The Honorable Kymberly K. Evanson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Abraham Flaxman and Amy Hagopian, individually and for a proposed class, *Plaintiffs*, *v.* Bob Ferguson, in his official capacity as the Attorney General of the State of Washington, and Kate Reynolds, in her official capacity as Executive Director of the Executive Ethics Board of the State of Washington, *Defendants.*	Case No. 2:23-cv-01581-KKE MEMORANDUM IN OPPOSITION TO MOTION DISMISS

Plaintiffs, individually and for the more than 2,000 other subscribers to the "Faculty Issues and Concerns" electronic mailing list, bring

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this action because the State of Washington, through its Executive Ethics Board, is restricting the matters they may discuss on that electronic mailing list by penalizing protected speech and conducting unreasonable searches of faculty email in enforcement actions.[1] Plaintiffs' constitutional challenge to vindicate First Amendment rights is the kind of case "that the federal courts are particularly well-suited to hear." *Chula Vista Citizens for Jobs and Fair Competition v. Norris*, 782 F.3d 520, 528 (9th Cir. 2015) (cleaned up).[2]

Defendants seek to reframe this case from a challenge to unconstitutional governmental restrictions on speech — restrictions that impact the speakers as well as "listeners," *Renee v. Geary*, 501 U.S. 312, 336-37 (1991) — by claiming that plaintiffs have been "using their state-issued email accounts for *private gain*" (ECF No. 19 at 2, emphasis added) and are "using State resources for *private gain.*"[3] (ECF No. 19 at 3, emphasis added.) The

[1] The defendants are the Attorney General of the State of Washington and the Executive Director of the Executive Ethics Board. Defendants do not dispute that they are the proper parties for plaintiffs' legal challenge.

[2] Plaintiffs use (cleaned up) when internal quotation marks, alterations, and citations are omitted from quotations. See Jack Metzler, *Cleaning Up Quotations*, 18 J. APP. PRAC. & PROCESS 143 (2017).

[3] Defendants acknowledge at page 5 of their memorandum that the email forwarded to the Faculty Issues and Concerns list by plaintiff Flaxman on June 6, 2023 (ECF No. 15-3 at 3-8) contained a hyperlink "soliciting donations for a strike fund" and that the email forwarded by plaintiff Hagopian on December 10, 2022 (ECF No. 15-2 at 3-5) contains a hyperlink "soliciting donations for a union strike fund." (ECF No. 19 at 5.) Neither

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Court should reject this claim because it is incorrect; the record shows beyond all doubt that plaintiffs were providing information about ways to make charitable contributions, speech protected by the First Amendment.[4] *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). Plaintiffs show below that they have "suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (cleaned up). The Court should reject defendants' attempts to disguise their constitutional wrongdoing and deny their motion to dismiss.

I. The Meritless Motion to Dismiss

Defendants ask the Court to dismiss this action under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.[5] (ECF No. 19.) Each approach is meritless.

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solicitation is for "private gain." Each solicitation is speech protected by the First Amendment under *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980).

[4] Plaintiffs discuss their protected speech below at 12-15.

[5] Defendants also assert, without any reasoning or citation of authority, that the complaint is "procedurally improper." (ECF No. 19 at 2.) The Court should reject this conclusory and undeveloped argument. *United States v. Alonso*, 48 F.3d 1536, 1544 (9th Cir. 1995).

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The motion under Rule 12(b)(1) of the Federal Rules of Civil Procedure "raises the fundamental question whether the federal district court has subject matter jurisdiction over the action before it." 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (3d ed). This question is easily resolved in favor of plaintiffs, who bring this action under 42 U.S.C. § 1983 and invoke the jurisdiction of the Court under 28 U.S.C. § 1343. (Amended Complaint, ¶¶ 2-3.)

Defendants do not dispute that the Court has jurisdiction under 28 U.S.C. § 1343(a)(3) to hear and decide this action brought "[t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 553 (1972). Nor do defendants disagree that 42 U.S.C. § 1983 is the appropriate federal statute to vindicate rights secured by the First Amendment. *See, e.g., Lane v. Franks*, 573 U.S. 228, 234 (2014).

