SENT VIA COURIER AND EMAIL
Pomona College
Office of the President
333 N. College Way
Claremont, CA 91711

November 13, 2024

Re: Unlawful Discipline of Students Following October 7, 2024 Protests at Carnegie Hall

Dear President G. Gabrielle Starr,

The Asian Law Caucus, Palestine Legal, the Center for Protest Law and Litigation, National Lawyers Guild of Los Angeles, and the ACLU Foundation of Southern California write this letter to you regarding a group of Pomona College students who have been suspended from Pomona College, under your "extraordinary authority" as President of the College, for the remaining 2024-2025 academic year. The suspension is based on the students' alleged participation in a protest, which took place on October 7, 2024. The students were protesting what, in their view, is a genocide taking place in Gaza. The student suspensions, and the peremptory manner they were imposed in, violate the students' rights under California law. Specifically, the suspension letters make clear that the College is holding anyone who attends a protest responsible for any unlawful or disruptive actions that may occur within the vicinity of the protest, regardless of whether the person participated in or even knew of those actions. This is, in effect, punishing the act of protesting itself.

Imposing discipline for that is a violation of the student's rights to free speech, expression, and association under California's Leonard Law, which extends the full protections of the First Amendment to students at private postsecondary institutions, including Pomona College. Additionally, suspending the students without providing them with a meaningful opportunity to be heard violates their due process rights. We urge you to lift these unlawful suspensions immediately.

Underlying Facts

On October 7, 2024, approximately 480 students from the Claremont Colleges convened a walk-out demonstration to bring attention to the complicity of the United States and Claremont Colleges Consortium in, what in their view, is an ongoing genocide in Gaza. The protesters

entered Carnegie Hall at approximately 11 am and continued protesting inside the building. The last protester departed from the building at approximately 3 pm, although most protestors left earlier. Although most protesters do not appear to have engaged in vandalism, College officials found evidence of vandalism after the end of the protest.

In the weeks following the protest, some students received interim suspension notices pending a hearing. Hearings were scheduled for at least some students; however, the College abruptly canceled these hearings.

During the week of October 21, 2024, you sent numerous Pomona Students an identical notice stating that they would be suspended, effective immediately, for the remainder of the 2024-2025 academic year. Your notice makes numerous allegations regarding the conduct of "the group," "the protestors," and "many individuals." However, the only *specific* allegations regarding the suspended individuals in the notice are that they "acknowledged being present in Carnegie during the protest activities."[1] Your notice advances a theory that because the students entered the building with other people during the protest and stayed for a period, they "negligently…contributed to the extraordinary circumstances leading to this... exercise of emergency powers."

The suspension notice stated that the students are not eligible to return to the College or participate in any College activities or services until the beginning of the Fall 2025 semester. You also stated that these suspensions serve as a ban notice from each of the Claremont Colleges, effective immediately. This consortium and campus ban prohibits the students from entering any property of The Claremont College Services (including, but not limited to, academic buildings, administrative buildings, support services buildings, dining halls, general property/grounds, or residence halls) for any reason, 24 hours each day.

Your notice also informs the students that their one and only opportunity to appeal this decision is to submit a "written petition" to the President within five business days. In this petition, the notice instructs that they may "respond to the allegations…and provide [e]vidence in support of their petition."

Pomona College violated the First Amendment and California law by issuing these disciplinary suspensions.

Your disciplinary suspension of these students violates their right to freedom of expression and assembly under the Leonard Law, which extends the protections of the First Amendment to the United States Constitution and the similar protections of Art. I, § 2 of the California Constitution to, inter alia, private colleges. The Leonard Law states, "No *private* postsecondary educational institution shall make or enforce a rule subjecting a student to

[1] Notably, not all recipients of the notice admitted to being present in the building during the protest. This inaccuracy as to a material fact is a key illustration of why issuing mass suspension notices is an inadequate substitute for holding individualized hearings.

disciplinary sanctions solely on the basis of conduct that is speech or other communication that … is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution."[2] This law was created to extend "full First Amendment rights to private high schools and colleges."[3] Further, a student may commence a civil action to obtain appropriate injunctive and declaratory relief for violations of this law.[4] California has chosen to elevate the right to speak freely as an affirmative right, even above the injunction against government suppression of speech that petitions the government.[5] There can be no debate as to whether this constitutional protection applies here.

