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THE HONORABLE JOHN H. CHUN

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION**

STUART REGES,

Plaintiff,

v.

ANA MARI CAUCE, et al.,

Defendants.

CASE NO. 2:22-cv-00964-JHC

NOTE ON MOTION CALENDAR:
January 29, 2024

**PLAINTIFF’S OPPOSITION TO DEFENDANTS’ MOTION FOR
SUMMARY JUDGMENT**

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1 Under Federal Rule of Civil Procedure 56, and Local Rules 7 and 56.1, Plaintiff
2 Stuart Reges files this opposition to Defendants’ Motion for Summary Judgment.
3 (Dkt. # 64).

4 **INTRODUCTION**

5 Plaintiff Stuart Reges, like all public university professors, has a First
6 Amendment right to speak on matters of public concern—including on his syllabi.
7 Defendants claim an interest in controlling his speech to prevent “disruption” and
8 because syllabi represent government speech. As a matter of law, Defendants cannot
9 show any interest in preventing “disruption” to a university campus by restricting a
10 dissenting view on a matter of public concern. And faculty speak for themselves in
11 the classroom, including on their syllabi—not for the state. The undisputed facts
12 confirm that the University of Washington (UW) censored Reges, siphoned his
13 students to shadow sections of his classes, investigated him, withheld his merit-pay
14 increase, and continue to threaten enforcement of a vague and overbroad policy
15 against him just because a small fraction of the UW community disagreed with his
16 speech and found it offensive. Defendants’ actions violated Reges’s First Amendment
17 rights and the very purpose of a public university—encouraging vigorous debate on
18 matters of public concern.

19 The Court should deny Defendants’ Motion for Summary Judgment (Dkt. # 64)
20 and grant summary judgment for Reges on his retaliation, viewpoint discrimination,
21 overbreadth, and vagueness claims. (Pl.’s Mot. Summ. J., Dkt. # 60.)

1 **RESPONSE TO DEFENDANTS’ STATEMENT OF MATERIAL FACTS**

2 The parties agree there is no genuine dispute of material fact, and the Court
3 should resolve this case on summary judgment. There is no dispute about *what* the
4 parties did. But Defendants obscure or omit important context, mischaracterizing
5 evidence as to *why* the parties took the actions they did—though Reges’s motivations
6 are immaterial.¹ To clarify this important context, Reges offers the following
7 additional, undisputed record evidence.

8 **1. The Parties Do Not Dispute the Material Facts.**

9 The parties agree on the material facts. UW crafted a land acknowledgment
10 statement (Pl.’s Mot. Summ. J., Dkt. # 60, at 3; Defs.’ Mot. Summ. J., Dkt. # 64, at 2),
11 and Defendants recommended computer science and engineering faculty include that
12 statement or a similar one in their syllabi as one of their “best practices for inclusive
13 teaching.” (Dkt. # 60, at 4–5; Dkt. # 64, at 2.) On January 3, 2022, Reges included his
14 land acknowledgment parody in his syllabus. (Dkt. # 60, at 5; Dkt. # 64, at 3.)

15 The following day, Defendant Balazinska removed Reges’s statement from his
16 Winter Quarter 2022 syllabus. (Dkt. # 60, at 7; Dkt. # 64, at 4.) She also derided his
17 parody statement as “offensive” in an email to Reges’s students and encouraged them
18 to submit formal discrimination and harassment complaints against him. (Dkt. # 60,
19 at 8–9; Dkt. # 64, at 4.) Within days, Defendants took the unprecedented step of
20 creating a competing “shadow” class that met at the same time as Professor Reges’s

21
22 ¹ The public-employee speech doctrine, under *Pickering*, does not examine the
23 speaker’s intent. *See Infra* Section I.A. Nor does any other claim or defense.

1 Winter Quarter 2022 course and did so again in Spring Quarter 2022. (Dkt. # 60, at
2 9–10; Dkt. # 64, at 4.)

3 In February 2022, Reges announced that he would include his statement in his
4 Spring 2022 syllabus. (Dkt. # 60, at 11; Dkt. # 64, at 4–5.) In response, some students,
5 faculty, and staff submitted new complaints to UW administrators. (Dkt. # 60, at 13;
6 Dkt. # 64, at 5.) Defendants began a disciplinary process. (Dkt. # 60, at 11–12; Dkt.
7 # 64, at 5.) Defendant Balazinska escalated the process to Defendant Allbritton, dean
8 of the UW College of Engineering. (Dkt. # 60, at 12; Dkt. # 64, at 5.) In July 2022,
9 Dean Allbritton convened a special investigating committee under UW Faculty Code
10 Section 25-71, charging it to investigate Reges because of his parody statement. (Dkt.
11 # 60, at 12; Dkt. # 64, at 5.)

12 The special investigating committee reported to Dean Allbritton in October
13 2022. (Dkt. # 60 at 12; Dkt. # 64, at 5.) Allbritton concluded the investigation by a
14 June 13, 2023, letter to Reges. (Dkt. # 60, at 12; Dkt. # 64, at 5.) Defendants withheld
15 Professor Reges’s merit-pay increase during the disciplinary investigation, though he
16 was otherwise entitled to receive it. (Dkt. # 60, at 12; Dkt. # 64, at 5.) Dean
17 Allbritton’s June 13 letter threatened that if Reges continued to place his statement
18 in his syllabi, and if anyone complained, she would conclude that he violated UW’s
19 discrimination and harassment policy, Executive Order 31. (Dkt. # 60, at 14; Dkt.
20 # 64, at 5–6.)

1 **2. Defendants Grossly Mischaracterize Reges’s Motivation for**
 2 **Parodying Land Acknowledgments.**

3 Though the material facts are undisputed, Defendants raise immaterial
 4 matter, unsupported by the record, to besmirch Reges’s motivation for parodying land
 5 acknowledgments. But the undisputed record evidence shows that Reges intended his
 6 land acknowledgment to parody UW’s own, and thereby, express his dissenting
 7 viewpoint. (Reges Dep. Tr., Walters Decl. Ex. A, at 70–73; Reges Decl., Dkt. # 63,
 8 ¶¶ 10–18.) He views UW’s land acknowledgment as a political statement expressing
 9 the views that: (1) land acknowledgments are appropriate to include on syllabi;
 10 (2) UW sits on land that colonizers stole and occupy; and (3) UW’s presence on that
 11 land is somehow illegitimate, shameful, wrong, or unlawful. (Reges Decl., Dkt. # 63,
 12 ¶¶ 11–17.)