Defendants do not offer evidence outside the pleadings to support their Rule 12(b)(1) motion and are therefore advancing a "facial" rather than a "factual" challenge to the jurisdictional allegations in the complaint. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). The Court thus resolves

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factual issues "as it would on a motion to dismiss under Rule 12(b)(6)." *Id.* Accordingly, for both the 12(b)(1) motion and the 12(b)(6) motion, "[a]ll of the facts alleged in the complaint are presumed true, and the pleadings are construed in the light most favorable to the nonmoving party." *Unified Data Services, LLC v. Fed. Trade Comm'n*, 39 F.4th 1200, 1209 (9th Cir. 2022) (cleaned up). Plaintiffs set those facts out below.[6]

II. The "Faculty Issues and Concerns" Discussion List Is a Public Forum

For about thirty years, the University of Washington has hosted an electronic mailing list known as the "Faculty Issues and Concerns" mailing list. (Amended Complaint, ¶ 10.) As the University of Washington explains on the webpage it has dedicated to the list, https://depts.washington.edu/uwaaup/wordpress/listserver/, while the mailing list is sponsored by the local chapter of the American Association of University Professors, "You do not have to be a member of AAUP to subscribe to the list server." *Id.*

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[6] Defendants include in their Rule 12(b)(1) motion arguments about ripeness (ECF No. 19 at 6-13) and a request to abstain under *Younger v. Harris*, 401 U.S. 37 (1971). (*Id.* at 13-19.) The Court should reject each request. *See infra* at 22-30.

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The "Faculty Issues and Concerns" mailing list is a "discussion list" that serves as a public forum for faculty conversations about matters of general higher education concern. (Amended Complaint, ¶ 11.) The list is "moderated" which means that each posting must be approved by a "moderator" before it can be electronically transmitted by email to persons who have subscribed to the list. (Amended Complaint, ¶ 14.)

The named plaintiffs, Amy Hagopian and Abraham Flaxman, are professors at the University of Washington (Amended Complaint, ¶ 5) who serve as volunteer moderators of the "Faculty Issues and Concerns" mailing list. (*Id.*, ¶ 15.) The moderators do not censor or edit postings to the list because of content or subject matter and seek to balance open discussion with the knowledge that the subscribers to the list do not want their inboxes overwhelmed with messages or personal attacks. (*Id.*, ¶ 18.)

The discussion list is open to full discussion of challenging and important topics of interest to the community of scholars at the University of Washington, even when postings contradict the positions or values of others

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on the list. (Amended Complaint, ¶ 13.) About 2,200 persons subscribe to the "Faculty Issues and Concerns" mailing list.[7] (Amended Complaint, ¶ 12.)

The "Faculty Issues and Concerns" email discussion list is a "public forum." In addition to streets and parks, which "by long tradition or by government fiat have been devoted to assembly and debate," *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 45 (1983), there is a "second public forum category," which

> [C]onsists of public property which the state has opened for use by the public as a place for expressive activity. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. *Widmar v. Vincent*, 454 U.S. 263 (1981) (university meeting facilities); *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167 (1976) (school board meeting); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (municipal theater).

Id. at 45.

The Ninth Circuit explained this "second category" in *Cinevision Corp. v. City of Burbank*, 745 F.2d 560 (9th Cir. 1984), which arose from a contract with the City of Burbank to promote concerts at the Starlight Bowl, a municipally owned venue. The City, which had the right under the contract

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[7] The list has increased its membership from the 1,780 subscribers shown on the webpage. https://depts.washington.edu/uwaaup/wordpress/listserver/.

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to disapprove any of the proposed concerts, rejected six of the eight concerts proposed for the summer of 1979. Cinevision sued under 42 U.S.C. § 1983 for the alleged violation of its First Amendment rights, asserting that the City had rejected the concerts because of their content. In an appeal from a jury verdict in favor of Cinevision, the Ninth Circuit held that the Starlight Bowl was a "public forum." 745 F.2d at 569-71. The reasoning of the Court of Appeals in *Cinevision* is fully applicable in this case:

> [B]y granting Cinevision access to the Bowl for the presentation of music by a variety of performers, the City transformed publicly owned property into a public forum for expressive activity, even if the expressive activity is promoted by a single entity.

