

September 13, 2024

Via Email

Mr. Zachary Greenberg
Faculty Legal Defense
Student Association Counsel
Foundation for Individual Rights and Expression
510 Walnut Street, Suite 900
Philadelphia, Pennsylvania 19106

Dear Mr. Greenberg:

This letter responds to your correspondence on August 30, 2024, regarding Los Rios Community College District's October 2, 2023, moratorium on faculty use of certain specific images and reproductions of Native American human remains and cultural items. The District established the moratorium as part of the District's compliance with the Native American Graves Protection and Repatriation Act (NAGPRA) and CalNAGPRA. The moratorium will expire as soon as the District adopts a policy concerning the matters addressed in the moratorium.

Although the District is certainly willing to discuss issues with your organization, it sees the moratorium as motivated by a strong public interest and at the same time, consistent with constitutional free speech principles and faculty academic freedom rights.

In your letter, you do not take issue with sections 1 and 2 of the moratorium. Your letter takes issue with section 3, which applies the moratorium to: "[t]he use or creation of images and reproductions of Native American human remains and cultural items (as those terms are defined in 25 U.S.C. 3001 et. seq.) under the control of the Los Rios Community College District." Section 3 goes on to provide: "This moratorium shall not apply when the culturally affiliated Tribe or Tribes have no objections to said use."

In California, the faculty at public higher education institutions have First Amendment rights in their speech related to scholarship and teaching, but those rights are not absolute. *Demers v. Austin*, 746 F.3d 402, 413 (9th Cir. 2014). Instead, those rights apply only to faculty members' speech on matters of public concern, and are subject to a balancing between the administrative interests of the institution and the free expression rights of the faculty member. *Id.* at 406, 415. Indeed, applicable precedent cautions courts against second-guessing administrators in determining the strength of the institution's interests that make up part of this balancing. *Id.* at 413.

The balancing of interests here favors the District's moratorium. The District as an institution has its own academic freedom rights. *See Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result); *University of Cal. Regents v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.)). Moreover, the imposition on faculty scholarship and teaching is slight, if there is any at all.

First, strong public interest reasons support the moratorium's restriction on the use of images and reproductions of Native American human remains and cultural items within the control of the District. Respecting human remains by taking them out of use, including images and reproductions, shows a commitment to honoring the traditions and beliefs of Native American Tribes, and helps create an atmosphere of trust and cooperation during the consultation and repatriation process under the NAGPRA and CalNAGPRA. Indeed, the District's tribal partners have asked us for an immediate moratorium on the use of all human remains and Native American cultural items at our colleges until the District can determine if they were obtained ethically with consent or until the District has a formal policy in place. Ceasing all use of the items – including use of images and reproductions – shows respect for the profound cultural and spiritual significance of the items. It respects the dignity of the deceased individuals and demonstrates ethical conduct and cultural sensitivity.

Second, as to imposition on academic freedom of individual faculty members at the District, the moratorium does not direct that any faculty member teach their class in a substantively different way, or that the viewpoints, perspectives, or lessons introduced take any different form. Faculty members are to provide instruction without use of particular images and reproductions. This does not extend to use of *all* Native American items or reproductions, but solely reproductions of those particular items that are **under the control** of the District, and without consent of the culturally affiliated Tribe or Tribes. In addition, to ameliorate any effects of the moratorium, the District asked its Vice Presidents of Instruction to contact all affected departments at District colleges to make plans for replacing any items needed for instruction, including follow up with a specific approved vendor for replacements.

Third, for faculty members to have a First Amendment right in their scholarship and teaching, their expression must be on a matter of public concern. *Demers*, 746 F.3d at 415. The speech must meet this test for a Court even to reach a balancing of interests between faculty and institutional interests. *Id.* Here, your letter does not describe how that public concern test is met for any of the ways in which faculty members would use the images and reproductions.

Your letter points out that NAGPRA itself does not require institutions to decline to use images or reproductions. All this means is that the District supposedly cannot rely on NAGPRA to support the part of the moratorium that FIRE challenges. An institution, however, does not have to rely on the mandate of federal law to promulgate directives affecting its operations. The moratorium's application to use of images and reproductions has support, for all the reasons described above.

As to the authorities cited in your letter, many are from different contexts in which government regulation must meet more stringent First Amendment standards. These particular authorities do not involve public employee expression, for which speech rights are available more narrowly, and when they do exist are tested under less demanding standards. *See Garcetti v. Ceballos*, 547 U.S. 410, 417-18, 421 (2006); *Demers*, 746 F.3d at 413, 415. In any event, none of the cases is on-point, or stands for the proposition that an institution cannot impose a moratorium like the one at issue here.

Please let us know if you think a way exists to resolve this matter consistent with what is set forth above, The District very much respects the academic freedom of its faculty and will consider any additional information your organization can offer.

Very truly yours,

A handwritten signature in black ink, appearing to read "P. Khang", with a long horizontal flourish extending to the right.

Peter V. Khang
Interim Chief Counsel
Los Rios Community College District