813 F.3d 850
United States Court of Appeals,
Ninth Circuit.

Mark L. OYAMA, Plaintiff–Appellant,
v.
UNIVERSITY OF HAWAII; Christine Sorensen; Jeffrey Moniz; John Does, 1–25; Jane Does, 1–25, Defendants–Appellees.

No. 13–16524.
|
Argued and Submitted June 9, 2015.
|
Filed Dec. 29, 2015.

Synopsis

Background: Secondary education student who applied to become a student teacher brought action against state university, alleging university's denial of his application because of student's comments regarding student sexuality and disabled students violated his free speech and due process rights. The United States District Court for the District of Hawaii, Helen W. Gillmor, Senior District Judge, 2013 WL 1767710, granted summary judgment to university. Student appealed.

Holdings: The Court of Appeals, Wardlaw, Circuit Judge, held that:

student speech doctrine was not applicable to public university setting;

public employee speech doctrine was not applicable to university's decision;

university's denial of student's application was directly related to defined and established professional standards;

court would impose requirement that university's decision must have been narrowly tailored to serve the university's legitimate purposes;

university's decision was narrowly tailored to serve university's goals;

university's decision reflected a reasonable professional judgment about student's lack of suitability for teaching; and

student was not constructively dismissed from program, and thus university did not deprive him of a constitutionally protect interest in remaining in program.

Affirmed.

[redacted]

Before: KIM McLANE WARDLAW, MARSHA S. BERZON, and JOHN B. OWENS, Circuit Judges.

OPINION

WARDLAW, Circuit Judge:

The University of Hawaii denied secondary education candidate Mark L. Oyama's application to become a student teacher, a prerequisite for recommendation to the State of Hawaii's teacher certification board. This appeal from the district court's grant of summary judgment to the University implicates the constitutional balance between two prerogatives of a public university's professional certification program: promoting open discourse among its students and limiting certification ***855** to candidates suitable for entry into a particular profession. We must delineate the scope of the University's authority to deny a teaching candidate's student teaching application on the basis of the candidate's speech. We conclude that the

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University did not violate Oyama's First Amendment rights because its decision related directly to defined and established professional standards, was narrowly tailored to serve the University's core mission of evaluating Oyama's suitability for teaching, and reflected reasonable professional judgment. In addition, because the University provided adequate procedural protections in denying Oyama's application, neither it nor its agents violated Oyama's procedural due process rights. We therefore affirm the district court's grant of summary judgment to the University.

I.

Mark Oyama earned an undergraduate degree in mathematics from the California Institute of Technology, followed by a Master's Degree in physics from the University of Hawaii. He then enrolled in the University of Hawaii's post-baccalaureate secondary education certification program at Manoa.

A. Hawaii's Post–Baccalaureate Certificate in Secondary Education Program

Under Hawaii law, "[n]o person shall serve as a half-time or full-time teacher in a public school without first having obtained a license." Haw.Rev.Stat. § 302A–805. The purpose of teacher licensing, or certification, is to "ensure that education professionals possess the appropriate training, preparation, and competencies for teaching." Univ. of Haw. at Manoa, *Secondary Teacher Education Program Handbook* 26 (rev. 2009) ("*Handbook* ").

The University of Hawaii at Manoa is Hawaii's only nationally accredited institution that recommends students for certification as secondary school teachers. *Id.* at i. The University offers a Post–Baccalaureate Certificate in Secondary Education (PBCSE) Program (the "Program") to students who have bachelor's degrees and wish to obtain certification as secondary school teachers.[1] According to the Program's handbook, the Program's goal is "to employ and prepare educators who are knowledgeable, effective, and caring professionals." *Id.* at 8. The "caring" component seeks to "advanc[e] social justice and overcom[e] both discrimination and oppression" and "requires a high level of professionalism demonstrated through ethical behavior, competence, reflection, fairness, respect for diversity, and a commitment to inclusion and social responsibility." *Id.* at 8–9. The Program's requirements include coursework and one semester of student teaching. Admission to the Program does not guarantee admission to student teaching. Rather, students must submit a Student Teaching Application and must meet all student teaching requirements set forth in the Program's handbook. For example, a student teacher must "[a]ct, speak, and dress like a teacher."

The Program's student teaching requirements reflect the many regulations and policies governing admission to the teaching profession in Hawaii. First, the University must comply with the Hawaii Department of Education's policies and regulations. Pursuant to Department of Education Policy No. 5600, for example, ***856** the University may approve candidates for student teaching only "upon verification ... of their ability to function effectively in Department classrooms." Second, the University must comply with the Hawaii Teacher Standards Board's (HTSB) teacher licensing and ethical standards. HTSB standards require teachers to, among other things, protect student safety, create an inclusive learning environment for all students, and demonstrate professionalism. Finally, the University is required to uphold the standards of its accrediting organization, the National Council for Accreditation of Teacher Education (NCATE). *See* Nat'l Council for Accreditation of Teacher Educ., *Standards for Professional Development Schools* 11 (2001) (explaining that accredited institutions must "develop criteria consistent with state and national standards for candidates' admission to and completion of the preparation program and make recommendations for candidate certification based on the standards").

B. Oyama's Performance in the PBCSE Program

In the summer of 2010, Oyama enrolled in the University's PBCSE Program. Oyama began his coursework and completed a field experience practicum at a local middle school. During this period, several faculty members separately contacted Program administrators to express their concerns about Oyama's suitability for the teaching profession.