Id. at 560.

The only functional difference between this case and *Cinevision* is that *Cinevision* involved a concert venue, while this case involves an electronic discussion list. This is a distinction without a difference: By making its email server available to host the "Faculty Issues and Concerns" mailing list, the University of Washington, like the City of Burbank, "transformed publicly owned property into a public forum." *Cinevision*, 745 F.2d at 570.

There is nothing unusual about a public university, like the University of Washington, creating a "generally open forum" which comes within

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the protections of the First Amendment from content-based exclusions. For example, in *Widmar v. Vincent*, 454 U.S. 263 (1981), a campus of the University of Missouri "routinely provide[d] University facilities for the meetings of registered organizations." *Id.* at 265. *Widmar* arose from the school's decision to bar a student organization that met on campus for religious purposes. *Id.* The Supreme Court held that the University had "created a forum generally open for use by student groups," *id.* 267, and could limit the content of the group's intended speech only upon showing "that its regulation is necessary to serve a compelling state interest and that it was narrowly drawn to achieve that end." *Id.* at 270.

The Court reached the same result in *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). There, the University of Virginia subsidized the activities of some student groups but withheld funds from one group because its focus was a religious activity. *Id.* at 827. The Court held that this action violated the First Amendment, reiterating that "[t]he state may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum." *Id.* at 829. (cleaned up)

Defendants base their argument that the "Faculty Issues and Concerns" discussion list is not a public forum on a single, easily distinguishable

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decision from an intermediate state reviewing court in a pro-se appeal, *Knudson v. Washington State Executive Ethics Board*, 156 Wash. App. 852, 235 P.3d 835 (2010). (ECF No. 19 at 21.)

Knudson did not involve an internet discussion list. There, the plaintiff "used state email resources to send an email to every SCC [Spokane Community College] faculty member with a state email address to encourage them to contact and urge legislators to approve two bills." 156 Wash. App. at 861, 235 P.3d at 839. The emailing in *Knudson* from an individual account directly to other individual accounts is unlike the exchange of ideas on an internet discussion list.[8]

Plaintiffs in this case do not argue that an entire email system is a "public forum." This case does not involve an entire email system but is limited to the Faculty Issues and Concerns mailing list, an internet discussion list hosted by the University of Washington for faculty conversations about matters of general higher education concern. (Amended Complaint, ¶ 11.) As in *Widmar*, the University of Washington, by making its resources

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[8] The utility of an internet discussion list to exchange ideas is illustrated in the 93 email messages from the "Evidence Professors Discussion List" that appear in Richard Friedman, D.H. Kaye, Jennifer Mnookin, Dale Nance, Michael Saks, *Expert Testimony on Fingerprints an Internet Exchange*, 43 JURIMETRICS J. 91, 93 (2002).

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available without restriction to the "Faculty Issues and Concerns Mailing List" has created a public forum that is entitled to the protections of the First Amendment.[9]

For the purposes of defendants' motion to dismiss, the Court should therefore view the "Faculty Issues and Concerns" discussion list as a public forum. The determinative question on liability is, therefore, whether defendants can show that their policy "furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed v. Town of Gilbert, Arizona*, 576 U.S. 155, 171 (2015) (cleaned up). This is a fact-dependent inquiry that is often "unsuitable for resolution at the pleading stage." *Duronslet v. County of Los Angeles*, 266 F. Supp. 1213, 1223 (C.D. Ca. 2017). Plaintiffs show below that, viewed in the light most favorable to plaintiffs, the record shows that the State of Washington, through its "Executive Ethics Board" is interfering with the free exchange of ideas on the "Faculty Issues and Concerns" mailing list.

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[9] *Compare Idaho State U. Faculty Ass'n for the Preservation of the First Amend. v. Idaho State U.*, No. 4:12-CV-00068-BLW, 2012 WL 1313304, at *7 (D. Idaho Apr. 17, 2012) (university limited "discussion on its email list and web servers to official school business").

