



October 9, 2020

G. Gabrielle Starr
Office of the President
Alexander Hall 206
Pomona College
333 N. College Way
Claremont, California 91711

Sent via Electronic Mail (president@pomona.edu)

Dear President Starr:

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 by Pomona College's requirement that student organizations, as a condition of recognition, allow administrators to remove the organization's leaders if they engage in "[i]nappropriate behavior and/or language" or in "advocacy for . . . illegal activities and/or behavior." This requirement interferes with the rights of student organizations to choose their own leaders, departing from both Pomona's published commitments to freedom of expression and its obligations under California law.

Accordingly, FIRE calls on Pomona College to immediately rescind this policy.

I. Pomona College's "Article XII" Requirement for Recognized Student Organizations

Our understanding of the pertinent facts follows. We appreciate that you may have additional information to offer and invite you to share it with us.

Any student organization "open to students at more than one of the Claremont Colleges' schools or solely to Pomona students" is required to be registered with Pomona College and to comply with certain requirements set forth in Pomona's "Student Organization Policies &

Procedures” handbook.¹ Pomona conditions a variety of privileges and rights on compliance with these requirements.² These “privileges and services” include access to funding from student fees, the ability to schedule events and publicize activities, and the use of certain facilities.³

One of the conditions of recognition is that an organization submit for review a constitution.⁴ A document providing a “step-by-step guide to . . . [u]nderstanding policies & procedures as they apply to student organizations at the Claremont Colleges” includes a sample constitution laying out “[w]hat should be covered” by an organization’s constitution.

That exemplar provides, as “Article XII,” a section entitled “Removal of Officers,” providing the mechanism by which organizations may remove their own officers and providing an administrator the discretion to remove officers. Article XII provides, in pertinent part and with emphasis added:

An officer may be removed only after every effort has been made by all parties involved to resolve the situation. If the situation cannot be resolved, then an officer can be removed from their position by a 2/3 vote of all club members. Approval to hold such a vote must first be obtained from the Smith Campus Center Assistant Director in charge of student organizations.

The Smith Campus Center Assistant Director may, at their discretion, remove an officer from their role should circumstances require such action. Grounds for removal of an officer include, but are not limited to:

- **Inappropriate behavior and/or language**
- Behavior that violates College policy and/or procedure
- Direct knowledge of hazing incidents and/or failure to report such incidents
- Direct knowledge of, **advocacy for**, and/or participation in **illegal activities and/or behavior**
- Behavior resulting in unreasonable and/or unnecessary risk for students⁵

¹ POMONA COLL., STUDENT ORGANIZATION POLICIES & PROCEDURES 1 (2020–2021), *available at* https://claremontindependent.com/wp-content/uploads/2020/10/Student_Organization_Handbook_2020-2021.pdf.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ CLAREMONT COLLS., STUDENT ORGANIZATIONS AT THE CLAREMONT COLLEGES 3 (2020–2021), *available at* https://claremontindependent.com/wp-content/uploads/2020/10/Student_Organization_Policies_Procedures_for_Recognition_2020-2021.pdf.

On October 5, 2020, John Lopes, the Assistant Director of the Smith Campus Center, sent an email to registered student organizations directing them to “[m]ake sure your constitution is updated to include the articles on Non-discrimination AND the removal of Officers/Removal of Members” and that these articles need to be copied from the template “verbatim!”⁶

This requirement was reported by the *Claremont Independent*.⁷ The *Independent* is a registered student organization at Pomona. It has previously been the subject of petitions demanding that an article criticizing a student activist be “taken down” because it was “defamatory and incorrect”⁸ or that *Independent* members “involved with the editing and publication process” be subject to “legal action” and “disciplinary action” for “hate speech.”⁹

II. Required Use of “Article XII” Violates California Law and Pomona College’s Public Commitments to Freedom of Expression

Pomona’s policies and California law afford students rights commensurate with those granted to students at public universities and colleges under the First Amendment. Because Pomona’s “Article XII” requirement would be unconstitutional if required by a public institution, Pomona violates California law and betrays its public commitment to freedom of expression.

A. *Pomona’s Policies Expressly Bind the College to the First Amendment.*

Pomona College’s policies afford its students broad, unequivocal rights to freedom of expression consistent with the First Amendment.

For example, Pomona’s Discrimination and Harassment Investigation and Response Procedures *expressly* commits the college to the strictures of the First Amendment:¹⁰

Consistent with California Education Code Section 94367, the definition of harassment contained in this policy and its application to student speech shall be subject to the limitations of

⁶ E-mail from John Lopes, Asst. Dir., Smith Campus Ctr. & Student Programs, Pomona Coll., to unidentified recipients (Oct. 5, 2020, 1:46 PM) (on file with author).

⁷ Abbas Ali & Liam MacDonald, *Pomona Administration Can Remove Club Officers At Discretion*, CLAREMONT INDEP., Oct. 5, 2020, <https://claremontindependent.com/pomona-administrators-can-remove-club-officers>.

