refer

the Court to her forthcoming opposition to the motion to dismiss for a fuller response to this argument. First, the Tribe is not a necessary party because AB 275 does not give it a legally protected interest related to the subject of this litigation. The Tribe's interest is not legally protected because AB 275 gives tribes no cause of action to enforce the law against the University, and its interest is not related to the subject of this action because AB 275 limits the Tribe's interest in remains to the context of inventorying and repatriation, not scientific research, which is expressly provided for by CalNAGPRA without tribal approval.

Furthermore, even if the Tribe's interest is legally protected and related to the subject of this action, it is still not a necessary party. Proceeding without the Tribe would not impair its ability to protect its interests, because Professor Weiss is not challenging AB 275 nor the inventorying and repatriation of the remains. Defendants admit that inventorying has already been completed. Sunseri Decl. Ex. H. And the claim that Professor Weiss's research prior to repatriation will "result in damage to the remains and items prior to their repatriation to the Tribe" or "potentially delay repatriation" is baseless. Defendants' Motion to Dismiss at 9; Weiss Suppl. Decl. ¶ 45. Furthermore, the University or other feasibly joinable parties such as the NAHC or tribal leaders (in their individual capacity) can adequately represent the Tribe's interests. The University would also not be at risk of inconsistent judgments because the University enjoys immunity under CalNAGPRA when it repatriates in good faith, Cal. Health & Safety Code § 8018, and AB 275 expressly contemplates research continuing up to the time of repatriation. *Id.* § 8016(a)(4).

Even if the Tribe is necessary and infeasibly joinable, it is not an indispensable party. Proceeding without the Tribe would not prejudice the Tribe or the University as any relief could be crafted to avoid affecting the Tribal interest in inventorying and repatriation.

Furthermore, Professor Weiss would not have an adequate remedy if this case were dismissed for nonjoinder. This is especially troubling because this case involves a blatant violation of constitutionally protected rights. It would go against equity and good conscience to deny Professor Weiss the opportunity to vindicate her constitutional rights merely because the University attempts to piggyback on the sovereign immunity of a tribe that has only a tangential interest in Professor Weiss's claims.

III. Professor Weiss Is Likely To Succeed on the Merits

A. Professor Weiss's speech was a substantial and motivating factor that prompted the adoption of the interim directive

Defendants effectively concede that the interim directive came because of Professor Weiss's speech on matters of public concern. "[O]n the heels of" the backlash to her speech and social media activity, the University adopted a restrictive policy directed at eliminating Professor Weiss's ability to conduct research. *See* Opp. at 11–12 (noting that Weiss "posting on social media" was what "demanded a response from the University"). But for her speech and social media activity, she would have been allowed to continue her research until the collection was ready for repatriation.

But Defendants attempt to deflect from this conclusion with two flawed rationales. First, they argue that their actions had nothing to do with Professor Weiss's speech and were only related to her "mishandling" of remains. Second, they claim that the interim policy is the result of a neutral consultation process and therefore is not retaliatory. Both arguments fall apart upon closer inspection. *See Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985) ("The existence of reasonable grounds . . . will not save a regulation that is, in reality, a façade for viewpoint-based discrimination").

1. The Defendants' action was in response to Professor Weiss's Speech

Defendants focus myopically on the controversy over Professor Weiss's tweet holding skeletal remains. But Defendants' own words reveal that this tweet is inseparable from the broader debate over repatriation and the proper disposition of Native American remains. As Defendant Del Casino rightly pointed out in his letter to the campus community, "[t]he image is tied to a larger argument in the same Twitter feed" regarding whether laws requiring repatriation "are anti-science, or at least impede scientific pursuits because they favor religious and cultural values over scientific ones." Weiss. Decl. Ex. 11. The question of whether tribal remains should be handled, displayed, and photographed is inexorably connected to the repatriation debate that Professor Weiss's book, tweets, and op-eds are a part of. Weiss Suppl. Decl. ¶ 41.

The reaction to Professor Weiss's photograph is directly connected to her writings on repatriation in another respect. But for Professor Weiss's writings on repatriation and the backlash

to her book, there would not have been such an intense and vitriolic reaction to her tweet. This is illustrated by the October 11, 2021, letter from the Native American Heritage Commission. In this letter, the Commission directly links its response to the tweet to Professor Weiss's "history of opposing repatriation" and her purported lack of "sensitivity or concern over the treatment of California Indian human remains." Del Casino Decl. Ex. H. Had a scholar that the Commission viewed as sympathetic to repatriation made the same tweet, its reaction would not have been the same.

