

October 24, 2024

Peter V. Khang  
General Counsel's Office  
Los Rios Community College District  
1919 Spanos Court  
Sacramento, California 95825

*Sent via U.S. Mail and Electronic Mail (chancellor@losrios.edu)*

Dear Interim Chief Counsel Khang:

FIRE appreciates your response to our August 30 letter concerning LRCCD's moratorium on faculty use of images and reproductions of Native American cultural items. However, your assertions that LRCCD's ban is untethered to repatriation laws and was implemented out of respect for Native American tribes only exacerbates our First Amendment concerns. Neither interest can support the burden LRCCD imposes on professors' academic freedom to engage in scholarship, teaching, and speech on public issues. To resolve the District's ongoing First Amendment violations while maintaining its interest in respecting the tribes, we again urge LRCCD to narrow its ban to apply only to faculty use of the specific cultural items subject to applicable repatriation laws.

Respectfully, your response misstates the applicable First Amendment precedent protecting the academic freedom of LRCCD faculty. Academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."<sup>1</sup> The United States Supreme Court proclaimed that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."<sup>2</sup> The United States Court of Appeals for the Ninth Circuit, whose decisions are binding on LRCCD, established that "teaching and academic writing are at the core of the official duties of teachers and professors," therefore any university restrictions on these duties would conflict with the "important First Amendment values previously articulated by the Supreme Court."<sup>3</sup>

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<sup>1</sup> *Keyishian v. Bd. of Regents.*, 385 U.S. 589, 603 (1967).

<sup>2</sup> *Id.*

<sup>3</sup> *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014); *see also Adams v. Trustees of the U. of N.C.-Wilmington*, 640 F.3d 550, 565 (4th Cir. 2011) (recognizing that academic freedom protected a professor's articles addressing

Even if, as you claim, academic freedom was to protect professors only when they speak on matters of public concern, LRCCD's ban would still be a severe restriction on that right. Expression by faculty members involving use of cultural images and reproductions undoubtedly relates "to *any* matter of political, social, or other concern to the community."<sup>4</sup> Indeed, this standard is "defined broadly"<sup>5</sup> by the Ninth Circuit and excludes only "speech addressed ... to personal interest[s]"<sup>6</sup> such as "individual personnel disputes and grievances."<sup>7</sup> Importantly, the speech need not "relate to an issue of exceptional significance," "address a topic of great societal importance, or even pique the interest of a large segment of the public."<sup>8</sup> The usage of Native American images and reproductions are the subject of societal debate, LRCCD policy, anthropological study, and great interest to the relevant tribes and to the public generally,<sup>9</sup> demonstrating that faculty expression on this topic is a matter of public concern and far beyond a "personalized grievance"<sup>10</sup> or "dispute over internal office affairs."<sup>11</sup>

Again, taking *arguendo* as true your assertion that academic freedom protects only speech on matters of public concern, LRCCD's moratorium severely burdens this right. LRCCD may impose this ban only if its interest "in promoting the efficiency of the public services it performs through its employees" outweigh professors' interest in exercising their fundamental First Amendment rights.<sup>12</sup> To demonstrate this weight, LRCCD would need to show that the expression it seeks to proscribe intentionally causes "actual, material and substantial disruption" to university operations.<sup>13</sup> The District has not even tried to make this showing and thus cannot justify its intrusion on professors' expressive rights.

Turning next to your assertion that LRCCD's "strong public interest" in "respect[ing] the dignity of the deceased individuals" and "honoring the traditions and beliefs of Native American Tribes" justifies this ban,<sup>14</sup> the First Amendment does not allow government agencies like LRCCD to impose content-based limits on speech in order to show respect or honor to any particular group.<sup>15</sup> Content-based speech regulations are presumptively invalid

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"topics such as academic freedom, civil rights, campus culture, sex, feminism, abortion, homosexuality, religion, and morality.").

<sup>4</sup> *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (cleaned up, emphasis added).

<sup>5</sup> *Ulrich v. City and Cnty. of San Francisco*, 308 F.3d 968, 978 (9th Cir. 2002)

<sup>6</sup> *Desrochers v. City of San Bernardino*, 572 F.3d 703, 709 (9th Cir. 2009) (cleaned up).

<sup>7</sup> *Id.* at 710 (cleaned up).

<sup>8</sup> *Craig v. Rich Twp. High Sch. Dist.*, 736 F.3d 1110, 1116 (7th Cir. 2013).

<sup>9</sup> *E.g.*, *National Museum of the American Indian*, SMITHSONIAN (last visited Oct. 10, 2024), <https://www.si.edu/museums/american-indian-museum> [<https://perma.cc/WCL7-LFLS>].

<sup>10</sup> *Kristofek v. Vill. Of Orland Hills*, 712 F.3d 979, 986 (7th Cir. 2013).

<sup>11</sup> *Miller v. Jones*, 444 F.3d 929, 935 (7th Cir. 2006).

<sup>12</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

<sup>13</sup> *See Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 782 (9th Cir. 2022).

<sup>14</sup> Letter from Peter V. Khang, Interim Chief Counsel, to author (Sept. 13, 2024) (on file with author).