⁸ Petition, *Demanding Protection and Accountability for Malak Afaneh, Student Activist*, https://docs.google.com/forms/d/e/1FAIpQLSeuKQo4Xg2ipMvuvwHyNfqXPeALuyDEqwQIghkef7tr92KB_w/viewform?gxids=7628 (last visited Oct. 7, 2020).

⁹ Archive of petition to David Oxtoby, President, Pomona College, *available at* https://docs.google.com/document/d/1bYL-0Tnbv_BiXt-2hDscgwkDf3-LVkt6SBu8Ykv2ST4; *see also* Matthew Reade, *Students Demand Administrators ‘Take Action’ Against Conservative Journalists*, CLAREMONT INDEP., Apr. 17, 2017, <https://claremontindependent.com/students-demand-administrators-take-action-against-conservative-journalists>.

¹⁰ Pomona College, Discrimination and Harassment Investigation and Response Procedures, as approved by the Board of Trustees on May 13, 2017, *available at* <https://www.pomona.edu/sites/default/files/public-dialogue-discrimination-and-harassment-investigation-and-response-procedures.pdf>.

the First Amendment to the United States Constitution and Article 1, Section 2 of the California Constitution.

As an educational institution, Pomona College is committed to the principle of free expression and the exploration of ideas in an atmosphere of civility and mutual respect. Thus, in keeping with the principles of academic freedom, there can be no forbidden ideas.

Similarly, Pomona’s Student Code asserts that “free speech is critical to Pomona’s mission as an educational institution, and therefore, the norm is that speech and other forms of expression are protected.”¹¹

B. California’s “Leonard Law” Bars Private Institutions from Infringing on Students’ Freedom of Expression and Association.

Even if Pomona College did not extend these rights to its students, California law does so. Education Code Section 94367 (the “Leonard Law”) bars secular, private colleges from making or enforcing any rule that would subject a student to discipline for speech that, were it “engaged in outside the campus . . . is protected from governmental restriction by the First Amendment” or the speech protections in the California constitution.¹² The Leonard Law places private institutions on par with their public counterparts with respect to expression and association protected by the First Amendment.¹³

C. Pomona Cannot Remove Student Organizations’ Leaders for “Inappropriate” Speech or Advocacy of Unlawful Activity.

Pomona’s “Article XII” violates the expressive freedoms of Pomona students and the organizations they form. The policy extends unfettered discretion to the college’s administration to remove organizations’ leaders for any reason, expressly including “inappropriate” speech or advocacy of unlawful activity.

i. Article XII implicates students’ right to expressive association.

When a university burdens the ability of a student organization to engage in expressive activity, the burden must withstand First Amendment scrutiny.¹⁴ In *Healy v. James*, a

¹¹ POMONA COLLEGE, 2019-2020 STUDENT HANDBOOK, Art. III: Proscribed Conduct, §3, *available at* <http://catalog.pomona.edu/content.php?catoid=35&navoid=7070>.

¹² CAL. ED. CODE § 94367(a).

¹³ *Yu v. Univ. of La Verne*, 196 Cal. App. 4th 779, 789 (2011) (Legislature’s intent in adopting the Leonard Law was that “a student shall have the same right to exercise his or [her] right to free speech on campus as he or she enjoyed when off campus”); *see also Salinas v. Palo Alto Univ.*, 2017 U.S. Dist. LEXIS 156715, at *35 (Sept. 25, 2017) (citing *Yu* for the proposition that the Leonard Law “does not exclude speech that occurs solely within the confines of a campus.”).

¹⁴ *Healy v. James*, 408 U.S. 169, 181 (1972).

proposed chapter of Students for a Democratic Society (SDS) was rejected by a public university's president. The Supreme Court of the United States, overturning the denial of recognition, explained that there was “no doubt” that the “denial of official recognition, without justification, to college organizations burdens or abridges” the associational right “implicit in the freedoms of speech, assembly, and petition.”¹⁵ This right to expressive association is likewise protected against unjustified burdens by the Leonard Law, as the right is “‘closely linked’ to First Amendment free speech rights and, indeed, partly ‘implicit in’ such speech rights.”¹⁶

Pomona would not violate the rights of student organizations by penalizing students or organizations for engaging in prohibited conduct or unprotected speech. However, it cannot burden an organization's choice of leadership because of protected expression.

ii. Article XII's burden on “inappropriate” expression violates the right to freedom of expression.

Pomona's regulation of “inappropriate” speech violates the expressive rights of its students in two ways.

First, the regulation is impermissibly vague, as whether or not speech is “inappropriate” is a subjective inquiry. Regulations on speech must “give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”¹⁷ The lack of objective criteria as to what speech is or is not appropriate leaves Pomona's administration with unfettered discretion to punish *any* speech it does not believe to be appropriate. If that broad grant of authority were not enough, the regulation removes any restraint whatsoever, providing that the “[g]rounds for removal” are “not limited to” the enumerated categories.