Defendants also try to downplay the connection between Professor Weiss's writings on repatriation and their actions by emphasizing that Professor Weiss's book came out more than a year before the interim policy was implemented. Opp. at 5. But Defendants ignore the escalating controversy and the corresponding increase in public pressure on the University to act against Professor Weiss, which peaked right before the interim policy was adopted. Defendant Jacobs spoke of being under immense pressure to act against Professor Weiss in July 2021. Weiss Decl. ¶ 22. It is for this reason that Professor Weiss's counsel warned Defendants against barring her from conducting her research just two months before the University did so. *Id.* Ex. 7. Her Mercury News op-ed was published on August 31, 2021, a little more than a month before the interim policy, but it only went viral on social media a few weeks later, receiving far more attention on social media than Professor Weiss's photograph tweet (over 1,000 responses versus just 70). Weiss Suppl. Decl. ¶ 41, Ex. 13. And Defendants concede that the Mercury News op-ed triggered intensifying calls to remove, discipline, or sanction Professor Weiss. Opp. at 4. The close "proximity in time" of this event and the University's interim policy belies the University's claim that there is no connection between her writings on repatriation and the directive. *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 751 (9th Cir. 2001).

Furthermore, even if Professor Weiss's tweet were wholly unrelated to the debate on repatriation, she was still speaking out on a matter of public concern. Her position as expressed in an October 4, 2021, Mercury News Article published shortly before the interim policy is that "[s]cience . . .… is more important than sensitivities" and "that being photographed with a skull of a Native American is little different than showing Egyptian mummies or Otzi, the iceman." Weiss

Suppl. Decl. ¶ 43 Ex. 14. Her critics, on the other hand, see displaying Native American remains as uniquely problematic because doing so "dredges up painful memories." Sunseri Decl. Ex. 1. By sharing pictures of herself with the remains from the collection, Professor Weiss took a stance on this important public debate. Weiss Suppl. Decl. ¶ 41. Punishing her for doing so is not just a response to supposed mishandling.

2. Professor Weiss did not mishandle remains

Defendants further attempt to deflect attention from their reaction to Professor Weiss' speech by claiming that she mishandled remains by some combination of sharing a photograph on social media, smiling, or holding the remains without gloves.

But Defendants cannot point to any policy, guideline, handbook, or other rule broken by Professor Weiss.[1] There was no policy barring the taking and sharing of photographs. Indeed, her department had encouraged her to take and share such photographs to help promote the anthropology department to its students, and Defendants do not deny that these photographs were on the Department's website and the walls of its building at the time when Professor Weiss sent her tweet. There was similarly no policy requiring the use of gloves. And had such policies been in effect, Professor Weiss would have complied, as she told Gonzalez immediately before the University adopted its retaliatory research ban. Weiss Suppl. Decl. ¶ 19.

Taking and sharing photographs holding remains is also not against the norms of Professor Weiss's profession, nor is holding remains without gloves. Weiss Decl. ¶ 35, Ex. 12; Bourque Decl. ¶ 4, 9–15; Cook Decl. ¶ 4–11; Owsley Decl. ¶ 12–25; Becker Decl. ¶ 6–9. Indeed, doing so may often be safer especially when remains have already been handled without gloves, as the University's collection has long been. Weiss Decl. Ex. 12; Owsley Decl. ¶ 15. All of this strongly suggests that the University's response was "false and pre-textual." *Keyser*, 265 F.3d at 751.

Defendants' declaration from Professor Wilcox fails to establish that she mishandled

[1] Defendants include a policy from a class that Professor Weiss taught which barred *students* from taking photographs in the research lab. Del Casino Decl. Ex. K. at 24. But this policy was intended to limit the odds that students engage in horseplay or other inappropriate behavior in the laboratory and was never intended to apply to professional researchers. And the Anthropology department took photographs of students to promote the activity of the department, so this policy clearly did not apply to professor or staff. Weiss Suppl. Decl. ¶ 20.