<sup>15</sup> *See infra* note 24; *see also Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015) ("an innocuous justification cannot transform a facially content-based law into one that is content neutral."); *Simon & Schuster v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 106 (1991) ("[T]his Court has long recognized that

unless they satisfy strict scrutiny, which requires the District to prove that “the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”<sup>16</sup>

LRCCD’s ban fails this test because it does not achieve a compelling government interest. Long-established legal precedent explicitly rejects government attempts to restrict speech to foster respect for minority groups.<sup>17</sup> That “the District’s tribal partners have asked” for this ban is not relevant,<sup>18</sup> as faculty First Amendment rights are not subject to the preferences of any particular group. The District’s policy regarding the use of even of images or reproductions of artifacts—divorced from applicable repatriation laws—stands in stark contrast to LRCCD’s stated goal of creating “an open intellectual forum where varying shades of opinion may be freely expressed and fairly debated,” which is fostered by “faculty’s freedom to present controversial issues in the classroom.”<sup>19</sup>

Make no mistake, LRCCD’s ban is subject to strict scrutiny as a content-based restriction because it “target[s] speech based on its communicative content.”<sup>20</sup> An agency’s “benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech,”<sup>21</sup> does not alter this determination. Even if the “speech regulation ... does not discriminate among viewpoints,” it is still content-based when it is “targeted at specific subject matter.”<sup>22</sup> The “right to receive information and ideas”<sup>23</sup> “naturally extends to educational settings,”<sup>24</sup> where “restraints on the way in which the information might be used or disseminated”<sup>25</sup> are necessarily content-based. For example, the Ninth Circuit held an educational rule was content-based because it examined “the content of what is being taught”

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even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights under the Amendment.”).

<sup>16</sup> *Reed*, 576 U.S. at 165.

<sup>17</sup> *E.g.*, *Matal v. Tam*, 582 U.S. 218, 246 (2017) (allowing trademark of the anti-Asian slur “THE SLANTS” because although “[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful ... the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”) (internal citation omitted); *Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011) (the First Amendment protects protesters holding signs outside of soldiers’ funerals reading “Thank God for Dead Soldiers,” “Thank God for IEDs,” and “Fags Doom Nations” because “[a]s a Nation we have chosen ... to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”); *R.A. V. v. City of St. Paul*, 505 U.S. 377, 378 (1992) (“St. Paul’s desire to communicate to minority groups that it does not condone the ‘group hatred’ of bias-motivated speech does not justify selectively silencing speech on the basis of its content.”).

<sup>18</sup> Letter from Peter V. Khang, *supra* note 14.

<sup>19</sup> *Controversial Issues*, Discussion of Controversial Issues, LRCCD Bd. of Trustees (revised April 21, 1982), <https://losrios.edu/shared/doc/board/policies/P-7142.pdf> [<https://perma.cc/QJ2S-AFK3>].

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (internal quotations and citations omitted).

<sup>22</sup> *Id.* at 155.

<sup>23</sup> *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

<sup>24</sup> *Pac. Coast Horseshoeing Sch. v. Kirchmeyer*, 961 F.3d 1062, 1069 (9th Cir. 2020).

<sup>25</sup> *Sorrell v. IMS Health*, 564 U.S. 552, 568 (2011) (quoting *Seattle Times v. Rhinehart*, 467 U.S. 20, 32 (1984)).

in determining whether courses were “solely avocational or recreational.”<sup>26</sup> LRCCD’s ban on using “Native American human remains and cultural items” is clearly a content-based restriction because it targets only expressive activity about that particular cultural group.<sup>27</sup>

Finally, your assertion that “the imposition on faculty scholarship and teaching is slight” is belied by the thousands of reproductions and images recalled by the District, demonstrating the severe burden of the District’s demand that professors must “provide instruction without use of particular images and reproductions.”<sup>28</sup> These items are used by thousands of faculty for research and to teach tens of thousands of students. We would be happy to connect you with Cosumnes River College Academic Senate President Jacob Velasquez, who has compiled faculty testimony detailing numerous ways LRCCD’s ban has limited pedagogy and research. Considering that a university’s restrictions on a single employee’s use of pedagogically relevant images violate the First Amendment,<sup>29</sup> the District’s widespread restrictions pose even greater threats to faculty expressive rights.

We offer this analysis to encourage the District to resolve this matter in a way that respects both the tribes and the First Amendment. For 25 years, FIRE has helped hundreds of colleges across the nation reform their policies to further their interests and protect free speech, without charge, in keeping with our charitable mission. We would be pleased to do the same for LRCCD by helping craft a policy that exempts faculty use of images and reproductions from this ban.

Sincerely,



Zachary Greenberg  
Faculty Legal Defense/Student Association Counsel

Cc: Jennifer Delucchi, Chancellor’s Executive Officer  
Brian King, Chancellor  
Jake Knapp, General Counsel

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<sup>26</sup> *Pac. Coast Horseshoeing Sch.*, 961 F.3d at 1070–71.

<sup>27</sup> The ban’s exemptions for objects outside the District’s control or provided with the tribes’ consent limit the *extent* of the burden on expression, but not the *type* of burden imposed.

<sup>28</sup> Letter from Peter V. Khang, *supra* note 14.

<sup>29</sup> *Burnham v. Ianni*, 119 F.3d 668, 671 (8th Cir. 1997) (finding that a state university violated a history professor’s clearly established First Amendment rights by removing photographs depicting the professor bearing antique weapons for a military history display).