Student protest has a long, storied history in the United States and is protected from particular types of punishment.[6] The landmark United States Supreme Court Case, *Tinker v. Des Moines*, upheld the fundamental right to freedom of expression for students who protested U.S. military imperialism in Vietnam.[7] Accordingly, students may not be punished "solely for engaging in speech," and speech that urges civil disobedience is fully protected by the First Amendment.[8]

Punishing a protester for the actions of others violates that protester's First Amendment rights. You have not provided any evidence showing that any of the students you suspended committed any act of violence or bodily harm, destruction of property, or intimidation. Instead, you have punished students based on a theory of guilt-by-association. This is unconstitutional.[9]

The Supreme Court of the United States has held that a protester may not be held personally responsible for someone else's violent act absent proof that they "directed, authorized, or ratified" those specific acts.[10] Four decades ago, in *NAACP v. Claiborne Hardware Co.*, white business owners brought suit against numerous defendants, including Charles Evers, an NAACP field secretary, who played a leadership role in organizing a civil rights boycott in Mississippi.[11] Evers made public speeches during the protests declaring that defectors from the boycott would have "their necks broken."[12] The Supreme Court held that despite Evers' highly charged rhetoric that pushed against the "bounds of protected speech," the First Amendment barred state courts from holding him liable for incidents of violence that some boycott enforcers

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[2] Cal. Educ. Code § 94367(a).
[3] Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1115 (1991–1992 Reg. Sess.) April 30, 1991, p. 4.
[4] Cal. Educ. Code § 94367(b).
[5] *See Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 366 (stating that Leonard Law is "broader and more protective than the free speech clause of the First Amendment.").
[6] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969); *Hess v. Indiana*, 414 U.S. 105, 108 (1973).
[7] *Tinker*, 393 U.S. at 511.
[8] *Yu v. University of La Verne*, 196 Cal.App.4th 779, 791 (2011); *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).
[9] *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 925 (1982).
[10] *Id*. at 927.
[11] *Id*. at 898.
[12] *Id*. at 894-895.

carried out without Evers' personal authorization, direction, or ratification.[13] As in *Claiborne*, here, too, there is no contention that any of the students personally authorized, directed, or ratified any of the alleged violent or unlawful acts you cite in the suspension notices. Here, you have not pointed to any rhetoric or act *committed by the suspended students themselves* that was unprotected speech.

The same free-association principles apply here as in *Claiborne.*[14] Just as it violated the First Amendment to punish Evers —despite his "emotionally charged rhetoric"[15]—for any unlawful actions that occurred at the boycott, here, too, the First Amendment and the Leonard Law bar you from punishing any individual student for any conduct which they did not participate in, direct, authorize, or ratify, that may have occurred at the October 7th protest.

In addition to *Claiborne*, cases like *Brandenburg v. Ohio, Hess v. Indiana,* and *Scales v. United States* prohibit liability or punishment for third-party wrongs—unless the punished party specifically intended to bring those wrongs about.[16] In *Brandenburg*, the Court held that a Ku Klux Klan leader's speech at a rally could not be punished because it did not "[incite] or [produce] imminent lawless action." [17] Thus, even directly advocating criminal conduct cannot be punished under the First Amendment unless the speech was both likely and intended to produce "imminent lawless action." [18] In *Hess v. Indiana*, an anti-war protest that began on the campus of Indiana University resulted in the blockage of a public street, where vehicles could not pass.[19] After the Sheriff arrived, Gregory Hess, a protest leader, was witnessed shouting, "We'll take the fucking street"—for which he was arrested.[20] The Court held that there was no evidence that Hess's words were intended or likely to produce "imminent disorder", and consequently, he could not be punished for them by the state.[21] In *Scales v. United States*, the Court held that even where an organization's goals included the violent overthrow of the United States Government, a member may not be penalized for his association absent proof they "specifically intend[ed]" to further the group's illegal ends.[22] The Court further explained in *Counterman v. Colorado* that specific intent is required to punish conduct during protests because "incitement to disorder is commonly a hair's breadth away from political 'advocacy'—and particularly from strong protests against the government and prevailing social order."[23]