13 Generally, he opposes the inclusion of political statements on syllabi, but he
 14 included his version to express a dissenting viewpoint from UW’s own. (*Id.* ¶¶ 12–17;
 15 Reges Dep. Tr., Walters Decl. Ex. A, at 47:20–48:20.) He did so through the form of
 16 parody, to cast the political nature of UW’s land acknowledgment into sharp relief—
 17 as parody does. (Reges Decl., Dkt. # 63, ¶ 18; Reges Dep. Tr., Walters Decl. Ex. A, at
 18 70–73.) This has been Reges’s consistent position from day one. (Pl.’s Mot. Summ. J.,
 19 Dkt. # 60, at 5–6; Reges Decl., Dkt. # 63, ¶¶ 13, 18, 20; Pl.’s Mot. Summ. J. Ex. F, Dkt.
 20 # 62-5.) He intended not to offend but to prompt others to look critically at land
 21
 22

1 acknowledgments, their purpose and use, through parody—though he recognized
2 that the parodic *form* of his statement might cause offense.²

3 Defendants resort to misquoting and mischaracterizing Reges’s words to
4 transform his protected speech into an act of “trolling”—that he, in Defendants’
5 words, “intended to create a less welcoming environment” for students. (Defs.’ Mot.
6 Summ. J., Dkt. # 64, at 3, 13.) There are four examples of Defendants’
7 misrepresentations.

8 First, Defendants’ brief begins with a misquote from Professor Reges’s diary,
9 conjuring the phrase, “I am trolling on purpose,” from whole cloth to cast a false light
10 on his motivation. But the record shows no instance where Reges said or wrote this
11 phrase, and Defendants provide no citation otherwise. (Defs.’ Mot. Summ. J., Dkt.
12 # 64, at 1.) Their wishcasting for a quote showing that Reges purposefully “troll[ed]”
13 does not make it so.

14 Reges’s lone diary entry that mentions “trolling,” quoted accurately, is
15 consistent with his true motivation to express a dissenting viewpoint in the form of
16 parody:

17 Why should only progressives be allowed to say what they think is true
18 of the land issue relative to native tribes? I haven’t seen anyone else try
to attack this issue in that way, but I don’t know what kind of argument

19 ² Parody inherently risks offending those who support the existing sentiment.
20 “Modern dictionaries . . . describe a parody as a ‘literary or artistic work that imitates
21 the characteristic style of an author or a work for comic effect or ridicule.’” *Campbell*
22 *v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994). “Parody needs to mimic an original
to make its point.” *Id.* at 580–81; *see also L.L. Bean, Inc. v. Drake Publishers, Inc.*,
811 F.2d 26, 28 (1st Cir. 1987) (“[P]arody seeks to ridicule sacred verities and
prevailing mores,” and so “it inevitably offends others . . .”).

1 they can give that would say that they can express their opinions about
2 it but I can't because I don't have the right opinions. . . . The more I
3 think about the land acknowledgement, the more I like the idea of
4 harping on that. I'm sure many people will find that upsetting because
5 it will be clear that I'm trolling. But it seems like a good thing to push
back on. I was just thinking about how they treat it with such reverence
that you'd almost think they were saying a prayer. It's not a bad analogy
to think that I'm fighting against prayer in schools. When I change the
prayer it becomes clear how silly this is.

6 (Reges Dep. Ex. 5, Walters Decl. Ex. B.) Explaining what he meant by "trolling,"
7 Reges testified: "I intended this as a parody. I think some people would object, even
8 people who don't like land acknowledgments, and as someone who doesn't like land
9 acknowledgments." (Reges Dep. Tr., Walters Decl. Ex. A, at 71:25–72:4.) To Reges,
10 "parody" is "a form of trolling." (*Id.* at 73:16–17.)

11 Second, Defendants omit necessary context to quote Reges that he was
12 "causing trouble on purpose." (Dkt. # 64, at 1). He wrote:

13 [Law professor Jonathan Turley] wrote a great article. At one point he
14 says he wouldn't have done what I did because he thinks my actions
15 were 'gratuitous and peevish,' but I can live with that criticism. I was
causing trouble on purpose, so it's fair to point that out.

16 (Reges Dep. Ex. 16, Walters Decl. Ex. C.) "Causing trouble on purpose" does not mean
17 he purposefully upset others. It refers to Reges's understanding that placing his land
18 acknowledgment parody in his syllabi would cast UW's land acknowledgment into
19 sharp relief, consistent with his intention to spark debate and discussion on campus,
20 and that the parodic form might cause consternation among others, like Professor
21 Turley viewing it as "gratuitous and peevish." *See* Jonathan Turley, *UW Professor*

1 *Triggers Free Speech Fight Over “Indigenous Land Acknowledgment”* (Jan. 13, 2022),
2 [<https://perma.cc/TJH6-RLNQ>].

3 Third, Defendants misrepresent Reges’s testimony to claim he “intended to
4 create a less welcoming environment.” (Defs.’ Mot. Summ. J., Dkt. # 64, at 13.)
5 However, the cited deposition testimony says only that Reges included his land
6 acknowledgment parody on his Winter 2022 syllabus and “mentioned it briefly” in
7 class. (*Id.* at 13 (citing McKenna Decl. Ex. 1, Dkt. # 65, at 85:5–18).) Defendants’
8 excerpt contains no testimony about Reges’s intent whatsoever. To the contrary, the
9 undisputed record shows that Reges *does* intend to create a welcoming environment
10 for students and does not believe in singling out students by race or national origin.
11 (McKenna Decl. Ex. 1, Dkt. # 65, at 37:8–17; Reges Decl., Dkt. # 63, ¶ 15.) Indeed,
12 students rate Reges highly for creating a welcoming classroom environment, (Reges
13 Decl., Dkt. # 63, ¶ 8), and Defendant Balazinska conceded that she did not believe
14 Reges would treat students unfairly. (Balazinska Dep. Tr., Walters Decl. Ex. D, at
15 174:19–20.)

16 Fourth, Defendants misuse Reges’s writing that he was “shaking all over”
17 because “now it’s getting very real,” to assert he was aware that his land
18 acknowledgment parody caused a “disruption.” (Defs.’ Mot. Summ. J., Dkt. # 64, at 9
19 (citing McKenna Decl. Ex. 1, at 90:5–18, 101:1–7).) In fact, Reges was “shaking all
20 over” because “now it’s getting very real,” because Defendants demanded he remove
21 his land acknowledgment from his syllabus, not because of any supposed disruption.
22 (Reges Dep. Ex. 9, Walters Decl. Ex. E.) He was not shaking because a small number

1 of UW students were discussing his land acknowledgment parody on Reddit, which
2 he found merely “interesting.” (*Id.*)

3 **3. The Undisputed Facts Show That What Defendants Call “Disruption”
4 Is Nothing More Than Listeners’ Reactions to Reges’s Speech.**

5 In attempting to show that Professor Reges’s land acknowledgment parody
6 caused a “disruption,” Defendants offer nothing but out-of-class complaints—at most,
7 ten, and many of them not submitted in admissible form. (*See* Balazinska Decl. Ex.
8 4, Dkt. # 66 (faculty and staff complaining or describing complaints they heard from
9 students).) The complainants object to the content and viewpoint of Reges’s parody
10 and take offense. (*Id.*) But claiming listeners’ reactions constitute disruption does not
11 make it so. Reges’s statement never caused *actual* disruption and Defendants provide
12 no evidence otherwise.