remains. For one, his mischaracterization of her tweet as "making a joke" with human remains taints his conclusion that her behavior violated ethical standards. Wilcox Decl., Ex. A at 4; *see* Bourque Decl. ¶ 12 ("Professor Weiss's expression of pleasure no doubt arose from being allowed once again to resume research on the SJSU collection to which she has dedicated her teaching and research career rather than any of the nefarious motives that have been attributed to her."). But his conclusion is also vague and unclear: he appears to believe that the total combination of tweeting, joking (which is not accurate), photographing, and holding a skull without gloves amounts to "disrespectful" behavior. This vague and subjective determination stands in stark contrast to the careful comparison of Professor Weiss's tweet to the ethical standards of the profession in the four declarations from eminent scholars submitted with this reply. *See* Bourque Decl. ¶ 4, 9–15; Cook Decl. ¶ 5–11; Owsley Decl. ¶ 12–25; Becker Decl. ¶ 6–9. Those scholars, moreover, all have direct and extensive expertise with the handling of human remains, while Professor Wilcox's expertise does not largely appear to involve the handling of remains. *Compare* Bourque Decl. ¶ 2–7, Cook Decl. ¶ 2–5, Owsley Decl. ¶ 2–5, Becker Decl. ¶ 2–5 *with* Wilcox Decl., Ex. 1.

Defendants, moreover, wrongly claim that Professor Weiss violated AB 275 either by "mishandling" the remains or by failing to consult with the Tribe. But Professor Weiss was engaged in routine curational responsibilities that were not within the scope of AB 275, which only governs the inventory and repatriation process. Weiss Suppl. Decl. ¶ 22. Thus, Professor Weiss was under no obligation to consult or to defer to the Tribe in how she carried out her curational duties.

But even assuming that AB 275 applied, Professor Weiss did not violate it. Consultations were ongoing at the time that Professor Weiss took and shared her picture. Sunseri Decl., Ex. G. And the tribes that had been consulted raised no objection to ongoing research or to the taking and sharing of photography prior to Professor Weiss's tweet as evidenced by the consultation log that Defendants rely on. Sunseri Decl., Ex. G. The Tribe had also previously entered into a memorandum of understanding with the University recognizing "the benefits to the Muwekma, SJSU, the public, and scientific interests by housing and maintaining the Collections at the SJSU repository for study and other educational purposes" and acknowledging "SJSU's established procedures for handling museum property while in the SJSU repository." Weiss Suppl. Decl. ¶ 32,

Ex. 10. Professor Weiss therefore had no reason to think that she needed to consult with the tribe once again before taking and sharing a photograph. This purported failure to consult also did not feature into the outrage over the tweet. For instance, it is not discussed in Del Casino's campus letter. He instead wrongly and without any expertise on the topic claimed that Professor Weiss's conduct violated ethical practices. Weiss. Decl., Ex. 11. *See* also Bourque Decl. ¶ 14.

Professor Weiss also did not fail to minimize handling. Professor Weiss was already in the midst of sorting these remains and taking a photograph for social media did not require additional handling. Weiss Suppl. Decl. ¶ 21–22. Moreover, AB 275 does not establish an objective definition of what it means to "minimize handling," only requiring consultation about minimizing handling during the repatriation process. *See* Cal. Health & Safety Code § 8013(a)(B)(i). Professor Weiss violated no existing policy and so the University is left without justification for its retaliation against her.

3. The scope and timing of the Interim Protocol is evidence of retaliation

The substance and timing of SJSU's policy change is strong evidence of retaliation. Defendants point to some similarities between SJSU's policy and the policies of other California universities. But Defendants do not address some key differences. *See* Memo. iso Motion for Prelim. Inj. at 6. All other policies clearly distinguish between tribal and non-tribal remains. None of the other policies bar the participation and access of the faculty member holding a position akin to the one held by Professor Weiss and Cal State expressly lists their collections manager as one of the individuals allowed access. Photographs are also not banned anywhere else. None of the other policies appear to apply to x-rays either. SJSU's idiosyncratic approach is not required by CalNAGPRA and is designed to curtail Professor Weiss's research.

Defendants also assert that SJSU's policy was not retaliatory because other California universities barred or required tribal authorization for research before CalNAGPRA and AB 275. Opp. at 14. The exact opposite is true. The fact that the other policies came before SJSU's, such as at SFSU, CSULB, and Sacramento State, shows that SJSU could have implemented similar policies years ago, but did not do so until after the controversy about Professor Weiss's speech arose. To the contrary, SJSU had in place an agreement with the Muwekma Ohlone Tribe which supported

and allowed for research. Weiss Suppl. Decl. ¶ 32, Ex. 10. These changes came about because of Professor Weiss's speech.