Second, speech remains protected even if others find it inappropriate, offensive, or shocking. This core principle is why the authorities cannot ban the burning of the American flag,¹⁸ prohibit the wearing of a jacket emblazoned with the words “Fuck the Draft,”¹⁹ penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse,²⁰ or disperse civil rights marchers out of fear that “muttering” and “grumbling” white onlookers might lead to

¹⁵ *Id.* at 181.

¹⁶ *Omicron Chapter of Kappa Alpha Theta Sorority v. Univ. of S. Cal.* (May 1, 2019, Nos. B292907, B294574) 2019 Cal. App. Unpub. LEXIS 3089, at *16. Even if the Leonard Law did not protect rights to expressive association, Article XII violates the free speech rights of individual students because it subjects them to a penalty for “inappropriate” expression. Under the Leonard Law, the mere maintenance of a rule purporting to restrict freedom of expression is unlawful, even if the regulation is never enforced. CAL. ED. CODE § 94367(a) (unlawful to “make or enforce” restrictions on student expression).

¹⁷ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

¹⁸ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the “bedrock principle underlying” the holding being that government actors “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

¹⁹ *Cohen v. California*, 403 U.S. 15, 25 (1971).

²⁰ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

violence.²¹ All of this speech was viewed as inappropriate by the authorities or segments of the public but was nevertheless protected speech.

This is particularly true for a student newspaper, which is likely to publish news pieces that may be embarrassing to their subjects, including the college’s administration, or opinion pieces that others on campus may find provocative, offensive, or inappropriate. Indeed, one of the seminal cases protecting students’ First Amendment rights arose from a student newspaper’s front-page use of a vulgar headline (“Motherfucker Acquitted”) and a “political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice.”²² These images were no doubt deeply offensive to many at a time of political polarization and civil unrest, yet “the mere dissemination of ideas—no matter how offensive to good taste” on a college “campus may not be shut off in the name alone of ‘conventions of decency.’”²³ If, however, a student newspaper’s leadership—whether that of the *Claremont Independent* or *The Student Life*—can be removed at the discretion of college officials for “inappropriate” expression, the editorial independence of the newspaper would be imperiled.

iii. While incitement is unprotected, “advocacy” of “illegal activities” is protected speech.

Article XII also violates students’ expressive rights because it is overbroad in its attempt to regulate incitement, instead reaching a broad range of protected speech.

Incitement is among the “historic and traditional categories” of unprotected speech.²⁴ Speech amounts to unprotected incitement only where the language “specifically advocate[s] for listeners to take unlawful action” *and* is “directed to inciting or producing imminent lawless action” *and* is “likely to incite or produce such action.”²⁵ These well-recognized limitations delineate unprotected incitement from rhetorical hyperbole, the mere endorsement of violence,²⁶ or the assertion of the “moral propriety or even moral necessity for a resort to force or violence.”²⁷ Protecting these forms of expression is particularly important on a college campus, where students and faculty will, for example, almost certainly discuss whether political violence is defensible.

²¹ *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

²² *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

²³ *Id.*

²⁴ *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (quoting, in part, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991).)

²⁵ *Nwanguma v. Trump*, 903 F.3d 604, 609–10 (6th Cir. 2018) (then-candidate Trump’s repeated “get ‘em out of here” statements to a crowd at a rally, concerning protesters, did not constitute specific advocacy of violence, even if the statements could be understood as encouraging violence).

²⁶ *Watts v. United States*, 394 U.S. 705, 708 (1969) (man’s statement, after being drafted to serve in the Vietnam War—“If they ever make me carry a rifle the first man I want to get in my sights is L. B. J.”—was rhetorical hyperbole protected by the First Amendment, not a true threat to kill the president).

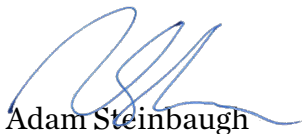
²⁷ *Noto v. United States*, 367 U.S. 290, 297–98 (1961).

Pomona needn't look far for an example of a prohibition on incitement that does not seriously threaten its students' expressive rights. Pomona's Student Code includes a prohibition on speech "that incites imminent lawless action," identifying three criteria mirroring the First Amendment's standard for unprotected incitement.²⁸ Because unprotected incitement is already prohibited by Pomona policy, and because a separate provision of Article XII bars other violations of "College policy," removing Article XII's "advocacy for" language would protect student expression without jeopardizing any Pomona College interest.

III. Conclusion

We request receipt of a response to this letter no later than the close of business on October 23, 2020, confirming that Pomona College has rescinded the requirement that student organizations adopt Article XII, that organizations that have adopted it have been informed that they may remove it, and that all recognized organizations have been informed that Pomona will never exercise the rights in Article XII against protected expression.

Sincerely,



Adam Steinbaugh
Director, Individual Rights Defense Program

Cc: Avis Hinkson, Vice Pres. for Student Affairs & Dean of Students, Pomona College
John Lopes, Asst. Dir. of Smith Campus Center & Student Programs, Pomona College

²⁸ POMONA COLLEGE, 2019-2020 STUDENT HANDBOOK, Art. III: Proscribed Conduct, §3, *available at* <http://catalog.pomona.edu/content.php?catoid=35&navoid=7070>.