13 Defendants first, without admissible evidence, make the immaterial claim that
14 a Native American student took a leave of absence because of Reges’s land
15 acknowledgment. (Defs.’ Mot. Summ. J., Dkt. # 64, at 4, 9.) The first source for the
16 claim is an email from the student to Defendant Balazinska that makes no mention
17 of any leave of absence. (Balazinska Decl. Ex. 4, Dkt. # 66, at UW_Reges_0008845.)
18 The second source is inadmissible, multi-level hearsay. Dean Allbritton’s June 13,
19 2023, letter is offered for the truth of the alleged leave of absence, (Allbritton Decl.
20 Ex. 3, Dkt. # 67, at 2), but Dean Allbritton lacks personal knowledge of the matter.
21 She took a representation from the special investigating committee at face value.
22 (Allbritton Dep. Tr., Walters Decl. Ex. F, at 100:13–101:9.) Likewise, the special

1 investigating committee never determined the truth of the matter regarding the
2 alleged leave of absence. UW’s corporate designee testified that the committee took
3 other faculty members’ word about the leave of absence at face value.³ (Schnapper
4 Dep. Tr., Walters Decl. Ex. G, at 115:4–8.)

5 Defendants also state that Allen School teaching assistants feared retaliation
6 by Reges. The undisputed record shows defendants Balazinska and Allbritton had no
7 reason to believe Reges retaliated against anyone, or that he might do so. (Balazinska
8 Dep. Tr., Walters Decl. Ex. D, at 222:24–223:3; Allbritton Dep. Tr., Walters Decl. Ex.
9 F, at 150:15–25.)

10 Defendants further claim that Reges admits “*the situation* damages the
11 cohesiveness of the teaching assistant program.” (Defs.’ Mot. Summ. J., Dkt. # 64, at
12 8 (emphasis added).) Reges admits no such thing, and this is yet another
13 mischaracterization of his testimony. The undisputed record shows that Reges
14 testified *Defendants’* unprecedented actions—in creating the Winter and Spring 2022
15 shadow sections of his courses—damaged cohesion among the teaching assistants.
16 (McKenna Decl. Ex. 1, Dkt. # 65, at 123:6–124:6.) The creation of the shadow sections
17 forced teaching assistants to choose between Reges and another professor, after
18 Defendants had labeled Reges’s statement dehumanizing and demeaning to
19 indigenous peoples. As Reges testified at his deposition:

20 _____
21 ³ Defendants similarly refer to a Native American student who allegedly
22 disenrolled from UW completely, (Allbritton Decl. Ex. 3, Dkt. # 67, at 2), but provide
no evidence demonstrating that this student even exists.

1 The [teaching assistant] community is like my life’s work. It’s the thing
2 that I’m most known for in the computer science education community.
3 At all three schools I’ve taught, I’ve set up [teaching assistant] programs
4 that continue to this day in pretty much the same form that I created
5 them, and there’s a sense of unity to the community. So to split the
6 [teaching assistants] harmed the community.

7 (*Id.* at 123:21–124:3.)

8 When asked whether it was the splitting of the class or offense taken because
9 of his parody that harmed teaching assistant cohesiveness, Reges speculated that it
10 “could be some of both.” (*Id.* at 124:10–14.) That is not an admission that *his speech*
11 (as opposed to reactions to his speech) caused anything. And, in fact, one Reges
12 teaching assistant was reassigned to the Winter Quarter 2022 shadow section but
13 requested to return to Reges’s course, saying, “I specifically chose to [be a teaching
14 assistant in Reges’s course] because I think Stuart Reges is the best lecturer I have
15 ever had at the University of Washington” (Walters Decl. Ex. H.)

16 ARGUMENT

17 Based on the undisputed material facts, Defendants are not entitled to
18 summary judgment on any of Plaintiff’s five claims. Contrary to Defendants’
19 arguments, as a matter of law, Professor Reges’s speech on a matter of public concern
20 is academic speech protected against employer retaliation; Defendants discriminated
21 against his viewpoint because they found it offensive; and UW’s anti-discrimination
22 and harassment policy is unconstitutional to the extent that it prohibits
23 “unacceptable” or “inappropriate” speech. Defendants’ motion should be denied.

1 **I. Defendants Fail to Demonstrate, as a Matter of Law, That *Pickering***
 2 **Balancing Favors Their Supposed Interests Over Professor Reges’s**
 3 **Speech on a Matter of Public Concern.**

4 The First Amendment protects the rights of public university faculty to speak
 5 on matters of public concern, related to their scholarship or teaching, even though
 6 they are government employees. *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014).
 7 First, Reges placed his parody land acknowledgment statement in his syllabus and it
 8 is thus related to his teaching as a matter of law. Second, Defendants’ attempts to
 9 minimize their punitive actions cannot change that, as a matter of law, they are
 10 adverse actions that would chill a person of ordinary firmness from exercising their
 11 expressive rights. Third, the Court must therefore weigh Reges’s interest in speaking
 12 on matters of public concern against the University’s interest in efficiently providing
 13 services. Because debate and exposure to diverse viewpoints on matters of public
 14 concern are to be expected in a university setting—even if offense results—and
 15 because no actual “disruption” occurred, UW has no cognizable interest at stake. As
 16 a result, UW’s purported interest in preventing future “disruption” via complaints of
 17 offense cannot outweigh Reges’s right to free expression. Defendants’ motion for
 18 summary judgment on Reges’s retaliation claims should be denied.

19 **A. Defendants fail to show that Reges’s land acknowledgment**
 20 **parody is beyond the protection of *Pickering* and *Demers*.**

21 The Ninth Circuit in *Demers v. Austin* made clear that the First Amendment
 22 protects public university professors’ “speech related to scholarship or teaching,”
 23 notwithstanding their status as government employees who teach and research as

1 part of their job duties. 746 F.3d at 406 (quoting *Garcetti v. Ceballos*, 547 U.S. 410,
2 425 (2006)). “Rather, such speech is governed by *Pickering*,” including its test
3 weighing the professor’s speech interest against the university’s interest as an
4 employer in efficiently providing services to the public. *Id.* at 406 (citing *Pickering v.*
5 *Bd. of Educ.*, 391 U.S. 563 (1968)).

6 Under *Pickering*, (1) “the employee must show that his or her speech addressed
7 ‘matters of public concern’” and (2) the employee’s interest “in commenting upon
8 matters of public concern” must outweigh “the interest of the State, as an employer,
9 in promoting the efficiency of the public services it performs through its employees.”
10 *Demers*, 746 F.3d. at 412 (quoting *Pickering*, 391 U.S. at 568). Defendants concede
11 Reges’s land acknowledgment parody commented on a matter of public concern (Pl.’s
12 Mot. Summ. J., Dkt. # 60, at 21), and, as noted *infra* Section I.C., Defendants cannot
13 show that UW’s interest in a dissent-free environment outweighs Reges’s interest in
14 speaking.