Oyama's statements concerning sexual relationships between adults and children were of central concern to the faculty. While taking Dr. Ratliffe's class on "Educational Psychology: Adolescence and Education," Oyama was assigned to write a reflection about a video entitled "Growing Up Online." Oyama wrote:

> Personally, I think that online child predation should be legal, and find it ridiculous that one could be arrested for comments they make on the Internet. I even think that real life child predation should be legal, provided that the child is consentual [sic]. Basically from my point of view, the age of consent should be either 0, or whatever age a child is when puberty begins.

When Dr. Ratliffe discussed these statements with Oyama, he said that "it would be fine" for a twelve-year-old student to have a "consensual" relationship with a teacher. When Dr. Ratliffe explained that state law would require Oyama to report such conduct, Oyama stated that he would obey the law and report the relationship, but still believed that such a "consensual" relationship was not wrong. Dr. Ratliffe contacted the Director of the Secondary Program, Dr. Moniz, about these statements, explaining that, while she did not "mind that [Oyama] has opinions that are different from other people's," she was concerned that Oyama "may not be aware of and in agreement with safety issues about the adolescents who will be in his care." She cautioned that, "because of his lack of sensitivity to and empathy with others and lack of self-awareness at this time, we should be very careful about accepting him as a teacher candidate."

Another concern stemmed from Oyama's comments about teaching students with disabilities. For example, in his class on "Educating Exceptional Students in Regular Classrooms—Secondary," Oyama expressed the belief that "if the disability is sufficiently severe and not of a physical nature ... there is little benefit to inclusion for the disabled student" in the classroom environment. Oyama also wrote that it is not reasonable to expect secondary school teachers to have the "extremely diverse skillset" needed to teach the range of grade levels presented in a mainstream ***857** classroom that includes students with learning disabilities. In another assignment, Oyama asserted that nine of ten special education students he encountered were "fakers" and explained that he was "not convinced that many 'disabilities' are actual disabilities or medically-based neurological conditions, but are rather the crude opinions of psychologists and psychiatrists." Mr. Siegel, Oyama's professor, informed Dr. Moniz of his "serious concerns regarding Mark Oyama entering the teaching profession." Mr. Siegel also noted his concern to Oyama, clarifying that his concern was "not based on [Siegel's] opinion," but rather on legal standards and his understanding, "based on [his] 43 years as an educator," of the criteria schools consider in evaluating prospective teachers.[2]

Oyama's performance in a field experience program at a nearby middle school corroborated many of his professors' concerns. In the Field Experience Evaluation Form, several dispositions are listed, which are evaluated as "unacceptable," "acceptable," or "target," the highest rating.[3] Oyama received multiple ratings of "unacceptable" and no ratings of "target." In the accompanying Observation/Participation Evaluation, Oyama received an "unacceptable" rating as to the ability to teach effectively, work collaboratively with colleagues, respond to suggestions from supervisors, and demonstrate the level of professionalism expected of middle school teachers. Oyama's supervising instructor, Dr. Irv King, concluded, "My overall impression is that Mark would not do well as a middle school teacher."

C. Denial of Admission to the Student Teaching Program

In January 2011, Oyama applied to the PBCSE Student Teaching Program. In a letter dated July 8, 2011, Dr. Moniz informed Oyama his application had been denied. While noting that Oyama had clearly met the "minimum" academic requirements, Dr. Moniz explained the University's "duty," pursuant to Department of Education Policy No. 5600, to "verify your overall ability to function effectively as a teacher in a Hawaii Department of Education school." Dr. Moniz noted that a "number of factors raised the College of Education's concern," specifying several bases for the University's decision. He explained:

> [T]he views you have expressed regarding students with disabilities and the appropriateness of sexual relations with minors were deemed not in alignment with standards set by the Hawaii Department of Education, the National Council for the Accreditation of Teachers (NCATE) and the Hawaii Teacher Standards Board (HTSB).

Dr. Moniz further explained that Oyama's "endorsement of sexual relationship[s] between adults and minors, as well as between teachers and students" was in tension with Hawaii Department of Education rules expressly prohibiting sexual contact between teachers and students or minors, *see* Haw. Admin. Rules, § 8–54–9, and ***858** with the HTSB's requirement that teachers protect students' safety, *see* HTSB Code of Ethics, Principle I. In

sum, Dr. Moniz found that Oyama's understanding of sexual relationships between adults and minors, as well as between teachers and students, was contrary to the "legal and ethical guidelines imposed by the State." Dr. Moniz wrote that "[s]uch a matter is serious enough in nature that, *taken alone*, [it] warrants a denial of you [sic] student teaching application" (emphasis added).

Dr. Moniz added, however, that "other issues ... support the denial of your application." He recounted several comments by Oyama that "demonstrated a lack of empathy and understanding of students with disabilities." He noted that these comments, "along with your professor's assessment that you have been unable to demonstrate any sort of willingness to accommodate students with disabilities," were "in opposition" to HTSB and NCATE standards. Dr. Moniz specifically discussed the inconsistency between, for example, Oyama's expressed view that "if a disability is sufficiently severe and not of a physical nature ... there is little benefit to inclusion for the disabled student" and both an HTSB standard requiring teachers to "[p]rovide services to students in a nondiscriminatory manner" and an NCATE standard requiring teachers to demonstrate professional dispositions necessary to teach "all students," including those "with exceptionalities." Oyama had therefore been unable to demonstrate the requisite Professional Disposition to enter the teaching profession.