This intent requirement has been cemented by multiple Supreme Court cases concerning protests to ensure that punishing fiery rhetoric will not result in chilling political speech at the

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[13] *Id*. at 928-29.
[14] *Id*. at 929.
[15] *Id*. at 928.
[16] *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Scales v. United States*, 367 U.S. 203 (1961).
[17] *Brandenburg*, 395 U.S. at 447.
[18] *Id*.
[19] *Hess v. Indiana*, 414 U.S. 105, 107, (1973)
[20] *Id*.
[21] *Id*. at 108-109.
[22] *See Scales*, 367 U.S. at 229; *Healy*, 408 U.S. at 185-86 (same for civil sanctions).
[23] *Counterman v. Colorado*, 600 U.S. 66, 81 (2023).

heart of First Amendment protection.[24] The Ninth Circuit recognized and applied *Claiborne* and the intent requirement in *Santopietro v. Howell*, a case affirming the right to freedom of association and expressions for "sexy cop" street performers in Las Vegas who the Court held were unlawfully arrested.[25] Further, the Supreme Court has affirmed that First Amendment protections do not "apply with less force on college campuses than in the community at large."[26] The Court has stated the *Brandenburg* standard—that only speech that incites or produces imminent lawless action is punishable—applies to the college and university setting.[27] Here, Pomona College has produced no evidence that any of the students intended to incite, or actually incited, imminent disorder or lawless action. Pomona College's punishment of student protestors is thus a violation of the First Amendment and consequently of the Leonard Law.

Your suspension letter claims that because the students allegedly entered the building with the protestors and stayed, they "negligently" "contributed to" the property damage, disruption, and vandalism that allegedly occurred. In 2024, United States Supreme Court Justice Sonia Sotomayor affirmed that negligence is not a valid legal basis upon which to punish speech.[28] Justice Sotomayor made this statement in an opinion denying a Petition for Writ of Certiorari in *Mckesson v. Doe*, a case in which a leader of a Black Lives Matter protest was sued under a negligence theory when an unidentified individual at the protest threw an object that hit a police officer in the face.[29] Justice Sotomayor referenced the notion that punishing protest leaders for negligence "would have enfeebled America's street-blocking civil rights movement."[30] Justice Sotomayor reiterated the Court's recent decision in *Counterman v. Colorado*—that an objective standard like negligence cannot be used to punish speech and that incitement cases instead demand a showing of intent.[31] The Ninth Circuit's adherence to *Claiborne*,[32] the related intent requirement cases upheld by the Supreme Court,[33] along with Justice Sotomayor's opinion in *Mckesson*,[34] convey that it remains unconstitutional to punish protestors for the actions of others, absent proof of intent to incite imminent lawless action. Consequently, your collective punishment of student protestors is based on a rejected theory of negligence.

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[24] *Id*.; *Hess*, 414 U.S. at 106; *Claiborne Hardware Co.*, 458 U.S. at 888, 928; *Brandenburg*, 395 U.S. at 447.
[25] *Santopietro v. Howell*, 73 F.4th 1016, 1025-28 (9th Cir. 2023)
[26] *Healy v. James,* 408 U.S. 169, 180 (1972).
[27] *Id*. (holding "the critical line heretofore drawn for determining the permissibility of regulation [on college campuses] is the line between mere advocacy and advocacy 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action").
[28] *Mckesson v. Doe*, 144 S. Ct. 913, 914, (2024).
[29] *Id*.
[30] *Id*., at 313 (citing 5th circuit dissent).
[31] *Id*.
[32] *Santopietro*, 3 F.4th 1025-28.
[33] *See Counterman v. Colorado*, 600 U.S. 66, 81 (2023); *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Hess v. Indiana*, 414 U.S. 105, 108 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Scales v. United States*, 367 U.S. 203 (1961).
[34] *Mckesson v. Doe*, 144 S. Ct. 913, (2024).