15 Defendants’ attempt to distinguish *Demers* and other academic speech cases
16 fails. While *Demers* acknowledges that in some cases it may be difficult to discern
17 what qualifies as “related to scholarship or teaching,” (Defs.’ Mot. Summ. J., Dkt.
18 # 64, at 13–14), the Ninth Circuit found that *Demers* was not a difficult case, even
19 though it involved speech unrelated to the subject matter of a professor’s courses. 746
20 F.3d at 415. Indeed, the Ninth Circuit confirmed *Demers*’s pamphlet was “related to
21 scholarship or teaching” because it discussed university restructuring that “would
22 have substantially altered the nature of what was taught at the school.” *Id.*

1 Defendants' argument that *Demers* does not protect Reges's land
 2 acknowledgment parody turns on the false premise that Reges's speech is not "related
 3 to scholarship or teaching." (Defs.' Mot. Summ. J., Dkt. # 64, at 14.) This argument
 4 fails for at least four independent reasons. First, it belies the undisputed record
 5 evidence. Second, it misconstrues precedent protecting the academic freedom rights
 6 of public university professors. Third, it misapplies precedent arising from the K-12
 7 educational setting. And fourth, Defendants' argument dangerously applies the
 8 government-speech doctrine to the pedagogy of public university professors.

9 **1. The undisputed record evidence shows that Reges's
 10 speech is related to scholarship or teaching.**

11 First, on the undisputed record, Defendants made land acknowledgment
 12 statements "related to scholarship or teaching" when they recommended faculty
 13 include a land acknowledgment in their syllabi as a "best practice" for *teaching*. (See
 14 Defs.' Mot. Summ. J., Dkt. # 64, at 12-13.)

15 UW, nonetheless, claims that Reges's statement, which he placed in his syllabi,
 16 is somehow not related to his teaching. Syllabi, of course, are a tool professors use in
 17 teaching their classes. Simply put, syllabi are related to teaching, and so must be
 18 their contents. Paradoxically, Defendants argue that Reges's land acknowledgment
 19 parody is not related to teaching *because* he placed it in his syllabi. (Defs.' Mot. Summ.
 20 J., Dkt. # 64, at 14 ("Reges's speech was in an official University document required
 21 to be distributed."))⁴ Their own evidence defeats that argument; UW's syllabus

22 ⁴ Defendants' government-speech defense is addressed *infra* Section I.A.4.

1 guidelines make clear that faculty are free to craft their own syllabi. (McKenna Decl.
 2 Ex. 6, Dkt. # 65, at UW_Reges_0003266 (“[T]his webpage provides faculty with
 3 language that *may* be included in syllabi. Providing this content in syllabi is
 4 *voluntary*.” (emphasis added)).)

5 Defendants identify the *only* content faculty are required to include in their
 6 syllabi by state law—a religious accommodations statement—as if it proves UW
 7 controls all other syllabi content. (Defs.’ Mot. Summ. J., Dkt. # 64, at 12 (citing RCW
 8 28B.137.010).) In fact, UW’s syllabus guidelines make clear that all other syllabus
 9 content is left to the discretion of the faculty member. (See McKenna Decl. Ex. 6, Dkt.
 10 # 65, at UW_Reges_0003266–77 (providing optional language regarding academic
 11 integrity, student conduct, disability resources, excused absences, face coverings,
 12 medical excuses, safety, and Title IX).) The syllabus guidelines also provide optional
 13 language stating that UW faculty have academic freedom and warning students
 14 living abroad that American faculty may “present[] and explore[] topics and content
 15 that other governments may . . . choose to censor.” (*Id.* at UW_Reges_0003273.)
 16 Ironically, it is UW that has censored Reges’s exploration of the topic of land
 17 acknowledgments.

18 Defendants argue that Reges is free to share his parody statement “in other
 19 settings,” but not his syllabi. (Defs.’ Mot. Summ. J., Dkt. # 64, at 4, 6.)⁵ In a press
 20

21 ⁵ Contradicting that argument, Dean Allbritton testified that Reges is free to
 22 hold a sign bearing his parody statement on campus grounds, or to post his statement
 on Reddit, without facing a disciplinary process *only if* the educational environment

1 statement, UW asserted that “the University and the Allen School believe course
 2 materials are not the appropriate place or manner for a debate about land
 3 acknowledgments,” (Walters Decl. Ex. I, at UW_Reges_0009291), and told one
 4 reporter that “a course syllabus is not the appropriate place to express personal views
 5 that bear no reasonable relation to the course being taught.” (Walters Decl. Ex. J, at
 6 UW_Reges_0001418.) But it was the Allen School that determined that a course
 7 syllabus is the appropriate place for land acknowledgments that endorse UW’s own
 8 message. *See also Meriwether v. Hartop*, 992 F.3d 492, 503–07 (6th Cir. 2021) (holding
 9 that professor “describing his views on gender identity even in his syllabus” is
 10 “related to scholarship or teaching” and therefore subject to academic-freedom
 11 exception to *Garcetti*).

12 2. Defendants misconstrue academic freedom.

13 Second, Defendants misread over a half-century of jurisprudence on academic
 14 freedom. The Supreme Court has held that “given the important purpose of public
 15 education and the expansive freedoms of speech and thought associated with the
 16 university environment, universities occupy a special niche in our constitutional
 17 tradition.” *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003); accord *Keyishian v. Bd. of*
 18 *Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed
 19 to safeguarding academic freedom, which is of transcendent value to all of us and not

20 _____
 21 is not disrupted—meaning, no one complains. (Allbritton Dep. Tr., Walters Decl. Ex.
 22 F, at 173:9–175:5.) Obviously, others could take offense to Reges’s land
 acknowledgment parody and complain to UW administrators no matter where they
 read it—whether in his syllabi or somewhere else.

1 merely to the teachers concerned.”); *Sweezy v. New Hampshire*, 354 U.S. 234, 250
2 (1957) (“Teachers and students must always remain free to inquire, to study and to
3 evaluate, to gain new maturity and understanding; otherwise our civilization will
4 stagnate and die.”). The Ninth Circuit recognized this tradition in *Demers*: The
5 “Supreme Court has repeatedly stressed the importance of protecting academic
6 freedom under the First Amendment.” 746 F.3d at 411.

7 Instead, Defendants overlook *Demers* and the Supreme Court’s longstanding
8 precedent, relying on *Garcetti v. Ceballos*’s general proposition that “when public
9 employees make statements pursuant to their official duties . . . the Constitution
10 does not insulate their communications from employer discipline.” 547 U.S. 410, 421
11 (2006). This ignores that the Supreme Court left open the question of whether
12 *Garcetti*’s holding applies to a specific type of public employee: college and university
13 professors. *Garcetti*, 547 U.S. at 425 (“We need not, and for that reason do not, decide
14 whether the analysis we conduct today would apply in the same manner to a case
15 involving speech related to scholarship or teaching.”).