4. The implementation of the protocol was also punitive and retaliatory

Even if adoption of the interim policy was unrelated to Professor Weiss's speech or a justified response to her tweet, the interim policy was also enforced in an especially harsh and vindictive manner against Professor Weiss precisely because of Defendants' hostility to her speech. Defendants' actions were not dictated by AB 275 or even by the interim policy, as Defendants went well beyond these policies in seeking to punish Professor Weiss.

For instance, for more than a month the University denied Professor Weiss access even though the NAGPRA collection was still held and curated by the Department of Anthropology and access could have been granted to her. Opp. at 7–8. For another two months, access was denied even though the interim policy did not say that research and teaching required written permission until it was amended in January. Opp. at 8. Throughout this time, Defendant Sunseri and others ignored her requests due to their hostility to her research and views on repatriation.

Similarly, for close to five months, Defendants have ignored her request for access to x-rays even though they are not covered by NAGPRA. Tribes such as the Muwekma Ohlone have never before adopted a policy against x-ray or photos. For instance, in 2019 Professor Weiss chaired a thesis of a graduate student who consulted with the Muwekma Ohlone, and the Tribe expressed no opposition to the taking and utilization of x-rays at that time. Weiss Suppl. Decl. ¶ 35, Ex. 2. Nor does Defendant Sunseri and Ragland's log of consultations ever refer to x-rays. Sunseri Decl. Ex. G. After months of asking about access to x-rays, Professor Weiss learned for the first time in Defendants' brief that the x-rays will now be repatriated even though these x-rays are not covered by AB 275. This new and unjustified policy of repatriating and destroying x-rays was likely adopted to deny Professor Weiss access to even the limited remnant of the collection that should remain after repatriation.

But the most glaring example of the Defendants' punitive and retaliatory approach involved Professor Weiss's request to access the non-Native American collection. Defendants conspired to find ways to deny her access to materials not protected by AB 275—something that no other

university in California has done—precisely because of their "opposition to her speech." *Keyser*, 265 F.3d at 751. Gonzalez referred her to Ragland and Sunseri even though they should have had no authority over this part of the collection. Ragland's response, which she did not share with Professor Weiss, was that Professor Weiss should be disqualified "from working independently with human remains" as a result of her "recent scientifically racist publications." Sunseri Decl., Ex. K. Gonzalez did not defend Professor Weiss's academic freedom, instead baselessly claiming that someone at the University's Office of Research would need to grant permission and that he would urge them to find reasons to deny, delay, or burden Professor Weiss's request based on "guidelines on cultural patrimony." *Id.* This exchange also illustrates the two-faced nature of Gonzalez's interactions with Professor Weiss. In his e-mail to her, Gonzalez assured her that he "personally support[ed] [her] proposed research activities." *Id.* By contrast, when Professor Weiss was not privy to the conversation, Gonzalez did nothing to rebut Ragland's highly incendiary attacks—including the false accusation that Professor Weiss supports the modern eugenics movement—and proposed looking for additional ways to stymie her research. Gonzalez then further delayed Professor Weiss's research by attempting to adopt new protocols to limit handling or bar photography. Gonzalez Decl. ¶ 25, Ex. M; Weiss Suppl. Decl. ¶ 12.[2] It was only after this effort proved unsuccessful that Gonzalez finally relented and let Professor Weiss access the parts of the collection that the interim directive never covered and under substandard conditions. *See* Weiss Suppl. Decl. ¶ 12, Ex. 7.

Defendants also claim that since a few other faculty members were shut out of the facility and one other faculty member had to retrieve botanical material from the facility that the policy was clearly neutral and not targeted at Professor Weiss. Opp. at 18. But this is not accurate in several respects. Professor Weiss is SJSU's only physical anthropologist who needs access to the skeletal remains. Weiss Suppl. Decl. ¶ 23. She previously had access to 100% of the SJSU collection and was responsible for determining who else got access. Overnight, she lost all access

[2] Gonzalez claims that he has "no plans to put forward resolutions targeting Professor Weiss or to propose policies that would curtail her research" just a few paragraphs after admitting that he sought new protocols to ban the photography of remains in the collection, something that is central to Professor Weiss's research and that she strenuously objected to. *Compare* Gonzalez Decl. ¶ 25 *with* ¶ 29. *See also id.* Ex. M. His claim that he will not propose additional protocols which will impede Professor Weiss's research is therefore not credible.

and was stripped of her leadership responsibility to control access to the research facility. Months later she is still only able to access less than 5% of the collection and cannot access the facility at all. The interim policy therefore impacted her in a unique and especially draconian fashion, and Defendants' assurance that Professor Weiss still "retains her position as Collections Coordinator" is meaningless. Opp. at 22.