Ultimately, your disciplinary suspension notice is unlawful. Student anti-war protests are classic expressive conduct that is protected by the First Amendment.[35] Suspending the students for the entire year without any real opportunity to be heard or advisement of the evidence against them, based solely upon a misapplied theory of negligent contribution, undoubtedly has chilled, and will continue to chill, other students from participating in anti-war protests.[36] Further, the Supreme Court has made it clear in a line of cases following *Brandenburg*, that protestors cannot be punished for the actions of others, absent proof that they intended to incite, or actually did incite imminent lawless action. Since your notices present no evidence of incitement or intention to incite, your suspension notices violate the First Amendment and the Leonard Law.

Pomona College violated students' rights to Fair Procedure.

In California, some disciplinary decisions of private institutions are subject to the common law doctrine of Fair Procedure.[37] Courts in California have acknowledged that "[E]ducation is vital and...is an interest of almost incalculable value, especially to those students who have already enrolled in the institution and begun the pursuit of their college training."[38] In cases where this incalculable benefit is taken away and due to the serious nature of the alleged conduct, the student may find it "especially difficult — if not impossible — to complete a postsecondary education elsewhere, thwarting the student's ability to realize 'the economic and professional benefits flowing' from a college degree."[39] In these situations, the requirements of the doctrine of fair procedure must apply.[40]

In *Boermaster v. Carry*, a student was expelled on the grounds of alleged intimate partner violence. The stigmatizing reason for the punishment, as well as the harshness of it, was found sufficient to necessitate the application of fair procedure. Here, students are suspended for most of the academic year and delayed a full year in graduating, based on their 'negligent' participation in a protest. The notices insinuate (albeit without evidence and under an unlawful guilt-by-association theory) that the students were somehow involved in significant property damage and bodily harm to an individual. The seriousness of these allegations and the College's failure to engage in any fair procedure presents a clear hindrance to the students being able to pursue their education, at Pomona or elsewhere, if they want to continue to progress toward their degrees. Therefore, they meet the criteria for having the fair procedure doctrine apply to their disciplinary processes.

While courts agree the fair procedure doctrine does not "compel formal proceedings with all the embellishments of a court trial [citation], nor adherence to a single mode of process,"[41]

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[35] *Tinker,* 393 U.S. at 8.
[36] *See generally*: *Pinard v. Clatskanie Sch. Dist. 6J,* 467 F.3d 755, 770 (9th Cir.2006).
[37] *Boermeester v. Carry*, 15 Cal. 5th 72, 89, 532 P.3d 1084, 1094 (2023).
[38] *Id*. (internal citations omitted).
[39] *Id*. (internal citations omitted).
[40] *Id.*
[41] *Pinsker II*, at p. 555, 116 Cal.Rptr. 245, 526 P.2d 253.

the procedure must afford adequate notice of the charges and a meaningful opportunity to be heard.[42] But here, the students were not told what they were specifically accused of or provided with the evidence against them prior to having to present their appeal. In *Cason v. Glass Bottle Blowers Ass'n*, the fair procedure doctrine was *not* met where the plaintiff was not permitted to hear or review their accuser's testimony or to refute that testimony, nor was he allowed to examine the written evidence submitted against him. Similarly, here, the students were not provided with any notice or evidence of their individual conduct before having to present a defense. Their notices simply stated – in some cases incorrectly – that they each "admitted to being present." The college appears to be both denying the students access to the evidence against them and placing the burden on the students to provide evidence that might prove their innocence.[43] This is a reversal of the basic tenet of due process in school disciplinary cases, which states that a school may not punish a student without providing evidence of their misconduct.[44] Although fair procedure is not identical to due process and may be more flexible in its requirements,[45] the core requirement of providing *evidence* of the accused's guilt is encompassed in the concept of fair process.[46]

Typically, an opportunity to be heard means having a hearing of some kind. In discussing the sufficiency of the procedure afforded in *Boermeester*, which included access to evidence against the plaintiff *and* a hearing, the California Supreme Court specifically noted that it was "not a case in which the accused student was given *no* hearing at all." The Court stated that they were refraining from opining "on *whether* and under what circumstances a private university might properly choose to refrain from providing an accused student with a hearing that gives the accused student the opportunity to respond to the evidence before the university's adjudicators."[47] Under the circumstances here—where the penalty imposed is severe, and there is no particular exigency involved because the students had *already been barred from campus pending their scheduled hearings*, it seems unlikely that this decision to vacate Pomona's standard disciplinary process and instead institute a permanent and unilateral ban would fall into any exception to the general rule that a hearing is required.[48] Doing so at this stage can be for no