Finally, citing the HTSB's "right to deny licensing to teachers who exhibit any behavior that is [in] opposition to the standards and ethics imposed by the State," Dr. Moniz noted the "unacceptable" ratings in Oyama's field experience evaluation, which corroborated Oyama's professors' concerns. Dr. Moniz concluded, "[W]e are not able to verify your overall ability to function effectively in a school setting.... At this time, we do not feel that you meet basic HTSB standards or standards for the profession set by our accreditors."

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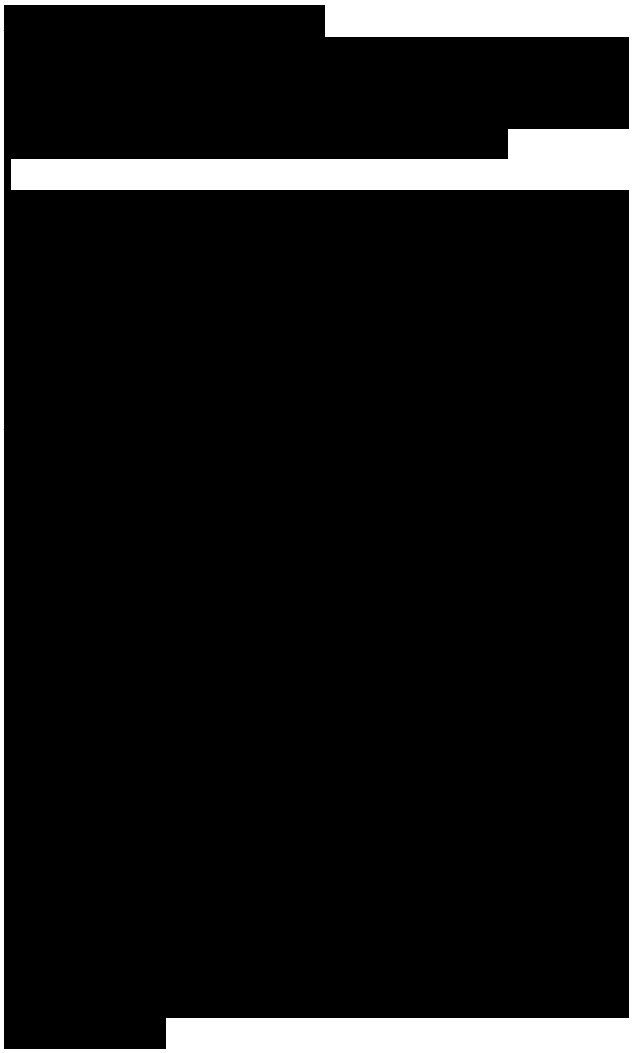

II.

"We review the district court's grant of summary judgment *de novo*." *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497 (9th Cir.2015). "[W]e may affirm based on any ground supported by the record." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir.2008).

III.

A. First Amendment Claim

Oyama argues that the University's decision to deny his student teaching application violated his First Amendment right to freedom of speech. Oyama equivocates, however, on the question of which First Amendment doctrine applies to his claim. Oyama first characterizes the University's decision as "retaliation for [his] personal opinions," a characterization evocative of the public employee speech doctrine first recognized in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). *See id.* at 568, 88 S.Ct. 1731 (addressing the "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"). Oyama then invokes student speech doctrine, quoting the Supreme Court's classic observation that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

We understand the hybrid nature of Oyama's First Amendment claim. On the one hand, Oyama was a student in an academic setting. On the other hand, Oyama was a candidate for a certification that would allow him to work as a public school teacher. Oyama's claim defies easy categorization because his position at the University combined the characteristics of both a student and a public employee.

In light of the mixed characteristics of Oyama's claim, we address the applicability of both student speech and public employee speech doctrines. While both doctrines illuminate certain principles that guide our analysis, we conclude that neither, standing alone, provides an adequate framework for evaluating Oyama's claim. Drawing from both student speech and public employee speech doctrines and from the few decisions of other courts that have confronted free speech claims in the certification context, we conclude that the University ***861** did not violate Oyama's First Amendment rights because its decision related directly to defined and established professional standards, was narrowly tailored to serve the University's core mission of evaluating Oyama's suitability for teaching, and reflected reasonable professional judgment.

1. Student Speech Doctrine

Because Oyama was a student when the University denied his student teaching application, we begin by examining the Supreme Court's student speech jurisprudence. As Oyama correctly notes, it is "clear that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' " *Morse v. Frederick*, 551 U.S. 393, 396, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) (quoting *Tinker*, 393 U.S. at 506, 89 S.Ct. 733). At the same time, however, "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school." *Hazelwood*, 484 U.S. at 266, 108 S.Ct. 562 (citation omitted) (quoting *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 685, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986)).

In the seminal student speech case, *Tinker*, the Court held that a high school may not suppress its students' speech unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." 393 U.S. at 513, 89 S.Ct. 733. *Tinker* involved a group of students who wore black armbands to school in protest of the Vietnam War. 393 U.S. at 504, 89 S.Ct. 733. The Court held that neither the high school's "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," nor its "urgent wish to avoid the controversy which might result from the expression" was sufficient to justify a ban on the students' "silent, passive expression of opinion, unaccompanied by any disorder or disturbance." *Id.* at 508–10, 89 S.Ct. 733.

