November 28, 2018

President Linda D. Rose
President's Office, SAC S-205
1530 W. 17th Street
Santa Ana, CA 92706-3398

URGENT

Sent via Priority Mail and Electronic Mail (Rose_Linda@sac.edu)

Dear President Rose:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is concerned about the threat to free speech posed by the decision to charge Andrew Rivas, Boston Bolles, and Jocabed Torres with violations of Santa Ana College's ("Santa Ana's" or "SAC's") Standards of Student Conduct as a result of their expressive activity on campus. All three students are scheduled for disciplinary hearings at 1:00 p.m. today as a result of words and pictures written by others on a "free speech ball" that the students set up in Santa Ana's free speech area. **We strongly remind you that Santa Ana is a public college bound by the First Amendment and thus may not punish students for engaging in protected expressive activity.**

The following is our understanding of the facts. Please inform us if you believe we are in error.

I. Background

Rivas, Bolles, and Torres are members of Santa Ana's chapter of the nationwide organization Young Americans for Liberty (YAL). Their chapter is a ratified club. On Monday, November 19, the chapter set up a "free speech ball"—an oversized beach ball upon which others are invited to write—in the free speech area of Santa Ana's campus.

This was approximately the eighth time since June 27 that the chapter set up a free speech ball and invited passing students, faculty, and staff to write messages or draw on the ball. Chapter members have never faced disciplinary consequences for language or symbols depicted on a free speech ball before today. On previous occasions, Santa Ana administrators, faculty, and

campus safety officers have observed the chapter's free speech ball and have not attempted to remove the ball or punish YAL members for its content. (Indeed, faculty and safety officers have themselves written messages on the free speech ball on several occasions.) In October, Vaniethia Hubbard, Santa Ana's Vice President of Student Services, observed YAL members with a free speech ball and spoke to them about it and the purpose of the event without incident or consequence.

On November 19, Rivas and Torres set the free speech ball up around noon and encouraged individuals passing by to write messages on it. After they had been out for about an hour, Associate Dean of Student Development, Jennifer De La Rosa approached Bolles and Torres. De La Rosa told Bolles and Torres that she had received complaints about the free speech ball and demanded that they deflate it and remove it from campus. De La Rosa was joined by uniformed campus security officers, who joined her in demanding that the students deflate and remove the free speech ball. Torres began livestreaming the encounter on Instagram, which led to a group of journalism students coming out to film and report on the discussion. At some point after De La Rosa started speaking to Bolles and Torres, Rivas arrived after he finished a tutoring session.

Bolles, Rivas, and Torres repeatedly asked De La Rosa and the campus safety officers to identify the Santa Ana policies and rules they were violating. De La Rosa and the campus safety officers did not tell the students what policies they were violating, but De La Rosa eventually explained that she took issue with some of what passersby wrote or drew on the ball. (The messages and drawings on the ball included several penises, swastikas, "Fuck Mexicans," the "n" word, "I like big black ass," "FUCK SAC," and "Hate Speech is Free Speech." None were drawn or written by Bolles, Torres, or Rivas.) De La Rosa identified, in particular, a "penis" drawn on the ball as a "sexual object" which was "a violation of our student code of conduct." In short, according to De La Rosa, "inappropriate" images and "hate speech" had been drawn on the ball, and she advised the students that she was "asking [them] to take this down because there is a penis on here."

Approximately forty-five minutes after De La Rosa first approached Boles and Torres, the students deflated the ball as instructed because they were concerned that it would be taken from them and damaged. As the ball was deflated, an officer photographed what was written on the ball and required students standing nearby to provide their identification. The students explained that they intended to set up another free speech ball on Santa Ana's campus in the future. An officer explained that, "if it comes back, then you'll deal with her again," and gestured to De La Rosa.

On November 21, the Office of Student Life informed Bolles, Rivas, and Torres via email that they were being charged with violations of the Rancho Santiago Community College District's Standards of Student Conduct (the "Conduct Code"). The email explained that the students had purportedly violated several Santa Ana policies by setting up the free speech ball, failing to file paperwork stating that they were holding an event on November 19, and failing to have their chapter advisor present with them during the event.