16 *Demers* decided, within the Ninth Circuit, that there is an academic freedom
17 exception to *Garcetti*. *Demers*, 746 F.3d at 406 (“We hold that *Garcetti* does not apply
18 to ‘speech related to scholarship or teaching.’”) (quoting *Garcetti*, 547 U.S. at 425)).
19 Public university professors’ on-the-job speech “is governed by *Pickering*,” *id.*, because
20 “teaching and academic writing are at the core of the official duties of teachers and
21 professors.” *Id.* at 411. Furthermore, if *Garcetti* applied as Defendants propose, then
22 that case “would directly conflict with the important First Amendment values

1 previously articulated by the Supreme Court.” *Id.* The *Demers* panel concluded “that
2 *Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to
3 teaching and academic writing that are performed ‘pursuant to the official duties’ of
4 a teacher and professor.” *Id.* at 412.

5 Other post-*Garcetti* circuit courts also recognize the exception for the teaching
6 and writing of public university professors. (See Pl.’s Mot. Summ. J., Dkt. # 60, at 19–
7 20.) Apposite here, the Sixth Circuit upheld the syllabus as a medium for protected
8 faculty expression, even when used to spur debate on a contested public issue.
9 *Meriwether*, 992 F.3d at 506–07 (“By forbidding [the plaintiff-professor] from
10 describing his views on gender identity *even in his syllabus*, [the university] silenced
11 a viewpoint that could have catalyzed a robust and insightful in-class discussion.”)
12 (emphasis added).

13 As they did in their motion to dismiss (Dkt. # 50), Defendants again rely on the
14 out-of-circuit and distinguishable case, *Abcarian v. McDonald*, 617 F.3d 931 (7th Cir.
15 2010). (Defs.’ Mot. Summ. J., Dkt. # 64, at 14.) There, the Seventh Circuit rejected a
16 surgery department head’s claim that his expression was related to scholarship or
17 teaching because his “speech involved administrative policies that were much more
18 prosaic than would be covered by principles of academic freedom.” *Abcarian*, 617 F.3d
19 at 938 n.5. In other words, in *Abcarian*, the plaintiff’s First Amendment claims failed
20 because he was speaking in his role as an *administrator*, not as a professor. *Id.* at
21 937–38.

1 For the same reason, Defendants’ reliance on the Fourth Circuit’s anodyne
2 dicta that a professor’s “assigned duties” may, at times, “include a specific role in
3 declaring or administering university policy, as opposed to scholarship or teaching”
4 provides them no cover. (Defs.’ Mot. Summ. J., Dkt. # 64, at 14 (quoting *Adams v. Trs.*
5 *of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011)).) The opinion’s
6 next sentence provides vital context: “However, that is clearly not the circumstance
7 in the case at bar.” *Adams*, 640 F.3d at 563. Indeed, the *Adams* court concluded, like
8 *Demers*, that professors’ academic speech remains protected by the First Amendment
9 after *Garcetti*. *Adams*, 640 F.3d at 562–64. Defendants cite no caselaw holding that a
10 syllabus is not related to scholarship or teaching.

11 3. Defendants mistakenly rely on K–12 jurisprudence.

12 Third, Defendants rely on pre-*Demers* cases arising from the K–12 educational
13 setting. (Defs.’ Mot. Summ. J., Dkt. # 64, at 14–15 (citing *Johnson v. Poway Unified*
14 *Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011) and *Downs v. Los Angeles Unified Sch. Dist.*,
15 228 F.3d 1003 (9th Cir. 2000)).) They argue *Garcetti* applied to the high-school
16 teachers’ claims rather than *Pickering*, and so it should be for public university
17 professors. (Defs.’ Mot. Summ. J., Dkt. # 64 at 15 n.2.) But public-school teachers are
18 hired to deliver to children a curriculum that is set by the state; the college or
19 university setting is different, as *Demers* acknowledges. 746 F.3d at 413 (“For
20 example, the nature of classroom discipline, and the part played by the teacher or
21 professor in maintaining discipline, will be different depending on whether the school
22 in question is a public high school or a university Further, the degree of freedom

1 an instructor should have in choosing what and how to teach will vary depending on
2 whether the instructor is a high school teacher or a university professor.”). In addition
3 to the “expansive freedoms of speech and thought associated with the university
4 environment,” *Grutter*, 539 U.S. at 329, colleges and universities educate adults; they
5 are not grade schools educating children, and thus college and university teaching-
6 employees’ academic freedom is greater. *See also Mahanoy Area Sch. Dist. v. B.L.*,
7 141 S. Ct. 2038, 2049 n.2 (2021) (Alito, J., concurring) (“For several reasons, including
8 the age, independence, and living arrangements of [public college or university]
9 students, regulation of their speech may raise very different questions from those
10 presented” in cases involving high school students.); Pl.’s Opp’n to Defs.’ Mot. to
11 Dismiss, Dkt. # 52, at 36–37 (collecting cases detailing reasons why K–12 schools and
12 universities are different for First Amendment purposes).

13 **4. Reges’s syllabus-based speech is not government speech.**

14 Defendants cannot rope Reges’s syllabus-based speech into the government-
15 speech doctrine, which has no bearing here. The government-speech doctrine is a
16 narrow First Amendment exception that is “susceptible to dangerous misuse” because
17 “[i]f private speech could be passed off as government speech by simply affixing a
18 government seal of approval, government could silence or muffle the expression of
19 disfavored viewpoints.” *Matal v. Tam*, 582 U.S. 218, 235 (2017). Thus, government
20 speech exists only when the state “maintain[s] direct control over the messages
21 conveyed.” *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1590 (2022) (internal quotation
22 omitted). The Court should reject Defendants’ misplaced reliance on the government-

1 speech doctrine as a matter of law for the same reasons Plaintiff briefed in his
2 opposition to dismissal. (Dkt. # 52, at 34–36.)

3 Discovery in this case has only bolstered Plaintiff's position. Like in *Shurtleff*,
4 UW does not scrutinize or preapprove the speech at issue. (Balazinska Dep. Tr.,
5 Walters Decl. Ex. D, at 81:10–22.) Indeed, “many faculty have great flexibility” to
6 choose the content of their syllabi. (Allbritton Dep. Tr., Walters Decl. Ex. F, at 72:21–
7 24). Although it would be insufficient, UW does not even bother with the charade of
8 placing a “seal of approval” on professors’ syllabi. *Matal*, 582 U.S. at 235. Defendants’
9 admissions undercut their unsupported claim that UW’s general guidelines for
10 syllabus construction transform professors’ syllabi into “official University
11 document[s].” (Defs.’ Mot. Summ. J., Dkt. # 64, at 14.) *See also supra* Section I.A.1.
12 The government-speech doctrine has no application here.