Since *Tinker*, however, the Court has identified several circumstances in which a high school may restrict its students' speech. In *Fraser*, the Court held that a school district "acted entirely within its permissible authority" in suspending a high school student for "giving a lewd speech at a school assembly." 478 U.S. at 677, 685, 106 S.Ct. 3159. In *Hazelwood*, the Court held that high school officials may delete potentially inappropriate material from a student newspaper "so long as their actions are reasonably related to legitimate pedagogical concerns." 484 U.S. at 273, 108 S.Ct. 562. Most recently, in *Morse*, the Court allowed the suspension of a student who held up a banner reading "BONG HiTS 4 JESUS" as the Olympic torch passed by, reasoning that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use." 551 U.S. at 397, 127 S.Ct. 2618. All of these cases involved the speech of high school students at school or school-sanctioned events. Beyond that context, "the Court has noted only that '[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents.' " *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1067 (9th Cir.2013) (alteration in original) (quoting *Morse*, 551 U.S. at 401, 127 S.Ct. 2618).

The district court evaluated Oyama's claim within the student speech framework and rejected it under *Hazelwood*, finding that the University's action was reasonably related to legitimate pedagogical concerns. Student speech doctrine does identify certain principles that inform our analysis ***862** here. First, the Court's student speech precedents recognize, to some extent, an institutional rationale for a school's decision to regulate its students' speech. In *Morse*, for example, the Court held that a high school could confiscate the "BONG HiTS 4 JESUS" banner and suspend the student who held it because of the school's congressional mandate to prevent illegal drug use among its students. *See* 551 U.S. at 408, 127 S.Ct. 2618. In this case, the University similarly bears an institutional responsibility: under state policy and national accreditation standards, it must limit certification recommendations to individuals suitable to enter the teaching profession. This institutional responsibility, like the "governmental interest in stopping student drug abuse" in *Morse*, may allow the University to deny a student teaching application based on speech demonstrating that the applicant lacks the professional skills and disposition to enter a classroom, even as a student teacher. *Id.*

Second, student speech doctrine recognizes a school's interest in managing how it "lend[s] its name" or its "imprimatur" to student expression. *Hazelwood*, 484 U.S. at 271–72, 108 S.Ct. 562. Here, this "imprimatur" concept resonates not because the views of a certification candidate may be "erroneously attributed to the school," *id.* at 271, 108 S.Ct. 562, but rather because the act of certification forces the university to speak. When the University recommends a student for certification, it communicates to the world that, in its view, that student is fit to practice the profession; as a result, the University places its "imprimatur" on each student it approves to teach. The consequences of that "imprimatur" are substantial. With the University's recommendation, a candidate is eligible to apply for a state teaching license and, so long as he or she satisfies other minimal requirements, to enter the classroom. Because the certification process necessarily implicates the University's "imprimatur," the University is entitled to deference in determining how to "lend its name" to certification candidates. *Id.* at 272, 108 S.Ct. 562.

While aspects of student speech doctrine are relevant here, the Supreme Court has yet to extend this doctrine to the public university setting. *See id.* at 273 n. 7, 108 S.Ct. 562 (expressly reserving the question of "whether the

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same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level"). In the twenty-seven years since *Hazelwood*, we too have declined to apply its deferential standard in the university setting. In *Brown*, which involved a university's decision not to approve a graduate student's thesis because it contained an unprofessional "Disacknowledgements" section, Judge Graber concluded that *Hazelwood* "appears to be the most analogous" Supreme Court case and "provides a workable standard for evaluating a university student's claim stemming from curricular speech." 308 F.3d at 951–52. But Judge Graber's approach failed to command a majority of the *Brown* panel. *See id.* at 955–56 (Ferguson, J., concurring) (agreeing that Brown's First Amendment claim fails, but not for the reasons expressed by Judge Graber); *id.* at 960 (Reinhardt, J., concurring in part and dissenting in part) ("vehemently disagree[ing] with Judge Graber's conclusion that *Hazelwood* provides the appropriate First Amendment standard for college and graduate student speech"). Nor has Judge Graber's reasoning been adopted by our precedents since. *See, e.g., Flint v. Dennison*, 488 F.3d 816, 829 n. 9 (9th Cir.2007) ("[W]e need not consider whether the principles of *Hazelwood* ... apply with full force in a university setting—a question neither we nor the Supreme Court have definitively answered." (citations omitted)). ***863** "Our sister circuits are split on the question" of whether *Hazelwood* applies in the university setting. *Id.* at 829 n. 9.[9]