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III. The "Executive Ethics Board" Is Interfering with the Exercise of First Amendment Rights on the "Faculty Issues and Concerns" Discussion List

The "Executives Ethics Board" ("EEB") enforces the "Ethics in Public Service" statute, RCW 42.52. (Amended Complaint, ¶ 26.) Plaintiffs do not challenge the statute. (*Id.*, ¶ 25.) Plaintiffs challenge the way in which the EEB "has applied the statute to restrict, without any compelling state interest, the content of statements that may be shared on the 'Faculty Issues and Concerns' mailing list." (*Id.*, ¶ 30.) Plaintiffs include in their amended complaint detailed factual allegations about the defective procedures (*id.*, ¶¶ 32-53) and limit this memorandum to two specific ways in which the EEB interferes with the First Amendment rights of plaintiffs and the other members of the Faculty Issues and Concerns discussion list.

A. The EEB seeks to suppress beneficent requests for financial contributions

The EEB has adopted a policy that any email message on the Faculty Issues and Concerns list that includes an incidental request to contribute funds to a particular cause violates state law. (Amended Complaint, ¶¶ 48-49.) The EEB has applied this policy to plaintiff Hagopian (*id.*, ¶¶ 80-82), proposing a fine that "may be more than $500." (*Id.*, ¶ 85.) The EEB has also applied this policy to plaintiff Flaxman (*id.*, ¶ 70), proposing a fine that "may

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be more than $500."[10] (*Id.* ¶ 70.) The EEB's policy does not further any legitimate state interest and violates important First Amendment rights.

1. Application of the Policy to Plaintiff Hagopian

On December 10, 2022, plaintiff Hagopian forwarded a message to the Faculty Issues and Concerns discussion list about a worker's strike at the University of California. (Amended Complaint, ¶ 73.) The message consists of 184 words (less hyperlinks) and included a short, five-word sentence asking the reader to "[c]onsider donating to our strike fund." (*Id.*, ¶ 75.) The EEB concluded that by forwarding this five-word sentence, plaintiff Hagopian had "use[d] state resources to support an outside organization" (*Id.*, ¶ 82), and that this use warranted a penalty that "may be more than $500." (*Id.*, ¶ 85.)

2. Application of the Policy to Plaintiff Flaxman

On November 29, 2022, plaintiff Flaxman forwarded a message to the Faculty Issues and Concerns discussion list "on the topic of health insurance." (Amended Complaint, ¶¶ 57-58.) The message provided information

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[10] The EEB terminated the matter without explanation on October 13, 2023. (Amended Complaint, ¶ 71.)

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about "Whole Washington, a campaign to bring universal healthcare to Washington State." (Amended Complaint, ¶ 59.)

The forwarded message was followed by the statement that "interested people can see where to sign here," and included a hyperlink to "Whole Washington," a coalition of healthcare professionals and volunteers from across Washington State. (Amended Complaint, ¶ 60.) The forwarded message also included the statement: "People who want to collect signatures from people and friends can pick up supplies at any of the bin hosts on the map." (*Id.*)

Flaxman responded to the complaint by advising the EEB that he viewed the email to the Faculty Issues and Concerns list as "expressing views about a matter of public concern" (Amended Compliant, ¶ 65) and requested the EEB to decline to investigate what he viewed as a prank complaint. (*Id.*, ¶ 64.) The EEB rejected this request and concluded that there was reasonable cause to believe that by forwarding this message, Flaxman had violated RCW 42.52, and should be fined in an amount that "may be more than $500." (*Id.*, ¶ 70.) After Flaxman retained counsel, the EEB terminated the matter without explanation. (Amended Complaint, ¶ 71.)

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3. The EEB bars protected speech without a compelling state interest

"[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment." *Village of Schaumburg v. Citizens for a Better Env.*, 444 U.S. 620, 632 (1980). As the Ninth Circuit held in *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006), "It is beyond dispute that solicitation is a form of expression entitled to the same constitutional protections as traditional speech." *Id.* at 792.

Email postings about health care are likewise within the protection of the First Amendment. Healthcare is a traditional matter of public concern. *See, e.g., Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1111 (W.D. Wash. 2010); *Carey v. Maricopa County*, 602 F. Supp. 1132, 1138 (D. Ariz. 2009).

The EEB is engaging in content-based restriction on speech when, as in this case, its policies "suppress particular ideas." *Valle del Sol Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013) (cleaned up). This means that "the

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burden shifts to the defendant to justify its speech restrictions." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011).