13 **B. Defendants fail to refute that they took adverse employment**
14 **actions against Reges.**

15 Defendants thrice note that Reges “was not fired,” (Defs.’ Mot. Summ. J., Dkt.
16 # 64, at 1, 6, 10), insinuating no meaningful adverse action occurred. But that is not
17 the test. An act of retaliation by a government employer “need not be severe” to violate
18 an employee’s First Amendment rights. *Anthoine v. N. Cent. Cntys. Consortium*, 605
19 F.3d 740, 750 (9th Cir. 2010) (quoting *Coszalter v. City of Salem*, 320 F.3d 968, 975
20 (9th Cir. 2003)). The relevant inquiry is objective: Whether the government’s actions
21 “were ‘reasonably likely to deter employees from engaging in protected activity’”
22

1 under the First Amendment. *Coszalter*, 320 F.3d at 976 (quoting *Moore v. Cal. Inst.*
2 *of Tech. Jet Propulsion Lab’y*, 275 F.3d 838, 847 (9th Cir. 2003)).

3 In *Coszalter*, the Ninth Circuit identified an “unwarranted disciplinary
4 investigation” and a “threat of disciplinary action” as individual adverse employment
5 actions under *Pickering*. *Id.* at 976. Additionally, creating “shadow sections” of a
6 professor’s course—not in furtherance of legitimate educational interests but in
7 retaliation for that professor’s speech—is an adverse employment action. *Levin v.*
8 *Harleston*, 966 F.2d 85, 88 (2d Cir. 1992).

9 There is no dispute that Defendants “launched . . . an investigation into
10 whether Reges had violated University policy or the Faculty Code and created . . .
11 alternative class section[s] for the [Winter] and Spring 2022 quarter[s].” (Defs.’ Mot.
12 Summ. J., Dkt. # 64, at 1.) Under *Coszalter* and *Levin*, that is sufficient to show
13 adverse employment action. Defendants do not address these cases.

14 It is beyond debate that an 11-month-long disciplinary investigation, under
15 threat of termination, suspension, or reduction of salary, on an allegation of violations
16 of a policy that bans “unacceptable” or “inappropriate” speech, in addition to multiple
17 other adverse actions against Reges, would reasonably chill the speech of an
18 employee. *See Coszalter*, 320 F.3d at 976. It is also uncontested that Defendants have
19 threatened Reges with another disciplinary investigation if someone complains about
20 his land acknowledgment in the future. (Defs.’ Mot. Summ. J., Dkt. # 64, at 5–6.)
21 Defendants cannot and do not dispute this.

1 **C. As a matter of law, Defendants fail to show an efficiency interest**
2 **in preventing “disruption” caused by the sharing of ideas on a**
3 **public university campus.**

4 UW’s interests in mandating a universal position on land acknowledgment
5 statements and a campus environment free of offense do not outweigh Reges’s speech
6 interest. “The desire to maintain a sedate academic environment, ‘to avoid the
7 discomfort and unpleasantness that always accompany an unpopular viewpoint,’ is
8 not an interest sufficiently compelling, however, to justify limitations on a teacher’s
9 freedom to express himself on political issues in vigorous, argumentative,
10 unmeasured, and even distinctly unpleasant terms.” *Adamian v. Jacobsen*, 523 F.2d
11 929, 934 (9th Cir. 1975) (internal citation omitted). Universities’ role fostering an
12 exchange of a “diversity of views” and “[i]ntellectual advancement” through “discord
13 and dissent” “will not survive if certain points of view may be declared beyond the
14 pale.” *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010)
(citing *Keyishian*, 385 U.S. at 603).

15 On their side of the scale, Defendants offer student and employee complaints
16 about Reges’s land acknowledgment parody as evidence of disruption. (Defs.’ Mot.
17 Summ. J., Dkt. # 64, at 8–9.) However, all these complaints are merely objections to
18 the content and viewpoint of Reges’s speech. While these objections may represent a
19 disturbance to the “sedate academic environment,” there is no governmental interest
20 in maintaining a university campus free from debate. *See Adamian*, 523 F.2d at 934.

1 Defendants provide no other evidence of a cognizable disruption to the learning
2 environment, in Reges’s classroom or otherwise.⁶

3 Similarly, the “disruption” to operations Defendants rely upon is nothing more
4 than faculty and staff responses to student complaints. (Defs.’ Mot. Summ. J., Dkt.
5 # 64, at 8 (“Director Balazinska became aware that staff were ‘at a loss for how to
6 best express their concern and frustration about this situation,’ and worried about
7 the effect on prospective students.”).) But causing an administrator or employee to do
8 something that is already part of their job responsibilities is no disruption. Hearing
9 and responding to student, staff, and others’ concerns are core parts of Director
10 Balazinska’s and Dean Allbritton’s jobs. (Balazinska Dep. Tr., Walters Decl. Ex. D,
11 at 31:11–21; Allbritton Dep. Tr., Walters Decl. Ex. F, at 17:4–6.) While Director
12 Balazinska and Dean Allbritton can and should respond to staff concerns, they cannot
13 do so in a way that violates the free-speech rights of another employee just because
14 his speech is unpopular. And, as it relates to teaching assistants’ fears of retaliation
15 (which Balazinska and Allbritton concede are unfounded, Balazinska Dep. Tr.,
16 Walters Decl. Ex. D, at 222:24–223:3; Allbritton Dep. Tr., Walters Decl. Ex. F, at
17 150:15–18), or a recruiter’s concerns about the ability to recruit, these types of
18 “speculative ills” cannot generate a government interest under *Pickering*. *Liverman*

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⁶ If a student in fact took a leave of absence because of objections to Reges’s
land acknowledgment parody, though not in evidence, that also constitutes a reaction
to Reges’s protected speech on a matter of public concern. University students should
expect to confront diverse viewpoints “in vigorous, argumentative, unmeasured, and
even distinctly unpleasant terms.” *Adamian*, 523 F.2d at 934.

1 *v. City of Petersburg*, 844 F.3d 400, 408–09 (4th Cir. 2016) (citing *Connick v. Myers*,
2 461 U.S. 138, 152 (1983)).

3 Defendants further point to the fact that 170 of Reges’s more than 500 students
4 switched to the new shadow section Defendants created in Winter Quarter 2022,
5 implying they did so because they were offended by Reges’s statement. (Defs.’ Mot.
6 Summ. J., Dkt. # 64, at 9.) As an initial matter, and as Plaintiff argues in his moving
7 brief, the undisputed facts show only one of Reges’s students expressed an intent to
8 switch to the new section because she took offense to Reges’s statement, as opposed
9 to undisputed evidence that a variety of other, more mundane reasons justified many
10 more students’ decisions to switch (*e.g.*, more favorable testing, grading, and
11 homework resubmission policies). (Pl.’s Mot. Summ. J., Dkt. # 60, at 10–11.)
12 Defendants did nothing to determine why students switched. (*Id.*) Defendants
13 present no evidentiary support that their discretionary choice to create a shadow
14 section resulted from any actual disruption to the learning environment.

15 UW does not have a legitimate interest in stifling dissent and debate: Indeed,
16 as a public university UW is “peculiarly the ‘marketplace of ideas.’” *Healy v. James*,
17 408 U.S. 169, 180 (1972). Limiting professors to “express only those viewpoints of
18 which the State approves” is “positively dystopian.” *Pernell v. Fla. Bd. of Governors*
19 *of the State Univ. Sys.*, 641 F. Supp. 3d 1218, 1230 (N.D. Fla. 2022). Defendants have
20 not demonstrated, and cannot demonstrate, that their nonexistent interest in stifling
21 discussion on a matter of public concern on a public university campus outweighs
22 Reges’s interest in catalyzing and participating in that discussion.