This case presents no occasion to extend student speech doctrine to the university setting. Under that doctrine, the key rationales for restricting students' speech are to ensure that students "are not exposed to material that may be inappropriate for their level of maturity" and "learn whatever lessons the activity is designed to teach." *Hazelwood*, 484 U.S. at 271, 108 S.Ct. 562. Neither of these rationales is relevant here. Concerns about student maturity cannot justify restrictions on speech in this context because certification candidates are adults; indeed, a prerequisite for enrollment in the Program is graduation from a four-year institution of higher education. *See Widmar v. Vincent*, 454 U.S. 263, 274 n. 14, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (explaining that "[u]niversity students" are "young adults" and "are less impressionable than younger students."); *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 246 (3d Cir.2010) ("Considerations of maturity are not nearly as important for university students, most of whom are already over the age of 18 and entrusted with a panoply of rights and responsibilities as legal adults."). Nor do "pedagogical concerns" explain why the University denied Oyama's application on the basis of his speech. *Hazelwood*, 484 U.S. at 273, 108 S.Ct. 562. The University's purpose was not to teach Oyama any lesson; rather, it was to fulfill the University's *own* mandate of limiting certification recommendations to students who meet the standards for the teaching profession. Hawaii entrusts the University with the task of verifying a candidate's ability to "function effectively" as an educator in public schools. This institutional responsibility, and not the "pedagogical concerns" of student speech doctrine, is the reason that the University evaluated or "regulated" Oyama's speech. Therefore, student speech doctrine does not adequately address the governmental purposes at stake in this context.

Furthermore, student speech doctrine fails to account for the vital importance of academic freedom at public colleges and universities. As the Supreme Court has explained,

> The essentiality of freedom in the community of American universities is almost self-evident.... To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.... Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957); *see also Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir.2010). The importance of academic freedom at a public university does not disappear when one walks down the hall from a ***864** political philosophy seminar to a professional certification program like the University of Hawaii's. Indeed, the progress of our professions, including secondary education, may depend upon the "discord and dissent" of students training to enter them: it is by challenging the inherited wisdom of their respective fields that the next generation of professionals may develop solutions to the problems that vexed their predecessors. *Rodriguez*, 605 F.3d at 708. Thus, our analysis of Oyama's claim would be constitutionally deficient if it did not reflect the "special niche" universities occupy "in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 329, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). The Court's student speech cases provide no basis for doing so.[10]

2. Public Employee Speech Doctrine

Oyama alternatively suggests that the University's denial of his student teaching application was analogous to an employer's act of retaliation, which is governed by *Pickering* and its progeny. *Pickering* "requires a court evaluating restraints on a public employee's speech to balance 'the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *City of San Diego v. Roe*, 543 U.S. 77, 82, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004) (per curiam) (alteration in original) (quoting *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731). "In unraveling the case law since *Pickering*, we have further refined the Court's balancing test into a five-step inquiry." *Dahlia v. Rodriguez*, 735 F.3d 1060, 1067 (9th Cir.2013) (en banc). We ask:

> (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir.2009).[11] The *Pickering* framework "give[s] [public] employers wide discretion and control over the management of their personnel and internal affairs," *Nichols v.* ***865** *Dancer*, 657 F.3d 929, 933 (9th Cir.2011) (internal citation and quotation marks omitted), and mandates "substantial deference ... to the government's reasonable view of its legitimate interests," *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 678, 116 S.Ct. 2361, 135 L.Ed.2d 843 (1996).

More explicitly than student speech doctrine, public employee speech doctrine clarifies the University's rationale for regulating Oyama's speech: like a government employer, the University must "protect its own legitimate interests in performing its mission" of limiting teacher certification to qualified professionals. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 961 (9th Cir.2011) (quoting *Roe*, 543 U.S. at 82, 125 S.Ct. 521). "The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick v. Myers*, 461 U.S. 138, 150, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). The Court has explained that because "[g]overnment agencies are charged by law with doing particular tasks," the government's "interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Waters v. Churchill*, 511 U.S. 661, 674–75, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994). In its certification role, the University, like a government employer, is "charged by law" with a "particular task"—here, that of ensuring that licensed teachers have "the appropriate training, preparation, and competencies for teaching." *Id.* As the public employee speech cases recognize, the University may constitutionally evaluate or restrict the candidate's speech to fulfill its responsibilities to the public and to achieve its institutional objectives.

Further, cases addressing the claims of public teachers provide a wealth of wisdom about the standards to which teachers and school officials are held. For example, in *Melzer v. Board of Education*, 336 F.3d 185 (2d Cir.2003), a teacher was an active member of NAMBLA, whose stated goal was to change the laws and attitudes governing sexual activity between men and boys. When his membership became public, many parents and students were outraged. *Id.* at 189–92, 199. The Second Circuit affirmed the school's termination of the teacher, concluding that the disruption likely to result from his continued employment would "interrupt[ ] the children's education, impair[ ] the school's reputation, and impair[ ] educationally desirable interdependency and cooperation among parents, teachers, and administrators." *Id.* at 199. Similarly, in *Craig v. Rich Township High School District 227*, 736 F.3d 1110 (7th Cir.2013), a high school guidance counselor wrote a book entitled "It's Her Fault," which, among other things, urged women to engage in "a certain level of promiscuity before marriage" and delved "into a comparative analysis of the female genitalia of various races." *Id.* at 1114. The Seventh Circuit upheld the school's termination of the counselor, concluding that the counseling position required the employee to "maintain a safe space for his students in order to ensure they remain[ed] willing to come to him for advice," and that without that environment, the students would "not approach him" and he could not "do his job." *Id.* at 1119–20. The similarities between the circumstances at issue in these cases and those presented here make public employee speech doctrine an attractive means of analysis for Oyama's First Amendment claim.