The email informed the students that their conduct would be reviewed for three potential violations of the Conduct Code:

> *M.* ***Expression which is libelous****, slanderous,* ***obscene****, or which incites students so as to create a clear and present danger of commission of unlawful acts on district premises, or violation of district regulations, or the substantial disruption of the orderly operation of the college.*
>
> *S.* ***Disruptive written*** *or verbal* ***communication****, vulgarity, open and persistent abuse of other students which include verbal abuse,* ***racial epithets and hate speech****. Engaging in intimidating conduct or bullying against another student through words or actions, including direct physical contact; verbal assaults, such as teasing or name-calling; social isolation or manipulation; and cyberbullying.*
>
> *V. Any act constituting good cause for suspension or expulsion, or* ***violation of district policies or campus regulations****. (i.e. ICC Constitution).*

(formatting as in letter).

Bolles, Rivas, and Torres' hearings are scheduled for 1:00 p.m. today.

II. Analysis

Santa Ana must immediately rescind the charges against Bolles, Rivas, and Torres. Both the display of the free speech ball and the content depicted and written on the ball are protected by the First Amendment.

It has long been settled law that the First Amendment is binding on public colleges like Santa Ana. *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); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, "free speech is of critical importance because it is the lifeblood of academic freedom"). *See also Griset v. Fair Political Practices Com.*, 8 Cal.4th 851, 866 n. 5 (1994) ("As a general matter, the liberty of speech clause in the California Constitution is more protective of speech than its federal counterpart.").[1]

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[1] Protection of student expression is founded not only in the constitutions of the United States and State of California, but also in California statutory law. Section 66301 of the California Education Code provides, in pertinent part, that neither the "governing board of a community college district, nor an administrator of any campus of those institutions, shall *make or enforce* a rule subjecting a student to disciplinary sanction solely on the basis of conduct that is speech or other communication that, when engaged in outside a campus of those institutions, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution." (Educ. Code. § 66301, subd. (a)) (emphasis added). As discussed below, the expression at issue is unequivocally protected by the First Amendment.)

The First Amendment does not exist to protect only non-controversial expression; it exists precisely to protect speech that some or even most members of a community may find controversial or offensive. The Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends others. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). This is no less true on public college campuses. *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (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.'").

A. Any punishment under Section S would violate the First Amendment.

None of the speech written or depicted on the free speech ball falls outside the First Amendment's protection. Moreover, the language of Conduct Code Section S is facially unconstitutional.

There is no exception to the First Amendment's protection for hate speech or racist speech. To the contrary, decades of precedent make clear that the First Amendment protects even the most hateful of speech. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down an ordinance that prohibited placing on any property symbols that "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender"). The Supreme Court reiterated this fundamental principle in *Snyder v. Phelps*, 562 U.S. 443, 461 (2011), proclaiming:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. . . . [W]e cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Last year, the Court once again reaffirmed this principle in *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017), holding unanimously that the perception that expression is "hateful" or that it "demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground" is not a sufficient basis on which to remove speech from the protection of the First Amendment.

In the public college context, federal courts nationwide have consistently struck down policies that—like the Conduct Code sections here at issue—use content-based, overbroad language in an attempt to prohibit offensive or racist speech, and in doing so sweep within their ambit a great amount of protected speech.[2] This is because "[c]ontent-based regulations are

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[2] *See, e.g., McCauley v. Univ. of V.I.*, 618 F.3d 232, 247–51 (3d Cir. 2010) (invalidating campus policies prohibiting "any act" that "frightens, demeans, degrades or disgraces any person" including any violations of "sexual harassment" and "unauthorized or offensive signs"); *DeJohn v. Temple Univ.*, 537 F.3d 301, 317–18 (3d Cir. 2008)

presumptively invalid." *R.A.V.*, 505 U.S. at 382. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

As this line of cases recognizes, policies using overbroad, subjective categories of prohibited speech "provide[] no shelter for core protected speech." *DeJohn v. Temple Univ.*, 537 F.3d 301, 318 (3d Cir. 2008). The First Amendment "does not leave us at the mercy of *noblesse oblige*," and instead requires that restrictions on speech be carefully designed to ensure that as little speech as possible is restricted. *United States v. Stevens*, 559 U.S. 460, 480 (2010). Overbroad or subjective policy language allows administrators the kind of unbridled discretion that inevitably leads to uneven, arbitrary, and viewpoint-based enforcement, which the First Amendment does not permit in any forum or context. *See Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1891 (2018) (invalidating ill-defined ban on "political" attire in non-public forum because the "indeterminate prohibition" precluded fair enforcement); *Grayned v. City of Rockford*, 408 U.S. 104, 113 n. 22 (1972) (noting that the Court regularly condemns broadly worded ordinances that "grant such standardless discretion to public officials that they are free to censor ideas and enforce their own personal preferences.").