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[42] *Boermeester* (internal citations omitted)
[43] *Cason* at pp. 144–145, 231 P.2d 6.
[44] *Goss v. Lopez*, 419 U.S. 565, 581, 95 S. Ct. 729, 739–40, 42 L. Ed. 2d 725 (1975).
[45] *Boermeester v. Carry*, 15 Cal. 5th 72, 87 (2023).
[46] *See Doe v. Occidental Coll.*, 40 Cal. App. 5th 208, 222(2019) (fair process generally requires at "at minimum" that "[t]he accused must be permitted to respond to the evidence against him or her" before a college may discipline the student) (citation and internal quotation marks omitted).
[47] *Id.* (emphasis added).
[48] The Pomona College Speech code states that any student who engages in unprotected speech "may be invited to have a conversation with any of the involved parties to further understand the details of the event." Further it states, "If, during these conversations, the College determines that the speech" is "unprotected…and would constitute a violation of the Student Code subject to a disciplinary response" then "the College may choose to pursue disciplinary action." By failing to offer a "conversation" to the students before taking disciplinary action, the College may have failed to adhere to its own Speech Code. Further, it is evident that the college code contemplates a multi-step process before formal disciplinary action is to be initiated. By unilaterally suspending the student protestors, Pomona College may have also violated the students' right to due process.

other reason than to send a message and intimidate other students from engaging in future protests.

Pomona College has caused immediate and irreparable harm to all students who have received disciplinary suspensions.

These suspensions incur significant harm to these students and constitute a major disruption to their lives and pursuit of their college degrees. Overnight, these students were forced to contend with a loss of their housing, meal plan, access to medical resources, including mental health care, income from various on-campus jobs, loss of their support networks and community, and a full year delay in progressing toward graduation. These students, who are disproportionately low-income, BIPOC, and members of other marginalized identities, have already suffered greatly as a result. For some students, whose families are counting on their ability to earn income, the year-long suspension may even prevent them from completing a college degree altogether.

In addition to the potential legal violations Pomona College has committed here, there is currently an open investigation as to whether the College has violated Title VI of the Civil Rights Act of 1964 and its implementing regulations, through its alleged discriminatory treatment of "Arab, Palestinian, Southwest Asian and North African (SWANA), and Muslim shared ancestry."[49] These draconian disciplinary suspensions further contribute to the hostile environment originally described in the civil rights complaint made by the students.

The Supreme Court emphasized that the civil rights boycott in *Claiborne* "included elements of criminality and elements of majesty"–just like the October 7 protest at Pomona College.[50] The Court affirmed the importance of protest in the American political process and the importance of freedom of association "in guaranteeing the right of people to make their voices heard on public issues."[51] In *Claiborne*, the Court explained that even if "the taint of violence" contributes to the success of a movement, it does not "color the entire collective effort."[52] The College should align its actions with the law and refrain from engaging in discipline that chills student speech, violates the First Amendment and the Leonard Law, and potentially ignores student due process rights. Here, you have attempted to use the taint of vandalism, disruption, and disturbance to severely punish students for their mere presence at the October 7 protest, in clear violation of their rights under the First Amendment and the Leonard Law and to a fair process. The College must revoke these disciplinary suspensions and immediately restore the related lost privileges to the student protestors.

We appreciate your prompt attention to this matter. We would appreciate a response no later than November 20, 2024, describing the steps you will take to conform the College's

[49] U.S. Dept. of Ed., Office of Civil Rights, Email to Zoha Khalili, (Aug. 6, 2024).
[50] *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).
[51] Id. at 907.
[52] Id. at 934.

actions to the law. If the College refuses to change course, we reserve the right to take any necessary legal action to vindicate the rights of the students. If you have any questions or would like to discuss this further, please do not hesitate to contact me via email at kanwalroops@asianlawcaucus.org or via telephone at 415-300-0853.

Sincerely,

Kanwalroop Kaur Singh
Staff Attorney
Asian Law Caucus

CC: Pomona College General Counsel