Defendants do not assert any justification for restricting plaintiffs' speech in their Rule 12(b)(6) motion to dismiss. While defendants cite the Washington statutes, their motion does not seek to defend the EEB's policy, which goes beyond state law and bars email that includes an incidental request for donations.

A Rule 12(b)(6) motion is not the appropriate vehicle for defendants to justify their restrictions on First Amendment rights. To the extent defendants seek to justify their speech restrictions, the Court should defer ruling on the merits of that justification until trial (or dispositive motions) and deny the Rule 12(b)(6) motion.

B. The EEB is encroaching on First Amendment rights when it conducts unrestricted inspections of faculty email

The EEB has adopted a written policy that the Board applied to plaintiffs to inspect faculty email, without judicial authorization, without judicial oversight, and without any restrictions on the use or dissemination of the

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email.[11] The policy is contained in WAC 292-110-010(4), which provides as follows:

> (4) No expectation of privacy. Technologies such as electronic mail, facsimile transmissions, the internet and voice mail may create an electronic record. This is what separates these from other forms of communication, such as a telephone conversation. The ethics rules do not distinguish between the various forms of communication. *Electronic records are reproducible and therefore cannot be considered private.* Such records may be subject to disclosure under the Public Records Act, or may be disclosed for audit or legitimate state operational or management purposes. (emphasis added)

Defendants include an excerpt from the regulation in their motion (ECF No. 19 at 9) but are unable to explain why records "cannot be considered private" because they "are reproducible."

This justification for the regulation is ludicrous. All records "are reproducible." Aside from the EEB's regulation, plaintiffs are not aware of any other claim that a confidential record "cannot be considered private" if it possible to reproduce it. This Court's draft opinions are reproducible, but no one has ever suggested that this means that the drafts "cannot be considered private." Grand jury minutes are also easily reproducible but are confidential. *See* Rule 6(e) of the Federal Rules of Criminal Procedure.

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[11] *Compare* RCW 10.97.050 (limiting dissemination of criminal history records).

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Similarly, Top Secret documents are easily reproduced, but 32 C.F.R. § 2400.30 provides as follows: "Documents or portions of documents and materials that contain Top Secret information shall not be reproduced without the consent of the originator or higher authority."

Equally unavailing is defendants' reliance on the Washington Public Records Act. (ECF No. 19 at 9.) Defendants argue that "any member of the public can request and obtain [the emails of plaintiffs and the other subscribers to the Faculty Issues and Concerns list]." (*Id.*) This argument misreads the statute, which limits public records requests to "identifiable records" and makes plain that "[a] request for all or substantially all records prepared, owned, use, or retained by an agency is not a valid request for identifiable records under this chapter, provided that a request for all records regarding a particular topic or containing a particular keyword or name shall not be considered a request for all of an agency's records." RCW 42.56.070(1). In other words, a request under the Washington Public Records Act for all emails that the EEB reviewed would be denied.

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The extent to which the First Amendment protects academic email is an important and unresolved question that merits a more thorough analysis than that offered by defendants in their Rule 12(b)(6) motion to dismiss.[12]

The Supreme Court recognized a First Amendment right to academic freedom in *Sweezy v. State of New Hampshire*, 354 U.S. 234 (1957). Justice Frankfurter, in a concurring opinion, which is the holding of the Court under the reasoning of *Marks v. United States*, 430 U.S. 188, 193 (1977), set out the principle relevant here:

> Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.

Sweezy, 354 U.S. at 262 (Frankfurter, J., concurring).

The First Amendment right to academic freedom was presented in Wisconsin when a professor asserted that a request for his emails under the state's freedom of information statute interfered with his right to academic freedom. *See* Jonathan Peters & Charles N. Davis, *When Open Government*

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[12] Defendants assert, without explanation, that there is no "privacy interest secured by the First Amendment," and that plaintiffs' reliance on the First Amendment right to academic freedom "has no basis whatsoever in law." (ECF No. 19 at 3.) This is another conclusory and undeveloped argument that should be summarily rejected. *United States v. Alonso*, 48 F.3d 1536, 1544 (9th Cir. 1995).