However useful public employee speech doctrine may appear, however, it ***866** cannot control our analysis of Oyama's First Amendment claim. The first and most basic problem is that Oyama was not a government

employee. In fact, Oyama was two steps removed from government employment: he was an applicant to a university *program* that could, in turn, permit him to teach at a secondary school under the supervision of a mentor teacher. Even then, only if Oyama satisfactorily performed as a student teacher, and met other requirements, would the University recommend him for certification and actual employment by the state. Characterizing Oyama as a public employee for First Amendment purposes would thus require us to extend this doctrine to those who do not yet work for the government but may wish to do so—a move we have not yet made. *See Johnson*, 658 F.3d at 962 (explaining that when a First Amendment plaintiff is not a government employee, "*Pickering* 's absence [is] not only unsurprising, but necessary").[12] Given Oyama's status as a student and the attenuated nature of his relationship to government employment, this appeal makes a poor candidate for taking such a fateful step.

The second problem, as with student speech doctrine, is that public employee speech doctrine provides no basis for considering the role of academic freedom at public universities. Public employee speech doctrine permits the government to regulate speech that might limit the "efficiency" of its operations, *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731; it does not require the government to promote, or even consider, its employees' freedom "to inquire, to study and to evaluate, to gain new maturity and understanding," *Sweezy*, 354 U.S. at 250, 77 S.Ct. 1203. As a student at the University of Hawaii, Oyama enjoyed greater freedom to test his ideas, critique professional conventions, and develop into a more mature professional than he would as a government employee. To hold Oyama to the same standard as we hold public employees would deprive him of rights the First Amendment guarantees him as a public university student.[13]

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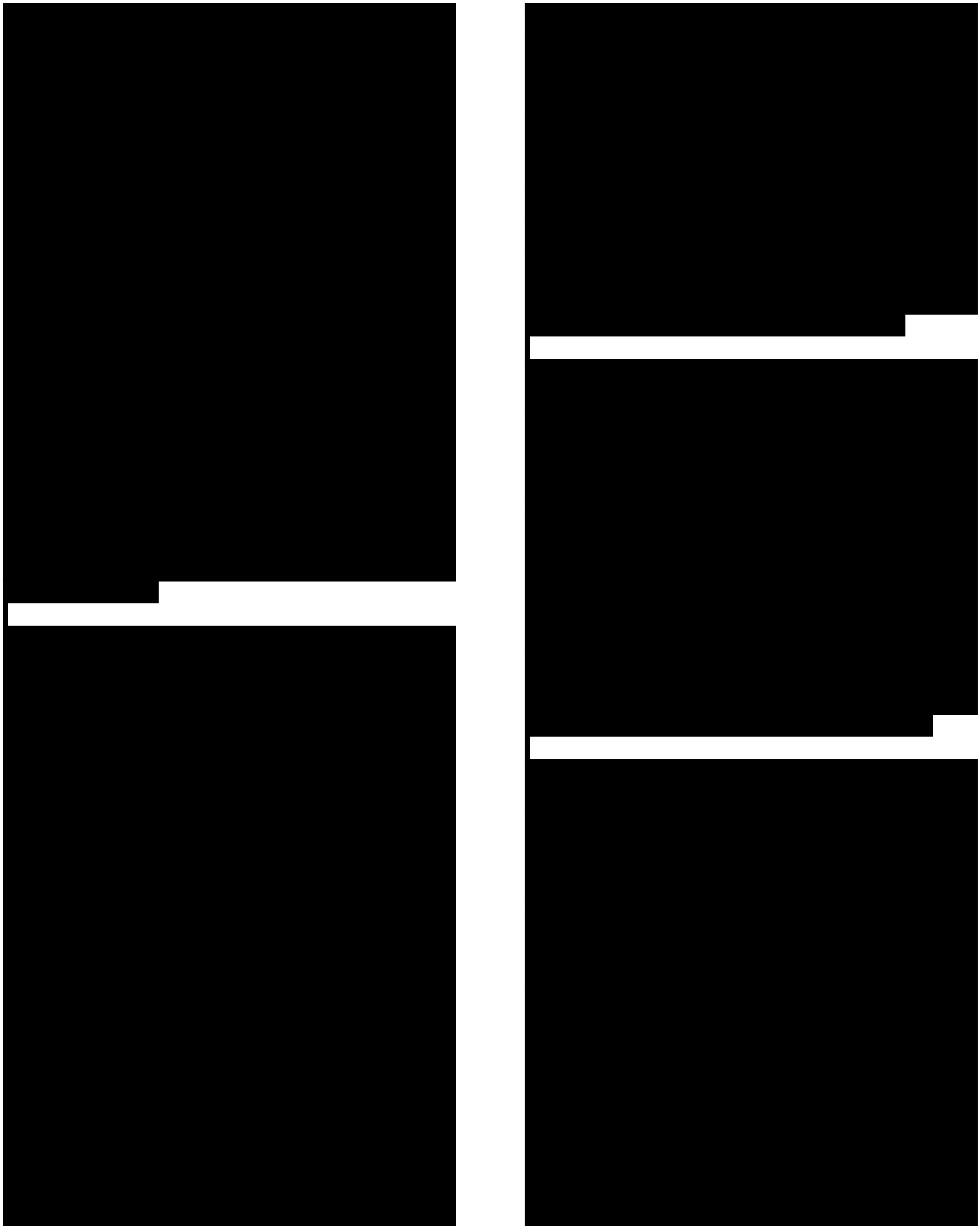

