



# FIRE

Foundation for Individual  
Rights and Expression

March 15, 2023

Dr. Cynthia Pemberton  
Office of the President  
Lewis-Clark State College  
Administration Building 207  
500 8th Avenue  
Lewiston, Idaho 83501

**URGENT**

*Sent via U.S. Mail and Electronic Mail (president@lcsc.edu)*

Dear President Pemberton:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,<sup>1</sup> is deeply concerned about Lewis-Clark State College's censorship of multiple artworks referencing reproductive healthcare and abortion.<sup>2</sup>

The removal of content from the "Unconditional Care: Listening to people's health needs"<sup>3</sup> exhibition at a gallery operated by your institution reportedly resulted from fears that displaying certain pieces could somehow violate Idaho's No Public Funds for Abortion Act (NPFSA).<sup>4</sup> That statute provides, in pertinent part, that no state entity may use "funds authorized by the state" to "perform or promote abortion, provide counseling in favor of

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<sup>1</sup> For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our mission at [thefire.org](http://thefire.org).

<sup>2</sup> Julie Luchetta, *Citing Idaho abortion law, Lewis-Clark State College censors its own art show*, BOISE STATE RADIO NEWS (Mar. 6, 2023, 9:24 PM), <https://www.boisestatepublicradio.org/politics-government/2023-03-06/citing-idaho-abortion-law-lewis-clark-state-college-censors-its-own-art-show>. The recitation of facts here reflects our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

<sup>3</sup> Center for Arts & History: Exhibits, LEWIS-CLARK STATE COLL., *available at* <https://www.lcsc.edu/cah/exhibits> [<https://perma.cc/NYF3-5U48>] (describing the exhibition as organized around artists sharing stories about public health issues "and the stories and concerns of those most directly impacted by them," from "chronic illnesses, disability, pregnancy, gun deaths to sexual assault, artists share powerful personal experiences around health and bodily autonomy.").

<sup>4</sup> Kelcie Moseley-Morris, *Idaho college censors portions of art exhibit for discussing abortion*, IDAHO CAP. SUN (Mar. 7, 2023, 3:44 PM), <https://idahocapitalsun.com/2023/03/07/idaho-college-censors-portions-of-art-exhibit-for-discussing-abortion>.

abortion, make referral for abortion, or provide facilities for abortion or for training to provide or perform abortion.”<sup>5</sup>

In an apparent panic to avoid potential liability under the NPFAA, LCSC acted upon an overbroad interpretation of the law, resulting in the unlawful censorship of artwork.

The First Amendment of the U.S. Constitution squarely protects speech about reproductive healthcare and abortion. The First Amendment’s prohibition of viewpoint-discriminatory limits on expression is particularly potent at public institutions of higher education, where “the vigilant protection of constitutional freedoms is nowhere more vital[.]”<sup>6</sup> Legislative enactments that would “cast a pall of orthodoxy” on public college campuses—like the NPFAA, as your institution broadly interprets it—sharply contradict our national commitment to protecting freedom of expression and academic freedom at public institutions like LCSC.<sup>7</sup> We remind you that the “bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>8</sup>

The First Amendment’s protection extends to artistic expression,<sup>9</sup> including and perhaps especially when that expression voices a political message or addresses matters of public concern.<sup>10</sup> Those who dislike certain artistic expression, the Supreme Court has noted, are free to “avert their eyes.”<sup>11</sup> LCSC administrators accordingly may not censor campus expression—including art—simply because some dislike the artist’s perceived message. Nor can any statute authorize LCSC to violate the First Amendment.

LCSC’s interpretation of the NPFAA will place the college on a collision course with the First Amendment rights of its students and faculty, let alone the expressive freedoms of artists and curators. The college’s apparent construction of the statute inappropriately fixates on the word “promote,” construing it to mean that college facilities, property, or resources cannot be used to facilitate others’ speech if that expression mentions abortion in a policy, personal, or political context.

That interpretation has troubling ramifications for the state of freedom of expression at LCSC, as it would just as readily restrict use of the same resources and spaces by students, student organizations, and faculty at LCSC—in violation of clearly established First Amendment

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<sup>5</sup> Idaho Code § 18-8705.

<sup>6</sup> *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citations omitted).

<sup>7</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 602–04 (1967).

<sup>8</sup> See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989); see also *Cohen v. California*, 403 U.S. 15, 25 (1971); *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”).

<sup>9</sup> *Johnson*, 491 U.S. at 404 (freedom of expression “does not end at the spoken or written word.”).

<sup>10</sup> *Cohen v. California*, 403 U.S. 15, 25 (1971) (holding an arrest for wearing a jacket that read “Fuck the Draft” was unconstitutional.)