B. Professor Weiss has reason to fear further unlawful actions

In addition to the ongoing harm of being denied the ability to conduct research, Professor Weiss also suffers because of the credible outstanding threat of further retaliation against her if she continues to speak out about repatriation and to teach her views to her students. Defendants allege that Professor Weiss has "no credible reason to fear" that they will act against her. Opp. at 21. But Defendants' speech *and* actions over the past year, along with Professor Weiss's stated intent to engage in the very expression that Defendants have threatened to silence, show the likelihood of further retaliatory actions against her. *See LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985) ("The likelihood that class members will suffer prospective injury is buttressed not only by the defendants' past conduct but also by the defendants' avowed future intent."); *Index Newspapers LLC v. City of Portland*, 474 F. Supp. 3d 1113, 1122 (D. Or. 2020) ("The combination of the Federal Defendants' repeated past conduct, Plaintiffs' stated intentions, and the Federal Defendants' stated intentions establish the real and immediate threat of repeated injury." (quotation omitted)).

For instance, Defendants argue that Gonzalez's speech was merely an academic discussion with colleagues and not a threat of further action. But Defendants ignore or downplay all the concrete signals in Gonzalez's remarks that he intended to take action against Professor Weiss if she did not stop expressing her views. For instance, Gonzalez agreed that teaching her views would be unethical and that doing so "very possibly could have damaging consequences for her career at San Jose State" as he would be required to "have a very different approach to this." Weiss Decl. Ex. 5 at 33:6–17. Gonzalez further intimated that he would continue to work within his department to limit "her capacity to do things or demand resources from the department or anybody else." Weiss Decl. Ex. 5 at 33:6-17. Gonzalez also noted that it would be difficult to sanction her for her research unless it could be found that she violated NAGPRA or some other law. Weiss Decl. Ex. 5

at 33:6–17. It is telling, therefore, that Defendants now claim that Professor Weiss's photograph and social media activity somehow violated NAGPRA, providing the exact pretext that Gonzalez suggested he needed to sanction her.

Defendants claim granting a preliminary injunction would suppress the Defendants' own protected First Amendment rights. But Professor Weiss does not seek to prevent Gonzalez or any of the other Defendants from merely "bad mouth[ing]" or "verbally threaten[ing]" her. Opp. at 16. Rather, she seeks assurances against retaliatory actions by someone in a position of authority who has threatened to censure her and who has already taken retaliatory actions against her.

Defendants also point to multiple statements of alleged support for Professor Weiss's academic freedom. Such statements cannot be taken seriously, however, given Defendants' recent conduct and their statements made in private, such as Ragland's email stating expressly that her motives for denying access were a direct response to Professor Weiss's views on repatriation. Sunseri Decl. Ex. K. It is unsurprising that Defendants have paid lip service to Professor Weiss's academic freedom. "In practical terms, the government rarely flatly admits it is engaging in viewpoint discrimination." *Ridley v. Massachusetts Bay Transp. Auth.*, 390 F.3d 65, 86 (1st Cir. 2004). Defendants' actions speak much louder than their words. *See* Weiss Suppl. Decl. ¶¶ 14–17.

IV. Professor Weiss Will Suffer Irreparable Harm Absent an Injunction

Professor Weiss already suffers continuing irreparable harm because First Amendment injuries are per se irreparable. *See Cuviello v. City of Vallejo*, 944 F.3d 816, 832 (9th Cir. 2019) ("[T]he loss or threatened infringement upon free speech rights 'for even minimal periods of time[] unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Klein v. City of San Clemente*, 584 F.3d 1196, 1207–08 (9th Cir. 2009). Defendants fail to even acknowledge this well-established rule.