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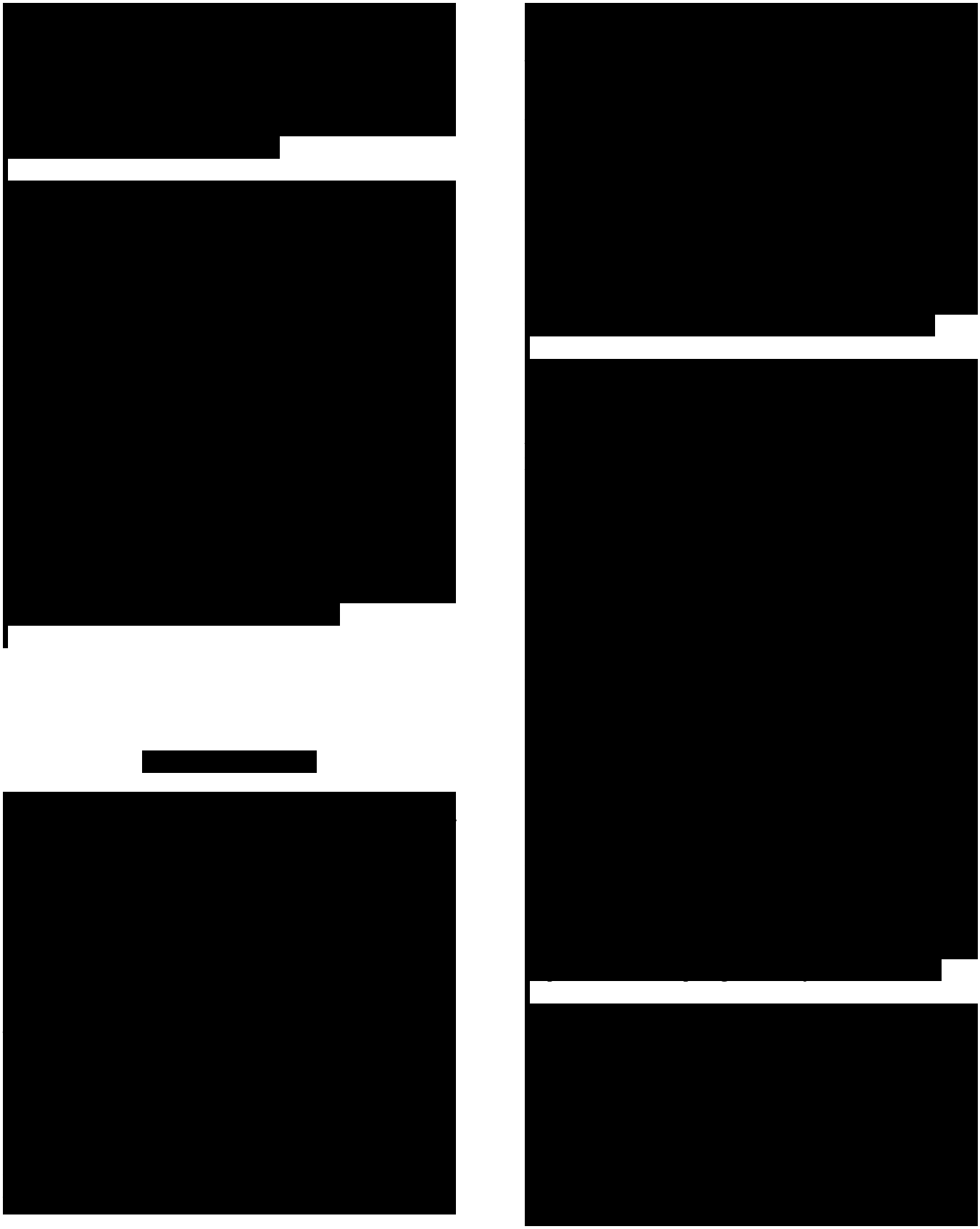