1 **II. Professor Reges Has a Standalone Viewpoint Discrimination Claim**
2 **Because Defendants Restricted His Speech, Deeming It Offensive.**

3 Defendants argue that Reges’s viewpoint discrimination claim “is not viable
4 separate from [his] retaliation claims,” and that “the University did not single out
5 Reges’s land acknowledge [sic] based on the viewpoint it reflects.” (Defs.’ Mot. Summ.
6 J., Dkt. # 64, at 16–17.) Both arguments fail for the same reason: Defendants
7 censored Reges’s speech and continue to threaten him with further punishment
8 because they and others deem his viewpoint offensive, in violation of bedrock First
9 Amendment principles.

10 Viewpoint discrimination is a separate injury from retaliation and thus a
11 separate claim is appropriate. It is Defendants’ *overarching* intent to discriminate
12 against Reges’s viewpoint, as published in his syllabus, that makes their censorship,
13 in addition to other viewpoint-discriminatory attempts to regulate or chill his speech,
14 subject to the distinct claim of viewpoint discrimination. It is a broader claim against
15 Defendants’ actions that applies regardless of whether Defendants, as a matter of
16 law, also intended to retaliate against him.

17 Retaliation and viewpoint discrimination claims require different analyses
18 even though courts balance employer and employee interests under *Pickering*. This
19 is because a plaintiff pursuing a First Amendment retaliation claim must also show
20 both an adverse action, and that the adverse action was motivated by the plaintiff’s
21 protected speech. *Coszalter*, 320 F.3d at 973. A viewpoint discrimination claim
22 requires no such showing. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*,

1 515 U.S. 819, 828 (1995) (“It is axiomatic that the government may not regulate
2 speech based on its substantive content or the message it conveys.”).

3 Even assuming Defendants did not retaliate against Reges for his speech (they
4 did), they nevertheless censored it because they found it offensive by removing his
5 statement from his syllabus. (Dkt. # 60, at 7; Dkt. # 64, at 4.) Furthermore, they have
6 threatened him with future adverse employment action if his, as per Dean Allbritton’s
7 June 13 letter, “dehumanizing” statement leads to further complaints, which he can
8 avoid only by censoring himself. (Dkt. # 60, at 14; Dkt. # 64, at 5–6.)

9 Defendants cite one in-circuit case for the proposition that *Pickering* “applies
10 regardless of the reason an employee believes his or her speech is constitutionally
11 protected.” (Defs.’ Mot. Summ. J., Dkt. # 64, at 17 (quoting *Berry v. Dep’t of Soc.*
12 *Servs.*, 447 F.3d 642, 650 (9th Cir. 2006)). But they misstate the case’s holding. In
13 *Berry*, the plaintiff argued that the court “should apply a stricter test instead of a
14 balancing test because the [defendant’s] restrictions on his religious speech . . .
15 violate his rights under both the Free Exercise and the Free Speech clauses of the
16 First Amendment.” *Berry*, 447 F.3d at 648–49. The plaintiff believed that
17 *Employment Division v. Smith* held that two constitutional rights combined make a
18 hybrid right with extra force. *See id.* at 649 n.5 (discussing *Emp. Div., Dep’t of Hum.*
19 *Res. v. Smith*, 494 U.S. 872 (1990)). The *Berry* court rejected that argument because
20 it “does not take into consideration the employer’s interests that led the Supreme
21 Court to adopt the *Pickering* balancing test in the first place.” *Id.* at 649. Instead,
22 *Berry* applied *Pickering*. *Id.* at 650.

1 *Berry*, however, cites approvingly to *Tucker v. State of California Department*
2 *of Education*, 97 F.3d 1204 (9th Cir. 1996). *Berry*, 447 F.3d at 650. As Reges does,
3 Tucker brought not only a retaliation claim, but also an overbreadth claim
4 challenging public employer workplace policies—and he succeeded in reversing an
5 award of summary judgment for the defendant. *Tucker*, 97 F.3d at 1216–17.
6 Therefore, it cannot be that in the Ninth Circuit all speech-based claims arising from
7 the employment context must collapse into a single *Pickering* balancing test.

8 To hold otherwise would be to cast aside a fundamental principle of First
9 Amendment law—that the state is powerless to restrict speech based on viewpoint
10 because that viewpoint causes offense. (*See* Pl.’s Mot. Summ. J., Dkt. # 60, at 15–18.)
11 This Court must examine UW’s interests as employer against that weighty bedrock.
12 Defendants’ motion for summary judgment on Reges’s viewpoint discrimination claim
13 should be denied.

14 **III. Executive Order 31 Is Overbroad Because It Covers Pure Speech, Not**
15 **Just Conduct.**

16 Defendants nearly concede that Executive Order 31 is overbroad by arguing
17 the Court should construe the policy “to avoid constitutional infirmities,” (Defs.’ Mot.
18 Summ. J., Dkt. # 64, at 19), and apply Defendants’ “limiting construction” to define
19 the ban on “unacceptable or inappropriate” conduct as not reaching pure speech. But
20 Defendants have already applied the Order to Reges’s pure speech, acting
21 inconsistently with the argument they now make before the Court and showing the
22 Order’s potential for overbreadth. Defendants cannot have their cake and eat it too.

1 Defendants' call for the Court to construe Executive Order 31 "to avoid
2 constitutional infirmities" must fail because the Order disclaims any limits. A policy
3 is overbroad if it ropes in a "substantial number" of applications to protected speech
4 relative to its legitimate sweep. *Comite de Jornaleros v. City of Redondo Beach*, 657
5 F.3d 936, 944 (9th Cir. 2011) (quoting *United States v. Stevens*, 559 U.S. 460, 473
6 (2010)). The Order prohibits "any conduct that is deemed unacceptable or
7 inappropriate, regardless of whether the conduct rises to the level of unlawful
8 discrimination, harassment, or retaliation." (Walters Decl. Ex. L.) There is no limit
9 to "any conduct" administrators might deem "unacceptable and inappropriate." That
10 the policy applies "regardless of whether the conduct rises to the level of unlawful
11 discrimination, harassment, or retaliation" demonstrates that its interpretation
12 cannot be constrained by definitions of those terms. The Order therefore covers
13 limitless applications to speech, let alone a "substantial number" of applications,
14 contradicting the limiting construction that Defendants now seek.