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and Academic Freedom Collide, 12 FIRST AMEND. L. REV. 295, 297-98 (2013). The University concluded that "[h]aving every exchange of ideas subject to public exposure puts academic freedom in peril and threatens the processes by which knowledge is created." *Id.* at 299-300. The University then balanced "the public interest" in releasing the emails with "other public interests favoring protection of such communications." *Id.* at 299. In this case, the EEB does not conduct any balancing nor does it evaluate the harm of disclosure of faculty emails.

The Court need not determine in this case the extent to which the First Amendment protects the email of university professors because the EEB lacks "reasons that are exigent and obviously compelling" when it examines faculty email.[13] As shown by the facts surrounding the EEB's unrestricted examination of the email of the named plaintiffs, the agency insists that it may exercise unbridled discretion to review faculty email, even when the review is a fishing expedition for other hypothetical wrongdoing.

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[13] Determination of the First Amendment privacy interest would require the Court to "balance the invasion of the employee's legitimate expectation of privacy against the government's need for supervision, control, and the efficient operation of the workplace." *O'Connor v. Ortega*, 480 U.S. 709, 719-20 (1987).

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The EEB investigated plaintiff Flaxman for an email that he admitted he had sent to the Faculty Issues and Concerns list. (Amended Complaint, ¶ 68.) Even though there was no dispute that the EEB had a copy of the email, which Flaxman admitted he had sent to the "Faculty Issues and Concerns" list, the EEB gained access to and searched all of Dr. Flaxman's email for the three-month period surrounding the date when Dr. Flaxman sent the email specified in the complaint. (*Id.*, ¶ 69.) The EEB has yet to articulate any justification for this fishing expedition.

Similarly, the EEB investigated plaintiff Hagopian about an email that she admitted she had sent to the Faculty Issues and Concerns list. (Amended Complaint, ¶ 79.) Again, even though there was no dispute that Hagopian had sent the email under investigation, the EEB gained access to and searched all Hagopian's emails.[14] (*Id.*, ¶ 81.)

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[14] This searched turned up twenty-seven emails sent to Hagopian. (Amended Complaint, ¶ 83.) These emails included an electronic boarding pass and alerts about breaking news stories from the Seattle Times, the New York Times, and the New Yorker, and various promotional offers. (*Id.*, ¶ 84.) The EEB contends that Hagopian misused state resources by receiving these emails. (*Id.*, ¶ 83.) Hagopian is defending this charge before the EEB and has not asked the Court to intervene. (Amended Complaint, ¶ 55.)

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Defendants do not dispute plaintiffs' allegation that inspection of faculty email is likely to include a search of electronic email from students that contains matters protected from disclosure by the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. 1232(g). (Amended Complaint, ¶ 46.) Rather than defend or explain their invasion of federal rights, defendants assert that plaintiffs cannot complain about the violation of FERPA because this is an injury "to the student, not to Plaintiffs." (ECF No. 19 at 10.) The students, of course, do not know that the EEB has examined their federally protected records and there is more than a "realistic danger," *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984), that the rights of the students will not be protected. That there is no private right of action to enforce FERPA (ECF No. 19 at 9-10) is irrelevant because plaintiffs are not bringing an action to enforce FERPA. Instead, plaintiffs rely on the EEB's violation of privacy rights created by FERPA to demonstrate the importance of their rights trampled on by the EEB. The Court should deny defendants' request to dismiss the "email claim."

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IV. Plaintiffs Allege an Article III Injury

There is no merit in defendants' claim that this case involves "vague insinuations" about limitations on protected speech. (ECF No. 19 at 7.) There is nothing "vague" about the EEB's threats to impose a fine on each of the named plaintiffs that "may be more than $500." *See ante* at 12-14. Nor is there anything "vague" about the EEB's unbridled examination of the email files of the named plaintiffs. *See ante* at 16-22.