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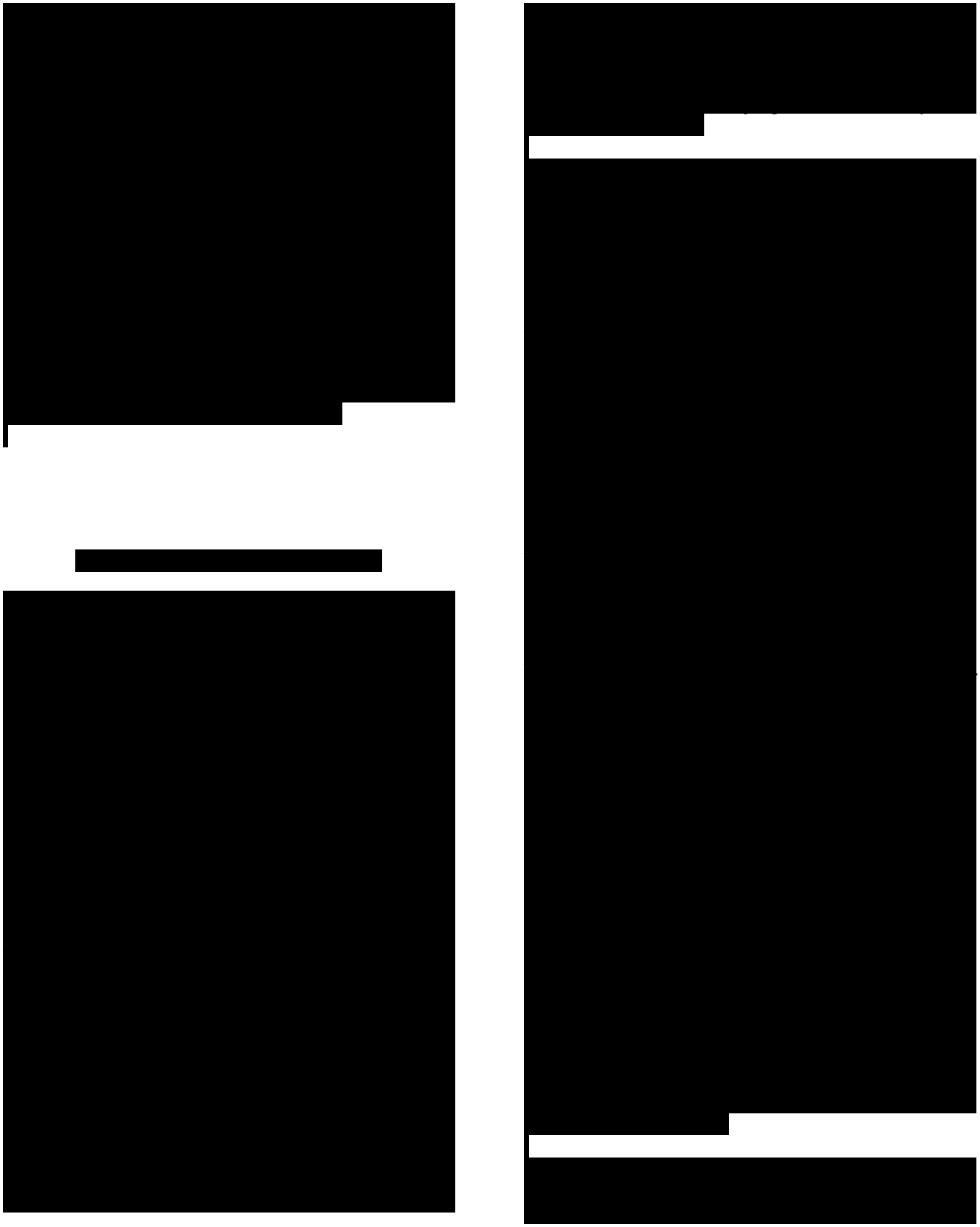

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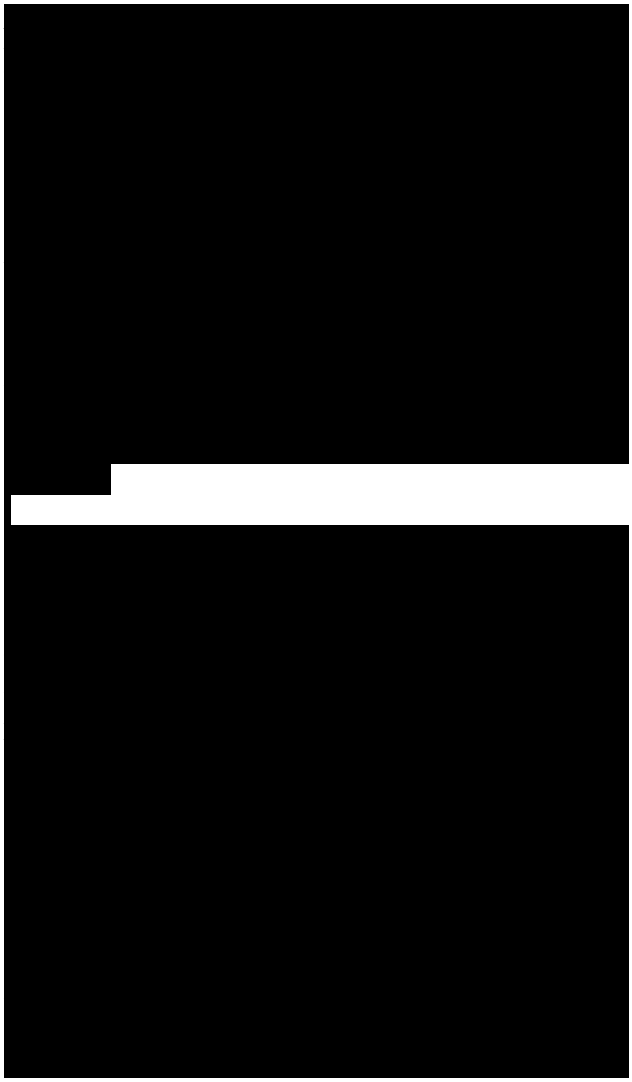

***876 IV.**

In the context of a public university's professional certification program, the university may evaluate the student's speech, made in the course of the program, in determining the student's eligibility for certification without offending the First Amendment under certain circumstances. Because the University of Hawaii's decision to deny Oyama's student teaching application directly related to defined and established professional standards, was narrowly tailored to serve the University's core mission of evaluating Oyama's suitability for teaching, and reflected reasonable professional judgment, the University did not violate Oyama's First Amendment rights. In addition, because the University granted Oyama adequate procedural protections in denying his student teaching application, it did not violate Oyama's due process rights. Therefore, the district court properly granted summary judgment in favor of the University.

AFFIRMED.

All Citations

813 F.3d 850, 327 Ed. Law Rep. 569, 15 Cal. Daily Op. Serv. 13,689, 2015 Daily Journal D.A.R. 13,815

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