<sup>11</sup> *Id.* at 21.

rights.<sup>12</sup> Likewise, when a state agency limits the art allowable in exhibition spaces the agency opens, those limitations founder under the First Amendment, which disdains efforts to “silence or muffle the expression of disfavored viewpoints.”<sup>13</sup>

As a result, LCSC has a legal obligation to interpret the statute narrowly to avoid a clash with the Constitution.<sup>14</sup> And it can be interpreted narrowly. Properly contextualized within the broader statute, the NPFAA’s use of “promote” can be read not to broaden its sweep, but to narrow it. In *U.S. v. Williams*, for example, the Supreme Court interpreted a comparable statute using a “string of operative verbs,” including “advertises, *promotes*, presents, distributes, or solicits,” as intended to reach “transactional” speech.<sup>15</sup> This was because the “canon of *noscitur a sociis* . . . counsels that a word is given more precise content by the neighboring words with which it is associated.”<sup>16</sup> The NPFAA’s use of similar words (“perform,” “provide counseling,” “make referral,” or “provide facilities”) likewise indicates that the intent was to prevent use of state property to *facilitate* the performance of abortions, not to censor art that simply *references* abortion in a public university’s art gallery.<sup>17</sup>

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<sup>12</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995) (public university’s viewpoint-based denial of student activity fee funding to religious student publications constitutes “a denial of their right of free speech guaranteed by the First Amendment.”); *Demers v. Austin*, 745 F.3d 402, 411–12 (9th Cir. 2014) (faculty “speech related to scholarship or teaching” protected under the First Amendment).

<sup>13</sup> See, e.g., *Peltier v. Sacks*, 328 F. Supp. 3d 1170, 1178 (W.D. Wash. 2018) (censorship of Leonard Peltier’s paintings at exhibit in government building’s rotunda violated the First Amendment); see also *Hopper v. City of Pasco*, 241 F.3d 1067, 1082 (9th Cir. 2001) (removal of art from exhibition space in City Hall constituted “violation of the artists’ First Amendment rights”). Courts determine whether art displayed in public exhibition spaces constitutes “government speech” by reviewing “(1) whether the medium at issue has historically been used to communicate messages from the government; (2) whether the public reasonably interprets the government to be the speaker; and (3) whether the government maintains editorial control over the speech.” *Pulphus v. Ayers*, 249 F. Supp. 3d 238, 247 (D.D.C. 2017). Here, there is no indication that the gallery typically serves as a vessel for the state’s own preferred messages, nor would any reasonable person conclude the pieces in the exhibition were endorsed by the Lewis-Clark State College of the state of Idaho. While the gallery’s process for curatorial decision-making is unclear, the gallery’s removal of the artwork was not “editorial”; it did not correspond to any judgment about the artworks’ merits, but rather a fear of liability due to an overly broad interpretation of state law.

<sup>14</sup> See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”); see also, e.g., *U.S. v. Hansen*, 25 F.4th 1103, 1110 (9th Cir. 2022) (quoting *U.S. v. Stevens*, 559 U.S. 460, 481 (2010), quoting *Reno v. ACLU*, 521 U.S. 844, 884 (1997)), cert. granted 143 S. Ct. 555 (2022)) (“courts ‘construe[] [statutes] to avoid serious constitutional doubts,’” only “when a statute ‘is readily susceptible to such a construction.’”).

<sup>15</sup> *U.S. v. Williams*, 553 U.S. 285, 294 (2008) (emphasis added); see also Eugene Volokh, *The University of Idaho General Counsel’s Letter on Abortion*, VOLOKH CONSPIRACY (Sept. 27, 2022), <https://reason.com/volokh/2022/09/27/the-university-of-idaho-on-abortion> (observing that there is “solid law supporting a narrow reading” of the NPFAA).

<sup>16</sup> *Id.*

<sup>17</sup> Even under LCSC’s broad interpretation, the six censored works—a handwritten transcription of a letter written over a century ago to Planned Parenthood founder Margaret Sanger, “video and audio of interviews with women about their experience with access to abortion, as well as sculptures that resemble abstracted waiting room chairs,” and “an embroidery that depicts bottles of mifepristone and misoprostol”—cannot reasonably be said to “promote” abortion. Brian Boucher, *An Idaho College Removes Artwork About Abortion, Citing a State Law*, N.Y. TIMES (Mar. 13, 2023), <https://www.nytimes.com/2023/03/13/arts/design/idaho-abortion-lewis-clark-college.html>.

It is clear that LCSC's decision to censor art protected by the First Amendment is not compelled by state law. Accordingly, we call on the college to immediately restore the censored artwork to the exhibit and publicly clarify it will not suppress free expression on campus due to the NPFAA—or any other state law LCSC misunderstands as somehow superseding its absolute duty to uphold the First Amendment.

Due to the urgent nature of this matter, we request a substantive response to this letter no later than Monday, March 20, 2023.

Sincerely,



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