Defendants are mistaken in their reliance on *Twitter, Inc. v. Paxton*, 56 F.4h 1170 (9th Cir. 2022). (ECF 19 at 7-8.) There, the plaintiff claimed that "its ability to freely make content decisions" had been "impeded." *Id.* at 1175. The Court of Appeals held that this was a vague allegation that "refer[red] only to a general possibility of retaliation" that failed to allege an injury-in-fact. *Id.* In this case, unlike *Twitter*, the EEB has threatened each of the named plaintiffs with significant fines for their speech and has performed an intrusive search of their emails. Plaintiffs in this case have met the standard set out in *Spokeo, Inc. v. Robbins*, 578 U.S. 330, 338 (2016), by "clearly" alleging standing. *See ante* at 13-14.

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Defendants are equally mistaken in their attempt to invoke prudential ripeness.[15] (ECF No. 19 at 10-13.) As analyzed in *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), prudential ripeness turns on "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 1070. This case does not present any "abstract disagreements." *Portman v. County of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993). The EEB asserts a right to unbridled access to faculty email and has applied to the named plaintiffs its zero-tolerance policy about any request for donations in postings to the Faculty Issues and Concerns discussion list, a public form that "facilitate[s] the free exchange of ideas essential to our democracy." *Camenzind v. California Exposition and State Fair*, 84 F.4th 1102, 1108 (9th Cir. 2023) (cleaned up). "Prudential ripeness" has no place in this case.

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[15] "Prudential ripeness," as the Supreme Court recently pointed out, "is in some tension with our recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014). Plaintiffs recognize that the Ninth Circuit continues to apply prudential ripeness. *Twitter*, 56 F.4th at 1173.

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V. *Younger v. Harris* Does Not Apply

There is no merit in defendant's assertion that *Younger v. Harris*, 401 U.S. 37 (1971) requires that the Court abstain from resolving plaintiffs' First Amendment claims.

The Ninth Circuit has identified four factors for applying *Younger* to civil proceedings:

> An ongoing state judicial proceeding; (2) the proceeding implicates important state interests; (3) there is an adequate opportunity in the state proceedings to raise constitutional challenges; and (4) the requested relief seeks to enjoin or has the practical effect of enjoining the ongoing state judicial proceeding.

Credit One Bank, N.A. v. Hestrin, 60 F.4th 1220, 1115 (9th Cir. 2023).

The Court must carefully apply these factors because "federal courts are obliged to decide cases within the scope of federal jurisdiction. Abstention is not in order simply because a pending state-court proceeding involves the same subject matter." *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 70 (2013).

A. There is no proceeding before the EEB concerning the message forwarded by Plaintiff Flaxman on November 29, 2022, or the ensuing search of his email

Defendants concede that there is no proceeding before the EEB about the message plaintiff Flaxman forwarded to the Faculty Issues and

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Concerns list on November 29, 2022. (ECF No. 19 at 11 n.2.) *Younger v. Harris* is therefore not a bar to claims arising from the sending of that email and the EEB's subsequent search of Flaxman's University email.

Defendants urge that the November 29th incident no longer presents a live controversy (ECF No. 19 at 11 n.2), relying on *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 893 F.2d 1012 (9th Cir. 1989). There, the plaintiff sought to stop the logging of specific trees. *Id.* at 1013. The district court ruled against the plaintiff, the Ninth Circuit denied an injunction pending appeal, and the trees were logged. *Id.* at 1014. The Court of Appeals held that it lacked the power to undo the logging, rendering moot the request for injunctive relief. *Id.* at 1015. The Court then turned to the request for declaratory relief and concluded that that request was also moot because "application of the disputed policies to future sales is too uncertain" and was not "capable of repetition, yet evading review." *Id.* at 1016. The latter is not true in this case.

Plaintiff Flaxman continues to be a volunteer moderator of the Faculty Issues and Concerns discussion list. (Amended Complaint, ¶ 15.) He is one of the two persons who reviews and approves all postings to the list. (*Id.*, ¶ 14.) Accordingly, there is a "reasonable expectation or demonstrated

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probability that the same controversy will recur involving [plaintiff Flaxman]." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 463 (2007). The controversy is also capable of repetition but evading review because the EEB inspects faculty email without notice to the faculty member and there is no opportunity to challenge the search until after the search has been completed.