The latter point is amply demonstrated by the YAL chapter's experience on the Santa Ana campus: On a number of previous occasions staff, faculty, and security officers observed free speech balls on campus with similar language and symbols displayed—and even participated by writing messages on the ball—and chapter members have never faced discipline for hosting a free speech ball until today.

In addition to prohibiting racial epithets and hate speech, Section S also purports to prohibit "disruptive written or verbal communication." However, the Supreme Court has long made clear that a public school at any educational level—even in the elementary or high school setting—may not restrict student speech without showing that it will or has caused an actual

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(invalidating sexual harassment policy that prohibited all "expressive, visual, or physical conduct of a sexual or gender-motivated nature" when "such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment"); *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1182–85 (6th Cir. 1995) (invalidating anti-discrimination and harassment policy prohibiting "demeaning or slurring individuals ... because of their racial or ethnic affiliation" or "using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation"); *College Republicans at San Fran. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1016–18 (N.D. Cal. 2007) (enjoining provision of Code of Student Conduct requiring students to be "civil to one another and to others in the campus community"); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (striking down campus speech code prohibiting "insults, epithets, ridicule, or personal attacks" as unconstitutionally overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 373–74 (M.D. Pa. 2003) (enjoining provisions of speech code prohibiting "acts of intolerance," requiring communication of beliefs so as not to "provoke, harass, intimidate, or harm another," or participating in "acts of intolerance that demonstrate malicious intentions toward others"); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1165, 1168–80 (E.D. Wisc. 1991) (striking down speech code provisions prohibiting "racist or discriminatory comments, epithets, or other expressive behavior directed at an individual" that demean racial, religious or ethnic groups and create a hostile environment); *Doe v. University of Mich.*, 721 F. Supp. 852, 868 (E.D. Mich. 1989) (striking down as overly broad and vague Policy on Discrimination and Discriminatory Harassment prohibiting students from "stigmatizing or victimizing" individuals or enumerated groups).

material and substantial disruption. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* Moreover, courts have made clear that a public college cannot restrict the speech of college students in the same way that a public elementary or high school may. *See, e.g., DeJohn*, 537 F.3d at 315–16 (holding that public college administrators "are granted *less leeway* in regulating student speech than are public elementary or high school administrators.") (emphasis in original).

Apart from an alleged complaint to De La Rosa regarding some of the content written on the free speech ball, there is no evidence that the words and pictures displayed there caused anything more than a "desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker,* 393 U.S. at 509. We emphasize that Section S by its terms purports to regulate pure speech and expressive activity, not disruptive *conduct*. In the present circumstances, any punishment of these students for the speech at issue cannot pass constitutional muster.

B. Any punishment under Section M would violate the First Amendment.

Section M of the Conduct Code purports to regulate "obscene" expression. The profanity and depictions of penises on the free speech ball come nowhere near the narrow category of speech that may be censored because it meets the legal definition of obscenity. Moreover, courts routinely hold that profanity and merely vulgar images are well within the protection of the First Amendment.

While the Supreme Court has held that obscenity is among the narrow categories of speech that do not enjoy First Amendment protection, it has also made clear that obscenity has a specific, narrowly-tailored definition. *See Miller v. California*, 413 U.S. 15, (1973) ("[N]o one will be subject to prosecution for ... obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct...."); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 235 (2002) (under *Miller*, to meet obscenity test, the government must prove that expression taken as a whole: "[1] appeals to the prurient interest [in sex], [2] is patently offensive in light of community standards, and [3] lacks serious literary, artistic, political, or scientific value.") (internal quotation marks omitted). The profanity and drawings of penises at issue today have nothing in common with the type of "hard core" pornography that may be constitutionally censored as obscene.

To the contrary, the mere depiction of a penis and the use of profanity are protected expression under settled First Amendment law. *See Cohen v. California*, 403 U.S. 15 (1971) (reversing conviction of man wearing a jacket bearing the slogan "Fuck the Draft" into a courthouse because message was protected under First Amendment); *see also Swartz v. Insogna*, 704 F.3d 105, 111 (2d Cir. 2013) (giving "the finger" is pure speech that cannot be penalized as disorderly conduct). While some may find the depiction and words juvenile or distasteful, as explained above, decades of case law hold that government actors may not

censor speech simply because it is offensive or vulgar; "because governmental officials cannot make principled decisions" concerning distasteful or impolite speech, "the Constitution leaves matters of taste and style . . . largely to the individual," and "one man's vulgarity is another's lyric." *Cohen*, 403 U.S. at 25.