Professor Weiss will suffer additional irreparable harm absent a preliminary injunction because delayed relief will mean that she will lose the opportunity to ever perform academic research on these Native American remains again, either directly, with photographs she could take prior to repatriation, or with the x-rays that the University now also intends to repatriate. If, however, an injunction is granted, Professor Weiss will have time to begin research and take

photographs or x-rays that can be used for research well after repatriation has occurred.

Defendants also claim that Professor Weiss's injury is self-inflicted because she should have known about the likelihood of repatriation due to AB 275's passage but was negligent in resuming her research during the COVID-19 pandemic. Both premises are faulty. While AB 275 contemplates deadlines for repatriation, those deadlines only apply if the relevant tribes want to repatriate the remains. Professor Weiss had been repeatedly assured by Sunseri and others that the Muwekma Ohlone Tribe supported ongoing research and was not interested in reburial of the Ca-Ala-329 collection and that SJSU's collection was not a priority for tribes in the area. Weiss Suppl. Decl. ¶¶ 30–32, Ex. 10. The Tribe's intent to seek quick repatriation only became clear after the Tribe reacted to her speech. Professor Weiss therefore did not have reason to believe that her research would be interrupted by AB 275 or that it would not be available to her once she returned to campus.

Professor Weiss's actions during the COVID-19 pandemic are also blameless. Accessing material on campus required seeking special authorization, and the University had signaled that it would only grant such requests if they were justified by some exigency. Weiss Suppl. Decl. ¶ 27, Ex. 8. Professor Weiss also repeatedly advocated for a quick resumption of in-person classes so that she could return to campus and recruit students to help with both research and curation. Weiss Suppl. Decl. ¶¶ 28–29, Ex. 9.

Professor Weiss also had reasonable expectations that she would have plenty of time to finish her curational duties and conduct research on the remains upon returning to the collection after pandemic restrictions lifted. As it turns out, she was right—many months have passed since she returned to campus, and repatriation has not yet occurred. Professor Weiss, however, has been unable to begin her intended research because of Defendants' actions.

Defendants also wrongly claim that access to the Carthage collection is already an adequate substitute for Professor Weiss. But, as Defendants concede, this is about 5% of SJSU's total collection. Sunseri Decl. ¶ 15. That collection is not an adequate substitute for the Native American collection due to its smaller size and the poor condition of the remains. Weiss Suppl. Decl. ¶ 26. Defendants do not try to rebut this point—they simply ignore it. Only an injunction would have a

"meaningful practical effect" on Professor Weiss's ability to conduct research by giving her access to a much larger and better-preserved collection. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010).

V. The Balance of Equities Favors Professor Weiss

The equities favor Professor Weiss. Academic freedom is of paramount importance, and the protection of constitutional rights always promotes the public interest.

The Defendants' arguments, to the contrary, rest on flaws already discussed at some length. Defendants, for instance, minimize Professor Weiss's injury by falsely stating that she has a "suitable replacement collection" to study. This is contradicted by Professor Weiss's uncontested explanation as to why the Carthage Collection is quite *un*suitable for her research.

Defendants also wrongly contend that CalNAGPRA requires the University to bar research on the remains because the tribes say so, a flawed reading discussed at length above. Defendants also wrongly claim that the Legislature intended that tribal interests should always prevail over research interests. This is not true; in fact, AB 275 expressly contemplates that research is permissible so long as it does not delay repatriation. Cal. Health & Safety Code § 8016(a)(4). AB 275 contemplates a balancing of interests that the Defendants' hard-line approach does not account for. Professor Weiss's proposed research would not upset that balance.

Defendants also posit that photographing and researching these remains would cause permanent damage to them "in a spiritual sense," even if no physical harm occurs, and even if such practices have been standard for decades. While this may be an accurate portrayal of the tribes' religious beliefs, the public interest is not served by advancing such religious beliefs over non-religious academic and constitutional interests. This Court should grant a preliminary injunction.

///

///

///

///

///

DATED: March 10, 2022.

Respectfully submitted,

DANIEL M. ORTNER
ETHAN W. BLEVINS
Pacific Legal Foundation

By s/ Daniel M. Ortner
DANIEL M. ORTNER

Attorneys for Plaintiff
Elizabeth Weiss

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2022, Opposing Counsel received the foregoing Plaintiff's Reply in Support of Motion for Preliminary Injunction via CM/ECF service.

s/ Daniel M. Ortner
DANIEL M. ORTNER, No. 329866