B. Proceeding before the EEB will not result in an adjudication of plaintiff Hagopian's claim about First Amendment privacy in emails

Plaintiff Hagopian's claim about the EEB's unreasonable search of her University email is not at issue in the proceedings before the EEB. The EEB intends to use emails it found during that search in the ongoing proceedings, but Washington courts, like the Ninth Circuit, have never recognized a motion to suppress unlawfully seized evidence in a civil case. *McDaniel v. City of Seattle*, 65 Wash. App. 360, 367, 828 P. 2d 81, 85, (1992); *Evans v. Skolnik*, 997 F.3d 1060, 1073 n.3 (9th Cir. 2021). For the same reasons discussed above about plaintiff Flaxman's claim about the unreasonable inspection of his faculty email, Hagopian presents a live, justiciable claim about email inspection that is not barred by *Younger*.

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C. Proceedings before the EEB are not akin to criminal prosecutions, as required for *Younger* abstention

Defendants rely on *Samples v. Washington State Executive Ethics Board*, No. C12-5418 BHS, 2012 WL 5285202 (W.D. Wash 2012) to support their claim that the pending proceedings before the EEB require *Younger* abstention. (ECF No. 19 at 16-17.) Defendants' reliance on *Samples* is misplaced.

In *Samples*, several state employees were alleged to have used state property when they appeared in commercial television advertisements and "identified themselves by their job title, or a close approximation of their job title." 2012 WL 5285202 at *1. The EEB alleged that this was "an improper use of state property" prohibited by RCW 42.52.160. *Id.* The plaintiffs in *Samples* were awaiting an administrative appeal and filed their federal civil rights lawsuit because the administrative appeal would require more than a year to complete. *Id.* The district court abstained under *Younger*, applying the holding of *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1093 (9th Cir. 2008) that *Younger* applies "to state-initiated proceedings." 2012 WL 5285202 at *1-*2.

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The Ninth Circuit overruled *San Jose* in *ReadyLink Healthcare, Inc. v. State Compensation Ins. Fund,* 754 F.3d 754 (9th Cir. 2014), relying on the decision of the Supreme Court in *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 70 (U.S., 2013). As the Court of Appeals explained:

> *Sprint* resolved these interpretive dilemmas, squarely holding that *Younger* abstention is limited to the "three exceptional categories" of cases identified in *New Orleans Public Service, Inc. v. Council of New Orleans (NOPSI)*, 491 U.S. 350, 367–68 (1989). *Sprint*, 571 U.S. at 70. Those cases are: (1) "parallel, pending state criminal proceeding[s]," (2) "state civil proceedings that are akin to criminal prosecutions," and (3) state civil proceedings that "implicate a State's interest in enforcing the orders and judgments of its courts." *Id.* at 71.

ReadyLink Healthcare, Inc., 754 F.3d at 759. The Ninth Circuit clarified this rule in *Applied Underwriters, Inc. v. Lara*, 37 F.4th 579 (9th Cir. 2022) to require "three additional factors" — "the state proceeding is 1) ongoing; 2) implicate[s] important state interests"; and 3) "provide[s] adequate opportunity … to raise constitutional challenges." *Id.* at 588 (cleaned up).

The ongoing proceeding before the EEB against plaintiff Hagopian does not implicate important state interests.

Plaintiff attaches as Exhibit 1 the "finding of reasonable cause" that the EEB has provided as the charging instrument against plaintiff Hagopian. The allegations against Hagopian are two-fold: First, that she

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"use[d] state resources to support an outside organization by forwarding an email to a UW listserv which solicited for donations to the outside organization," and second, that, by receiving emails (listed at pages 6-7 of Exhibit 1) at her University account, Hagopian "used her state email for her private benefit." (Exhibit 1 at 8.) These allegations do not implicate any "important" state interest.

The Washington ethics statute does not prohibit "support[ing] an outside organization." RCW 42.52.160 prohibits using state resources "for the private benefit or gain of the officer, employee, or another." Plaintiffs are free to support any "outside organization."

Receiving what is likely spam email at a university account is a detriment, rather than any "private benefit." It is difficult to conceive of any "important" state interest that is involved in receiving this email. The Court should therefore defendants' request to abstain.

VI. CONCLUSION

For the reasons above stated, the Court should deny the motion to dismiss.

Respectfully submitted,

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I certify that this document contains 5,545 words, in compliance with the Local Civil Rules.

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