Santa Ana cannot simply label protected speech as "obscene" and make it so. Because the speech and depictions at issue here do not meet the Supreme Court's definition of obscenity, the students cannot be punished for them under Section M consistent with the First Amendment.

C. Any punishment under Section V would violate the First Amendment.

To the extent the charges against the students are based on their failure to file paperwork in advance or have their club advisor present, those charges are unconstitutional. The open, outdoor areas of campuses are public forums for students like Bolles, Rivas, and Torres. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) ("[T]he campus of a public university, at least for its students, possesses many of the characteristics of a public forum. . . students enjoy First Amendment rights of speech and association on the campus".) Students must be allowed to engage in non-disruptive expressive activity in the open, outdoor areas of Santa Ana's campus without fear that they will be stopped by an administrator or subject to unconstitutional permitting requirements.

Administrative procedures requiring a speaker to obtain a license or permit, or to register before engaging in expression are highly disfavored under long-established law. *See N.Y. Times v. United States*, 403 U.S. 713, 714 (1971). The First Amendment does not allow—and courts will not uphold—broad permitting schemes that place a significant burden on speech and are not sufficiently tailored to serve an important government interest. *See Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002). Policies that require individuals or small groups to obtain a permit or license in order to engage in any expressive activity are not narrowly tailored. *See Boardley v. Dep't of Interior*, 615 F.3d 508, 520–23 (D.D.C. 2010) (permit requirement for individuals or small groups held unconstitutional); *Cox v. City of Charleston*, 416 F.3d 281, 285–87 (4th Cir. 2005) (same); *Burk v. Augusta-Richmond Cty.*, 365 F.3d 1247, 1255 n.13 (11th Cir. 2004) (same); *Douglass v. Brownell*, 88 F.3d 1511, 1524 (8th Cir. 1996) (same); *Grossman v. City of Portland*, 33 F.3d 1200, 1205–08 (9th Cir. 1994) (same).

Santa Ana's requirement that ratified clubs complete an "Activity Approval/Permit For Use of Facilities By Student Groups"[3] at least three weeks before engaging in any activity on campus is an unlawful prior restraint. The requirement places a significant burden on speech and is not narrowly tailored to any government interest, let alone a significant one. *See Watchtower*, 536 U.S. at 165–66. Santa Ana's permitting requirement is particularly onerous because it applies even to the non-disruptive activities of small groups of students like Bolles, Rivas, and

[3] Activity Approval/Permit For Use of Facilities By Student Groups, SANTA ANA COLL. (Mar. 23, 2017), https://www.sac.edu/StudentServices/StudentLife/Pages/Activity-Forms.aspx.

Torres. *See Grossman*, 33 F.3d at 1205–08. Moreover, the requirement that an advisor be present at all events imposes an additional unconstitutional burden by limiting expressive activity to those times an advisor is able and willing to be present. College students are adults and the requirement that they be chaperoned when engaging in protected expressive activity violates First Amendment. To the extent Bolles, Rivas, and Torres are facing sanctions under Section V because of their failure to register their expressive activity in advance or have an advisor present, those charges are unconstitutional.

III. Conclusion

For the foregoing reasons, Rivas, Bolles, and Torres cannot be sanctioned as a result of today's due process hearing under any of the Conduct Code sections invoked by Santa Ana without violating their First Amendment rights. A finding that they have violated the Conduct Code would betray Santa Ana's mission as a higher as a public institution of higher learning and open the institution to significant potential legal liability. Santa Ana must immediately drop the charges against Rivas, Bolles, and Torres and provide adequate assurance that its policies and Conduct Code will not be employed in the future to punish or chill protected student expression.

FIRE is committed to using all of the resources at our disposal to see this matter through to a just conclusion. Because of the urgency of this matter and the short time period allotted under Santa Ana procedures for a decision and appeal, we request a response to this letter by Monday, December 3, 2018.

Sincerely,

Marieke Tuthill Beck-Coon
Director of Litigation
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cc:

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