15 Defendants also argue that the Court should analyze Executive Order 31
16 similarly to a police department's social-media policy in the distinguishable case of
17 *Hernandez v. City of Phoenix*, 43 F.4th 966 (9th Cir. 2022). There, the Ninth Circuit
18 rejected an overbreadth challenge to a social-media policy that applied even to off-
19 duty police officers because "[p]olice departments . . . have a strong interest in
20 maintaining a relationship of trust and confidence with the communities they serve."
21 *Id.* at 981. *Hernandez's* holding rests on the state's interest in maintaining not only
22 discipline and cohesion among the police ranks, but also public trust that the law will

1 be enforced in an even-handed way—and those interests could be equally harmed by
2 statements from on- or off-duty officers. *Id.* As a result of police’s particular “mission,”
3 the court could not “say that a substantial number of the policy’s applications are
4 unconstitutional.” *Id.*

5 In contrast to police departments, public university “efficiency cannot be
6 purchased at the expense of stifling free and unhindered debate on fundamental
7 educational issues.” *Peacock v. Duval*, 694 F.2d 644, 647 (9th Cir. 1982). Indeed,
8 “conflict is not unknown in the university setting.” *Hulen v. Yates*, 322 F.3d 1229,
9 1239 (10th Cir. 2003). Even acting in an employer capacity, public universities have
10 no interest in restricting the free speech and academic freedom rights of professors,
11 who are hired not as state mouthpieces but as experts who challenge students to
12 engage in critical thinking, speaking from a “multitude of tongues.” *Keyishian*, 385
13 U.S. at 603. Universities have no interest in limiting speech and inquiry unless they
14 have weightier efficiency interests. As discussed *supra* Section 1.C., those interests
15 do not exist here. Therefore, Executive Order 31 has little legitimate sweep with
16 respect to the in-classroom speech of UW professors. Judged in relation to that sweep,
17 its potential applications to protected speech are overbroad. Therefore, Defendants’
18 motion for summary judgment on Reges’s overbreadth claim should be denied.

19 **IV. Executive Order 31 Is Vague Because a Person of Ordinary**
20 **Intelligence Cannot Understand Its Meaning and It Permits Arbitrary**
21 **Enforcement.**

22 Executive Order 31 is vague because “it fails to provide people of ordinary
23 intelligence a reasonable opportunity to understand what conduct it prohibits” and

1 “it authorizes or even encourages arbitrary and discriminatory enforcement.” *Hill v.*
2 *Colorado*, 530 U.S. 703, 732 (2000).⁷

3 As Dean Allbritton’s actions and June 13, 2023, letter demonstrate, even
4 university deans cannot know what constitutes “conduct” “deemed unacceptable or
5 inappropriate, regardless of whether” it meets the legal definitions of discrimination
6 or harassment. Defendants must believe the Order applies to Reges’s parody—pure
7 speech—because they instituted a disciplinary investigation and threaten future
8 enforcement against him under the Order.

9 But the Order’s vague language must share the blame. It does not define
10 “conduct,” a term courts have long struggled to define as distinct from speech. *See,*
11 *e.g., Chase v. Davelaar*, 645 F.2d 735, 739 n.12 (9th Cir. 1981) (“We are hesitant to
12 rely uncritically on the speech/conduct dichotomy. In part, our hesitancy arises from
13 the conceptual weakness of the distinction. ‘Speech’ communication of ideas or
14 attitudes is itself a form of ‘conduct.’”).

15 In addition, the Order provides that unacceptable or inappropriate “conduct”
16 does not need to “rise to the level of unlawful discrimination, harassment, or
17 retaliation”—while defining those three terms as particular forms of “conduct” with
18

19 ⁷ Defendants cite out-of-circuit precedent for the proposition that “a civil law is
20 void for vagueness only if its terms are ‘so vague and indefinite as really to be no rule
21 or standard at all’” or if it is “substantially incomprehensible.” (Defs.’ Mot. Summ. J.,
22 Dkt. # 64, at 20 (quoting *Ford Motor Co. v. Tex. Dep’t of Transp.*, 264 F.3d 493, 507
(5th Cir. 2001).) But courts in the Ninth Circuit void “insufficiently clear” policies “to
avoid any chilling effect on the exercise of First Amendment freedoms.” *Foti v. City*
of Menlo Park, 146 F.3d 629, 638 (9th Cir. 1998).

1 “the meaning given them by applicable [anti-discrimination law].” Thus, as explained
2 *supra* Part III, “conduct that is deemed unacceptable or inappropriate” can
3 reasonably be understood to potentially include all possible acts, including pure
4 speech, that fall outside the definitions of those terms. Contrary to Defendants’
5 suggestion, a person of ordinary intelligence cannot understand what the Order
6 prohibits because the possibilities are limitless. Especially because the Order must
7 be interpreted “in the context of academic freedom in the University environment,”
8 (Defs.’ Mot. Summ. J., Dkt. # 64, at 20 (citing Exec. Order 31 § 5(A)), this Court should
9 consider the high interest in maintaining free speech, vigorous debate, and academic
10 freedom on public university campuses when determining whether the policy’s
11 vagueness risks stifling free expression.

12 Likewise, the Order’s terms invite arbitrary application. As noted in Dean
13 Allbritton’s June 13, 2023, letter, she will enforce the Order against Reges and
14 preemptively conclude he intends to violate Executive Order 31 if students or staff
15 express their offense to his land acknowledgment—pure speech—going forward.
16 (Defs.’ Mot. Summ. J., Dkt. # 64, at 5–6.) Those future complaints are the only
17 evidence of “disruption” needed to resume disciplinary proceedings. (Allbritton Dep.
18 Tr., Walters Decl. Ex. F, at 112:3–8.) But if the policy’s enforcement, applied to pure
19 speech, turns on listeners’ objections to the content or viewpoint of that speech, then
20 the term “conduct” as used in the Order is “meaningless,” notwithstanding
21 Defendants’ claim otherwise. (Defs.’ Mot. Summ. J., Dkt. # 64, at 20.) The Order
22 authorizes administrators to apply it to anything they “deem[] unacceptable or

1 inappropriate”—an inherently arbitrary standard. If the Order is not vague—as
2 Defendants argue (Defs.’ Mot. Summ. J., Dkt. # 64, at 20)—because it contains
3 definitions of discrimination and harassment, then they should apply it only to
4 “conduct” meeting those definitions, not Reges’s pure speech. Because the Order is
5 vague—even by Defendants’ own interpretation when applying it to Professor Reges’s
6 pure speech—Defendants’ motion for summary judgment on Reges’s vagueness claim
7 should be denied.

8 **CONCLUSION**

9 Based on the undisputed material facts, Defendants are not entitled to
10 summary judgment on Reges’s retaliation, viewpoint discrimination, overbreadth,
11 and vagueness claims. The Court should deny their motion.

12 DATED: January 22, 2024

13 Respectfully submitted,

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2 **CERTIFICATE OF WORD COUNT**

3 I certify that this memorandum contains 8,388 words, in compliance with the
4 Local Civil Rules.

5 */s/ Gabriel Walters*
6 Gabriel Walters

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CERTIFICATE OF SERVICE

Plaintiff's counsel confirms that a true and correct copy of the foregoing was served via the Court's electronic filing system on this day, January 22, 2024. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated below and parties may access this filing through the Court's electronic filing system.

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