

August 30, 2024

Brian King  
Office of the Chancellor  
Los Rios Community College District  
1919 Spanos Court  
Sacramento, California 95825

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

Dear Chancellor King:

FIRE, a nonpartisan nonprofit dedicated to defending freedom of speech,<sup>1</sup> is concerned by Los Rios Community College District's moratorium on faculty use of images and reproductions of Native American human remains and cultural items.<sup>2</sup> As LRCCD's ban violates professors' First Amendment rights and is untethered to federal law governing ownership of these items, we urge the district to allow faculty use of images and reproductions of these items. Doing so will allow LRCCD to comply with both applicable law and binding constitutional obligations.<sup>3</sup>

Our concerns arise out of LRCCD's October 3, 2023, announcement of a moratorium on the "use or creation of images and reproductions of Native American human remains and cultural items" until the District establishes its policy to comply with the Native American Graves Protection and Repatriation Act (NAGPRA).<sup>4</sup> Under the moratorium, "use" includes "teaching, research, inclusion in student-produced papers, and publication" as well as any instance where

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

<sup>2</sup> The recitation of facts here reflects our understanding of the pertinent information. We appreciate that you may have additional information and invite you to share it with us.

<sup>3</sup> *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" (internal citation omitted)).

<sup>4</sup> *Moratorium on the Use of Human Remains, Native American Cultural Items, Images, and Reproductions of Native American Human Remains and Cultural Items*, LOS RIOS CMTY. COLL. DIST., <https://employees.losrios.edu/lrccd/employee/doc/equity/nagpra-moratorium.pdf> [<https://perma.cc/QX5Q-48MP>]; *NAGPRA Moratorium*, LOS RIOS CMTY. COLL. DIST., <https://employees.losrios.edu/our-organization/nagpra-moratorium> [<https://perma.cc/QEK3-JGTN>].

the objects are “visible in a classroom, display, exhibit or other use area.”<sup>5</sup> To comply with this moratorium, LRCCD colleges have restricted faculty use of numerous images and reproductions of Native American artifacts.<sup>6</sup> However, while NAGPRA requires institutions receiving federal funds to create a process for identifying and repatriating Native American remains and cultural items to associated tribes or organizations,<sup>7</sup> it concerns only the actual items—not images or reproductions.<sup>8</sup>

LRCCD thus violates professors’ First Amendment right to use images and reproductions of Native American artifacts for academic purposes. The First Amendment has long protected displaying photographs, images, and other tangible items for communicative purposes.<sup>9</sup> The law takes an especially dim view of content-based restrictions such as LRCCD’s policy, which restricts faculty expression precisely *because* it concerns Native American artifacts and not some other topic of scientific inquiry.<sup>10</sup> Such rules are “presumptively unconstitutional” and a government actor like LRCCD can justify them only if it proves they are narrowly tailored to serve compelling university interests.<sup>11</sup> And since NAGPRA does not concern *images or reproductions of* cultural objects, LRCCD may not cite that law as a governmental interest justifying its content-based limit on faculty expressive rights.<sup>12</sup>

LRCCD’s ban also burdens academic freedom, which provides faculty substantial breathing room to determine how to approach materials relevant to their courses. Because faculty “must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding,”<sup>13</sup> academic freedom is both “a special concern to the First Amendment” and a

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<sup>5</sup> *Moratorium on the Use of Human Remains*, *supra* note 4; *NAGPRA Moratorium*, *supra* note 4.

<sup>6</sup> *Los Rios Community College District – Cosumnes River College Campus Audit Report*, COSUMNES RIVER COLL. (July 26, 2024) (on file with author); *January 2024 NAGPRA Audit Summary*, SACRAMENTO CITY COLL. (Jan. 1, 2024) (on file with author); *Los Rios Community College District – Folsom Lake College Campus Audit Report*, FOLSOM LAKE COLLEGE (July 17, 2024) (on file with author).

<sup>7</sup> 25 U.S.C.A. § 3001 (1990) (defining “cultural items” as “human remains” and “objects” associated with a “death rite or ceremony of a culture” of a Native American group), *available at* <https://uscode.house.gov/view.xhtml?path=/prelim@title25/chapter32&edition=prelim>.

<sup>8</sup> *Id.* LRCCD’s FAQ on this law also contains no reference to college faculty use of images or reproductions. *NAGPRA Moratorium*, *supra* note 4.

<sup>9</sup> *E.g.*, *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017) (“The First Amendment protects actual photos, videos, and recordings”); *see also R.A. V. v. City of St. Paul*, 505 U.S. 377, 377 (1992) (striking down ban on displaying offensive symbols on First Amendment grounds); *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (holding the First Amendment protects flag burning as expressive conduct); *Tucker v. State of Cal. Dept. of Educ.*, 97 F.3d 1204, 1216 (9th Cir. 1996) (holding the First Amendment protects displaying religious symbols).

<sup>10</sup> *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”).

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


<sup>12</sup> *See* 25 U.S.C.A § 3001, *supra* note 7.

<sup>13</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“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

principle “of transcendent value to all of us and not merely to the teachers concerned.”<sup>14</sup> The American Association of University Professors, whose statements on faculty rights have been cited for nearly a century, defines freedom in teaching as encompassing faculty’s right to select course materials, assignments, and determine an approach to a subject “without having their decisions subject to the veto of a department chair, dean, or other administrative officer.”<sup>15</sup> Courts have specifically found that the First Amendment protects faculty expression that is “related to scholarship or teaching”<sup>16</sup> or “germane to the classroom subject matter,”<sup>17</sup> including the display of pedagogically relevant photographs.<sup>18</sup> The moratorium on the use of images and reproductions of Native American remains and cultural objects in instruction and scholarship, given the absence of legal justification as outlined above, clearly violates LRCCD faculty’s academic freedom.

We accordingly request a substantive response to this letter no later than close of business September 13, 2024, confirming LRCCD will narrow the moratorium to exempt use of images and reproductions. To that end, FIRE would be happy to help LRCCD revise this policy to uphold its First Amendment obligations.

Sincerely,



Zachary Greenberg  
Faculty Legal Defense/Student Association Counsel

Cc: Jennifer Delucchi, Chancellor’s Executive Officer  
Peter Khang, Deputy General Counsel

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civilization will stagnate and die.”); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (“[F]ree speech is of critical importance because it is the lifeblood of academic freedom”).

<sup>14</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

<sup>15</sup> *Statement on Online Education*, AAUP (Jan. 2024) (quoting *Statement on the Freedom to Teach*, AAUP, Nov. 7, 2013), <https://www.aaup.org/report/statement-online-education#:~:text=The%20Freedom%20to%20Teach%2C%20a,for%20which%20faculty%20members%20are> [https://perma.cc/7URF-95KA]; *see also Academic Freedom*, FIRE, <https://www.thefire.org/defending-your-rights/academic-freedom> (last visited Aug. 26, 2024) (“Academic freedom gives faculty the right to teach, research, and speak about matters of public concern without being punished — even where their views, findings, or methods are controversial.”).

<sup>16</sup> *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014).

<sup>17</sup> *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 683 (6th Cir. 2001) (rejecting the “the argument that teachers have no First Amendment rights when teaching, or that [authorities] can censor teacher speech without restriction” as “totally unpersuasive.”).

<sup>18</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).