

May 14, 2013

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**RE: OCR Policies, Practices and Procedures That Are Violating the First Amendment
Speech Rights of College and University Students**

Dear Acting Assistant Secretary Galanter and Deputy Assistant Secretary Battle:

The undersigned civil rights organizations write to express our concerns regarding the misuse of Title VI of the Civil Rights Act of 1964 to interfere with the speech rights of college and university students. In particular, a series of pending investigations by the Department of Education's (DOE) Office for Civil Rights (OCR) has brought to light some deficiencies in OCR policy, practice and procedure. We believe these concerns may be remedied with input from civil rights organizations and affected student groups, and therefore respectfully ask to meet with your department to discuss these matters in further detail. This letter provides an overview of these issues.

First, we are concerned that OCR policies are being used by outside groups to stifle student speech about contentious political issues on the basis of its content. Specifically, in a number of Title VI complaints filed with OCR, speech that advocates for Palestinian human rights has been mislabeled as anti-Semitic. This gross mischaracterization has led to intrusive, selective scrutiny of this speech by university administrators and federal agencies alike, particularly when the speech originates from Arab or Muslim student groups.

Second, the investigations into such complaints by DOE regional field offices have been plagued by a number of practices that contribute to the unconstitutional chilling of student speech, also most often when that speech emanates from Arab or Muslim students. Most concerning are the overlong delays in such investigations, which in some cases have carried on for years, well beyond the OCR's internal benchmark of 180 days.

Third, OCR procedure does not appear to allow students most affected by these Title VI complaints and investigations an opportunity to participate in the process. While this may not seem troubling in contexts the OCR has historically dealt with, it is problematic where one group of students is alleging that the constitutionally protected speech of another group violates Title VI. Each of these points is taken up in turn below.

OCR Policies Are Being Used to Quash Student Speech

The OCR is charged with enforcing Title VI of the Civil Rights Act of 1964, which *inter alia* prohibits educational institutions that receive federal financial assistance from discriminating against people based on their race, color or national origin. The purpose of Title VI is to ensure that “indirect” discrimination by the federal government – in the form of the allocation of government funds to discriminatory entities – does not occur.¹

What Title VI was clearly *not* intended to do is suppress student speech. Indeed, the OCR has made it clear that its investigations are not intended to, and ought not to, censor or limit constitutionally protected speech and expressive activity.² Nonetheless, this is frequently the manner in which this statute is currently being misused in attempts to suppress speech that advocates for Palestinian human rights.

In 2004, the OCR announced its willingness to investigate allegations of discrimination against groups that share ethnic characteristics, regardless of whether the groups also exhibit religious characteristics, such as Jewish, Muslim, and Sikh students.³ This policy shift was reiterated in a 2010 “Dear Colleague” letter, which stated that the OCR would henceforth investigate Title VI discrimination claims brought by members of religious groups, if the alleged discrimination is based on the group’s shared ancestry or ethnic characteristics.⁴

The OCR and the DOE as a whole certainly have a duty to investigate all legitimate claims of civil rights violations. We applaud the use of Title VI to combat actual cases of anti-Semitism on campuses, just as we would applaud its enforcement in cases of Islamophobia. We are concerned, however, that the department’s policies are being exploited by outside groups to violate the civil rights of the very students the DOE is charged with protecting. The numerous complaints and continued threats of complaints rooted in the policy shift have resulted in universities increasing pressure on students advocating for Palestinian rights, often applying campus rules unequally and obstructing their activities to avoid accusations that the university is enabling an anti-Semitic environment by allowing students to express their views.

¹ 110 Cong. Rec. 6544 (Statement of Sen. Humphrey).

² Dear Colleague Letter from Ass’t Sec’y, “First Amendment” (July 28, 2003), *available at* <http://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

³ Letter from Kenneth L. Marcus, Deputy Ass’t Sec’y for Enforcement, to Colleague, “Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004), *available at* <http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>.

⁴ Letter from Russlynn Ali, Ass’t Sec’y for Civil Rights, to Colleague, *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

Indeed, these shifts and the complaints we refer to did not occur in a vacuum. They were the product of years of lobbying efforts by groups who vigorously oppose the message of student groups such as Students for Justice in Palestine and Muslim Student Unions/Associations that exist on many campuses. These lobby groups pushed for the new policies to further their goals of limiting speech on campuses that is critical of Israel,⁵ and they have since utilized them to file complaints against a number of universities, alleging that constitutionally protected speech on one of today's most important and contentious topics – the Israel-Palestine debate – is anti-Semitic if it involves criticism of Israeli government policies.⁶

Ironically, although these policies were characterized as protecting Muslims and Sikhs in addition to Jewish students, there was virtually no Muslim or Sikh representation during the process of crafting them,⁷ and they have in fact led to increased scrutiny and suppression of speech by Muslim and other students that advocate for Palestinian rights.

Overlong Investigations Are Leading to a Chilling of Speech

All OCR investigations of activity related to pro-Palestinian speech that we are aware of have been open for exceedingly long periods of time, in most cases, for years. Several investigations currently open at OCR's San Francisco office are illustrative. It currently has three pending investigations into political speech critical of the Israeli government as allegedly anti-Semitic. The manner in which these investigations are proceeding and the extreme length of their pendency are causing a profound chilling of student speech.⁸

The three investigations of concern here are those at the University of California (UC) Irvine, Santa Cruz and Berkeley. The investigation of UC Irvine began in 2004 and remained open for three years before its dismissal in 2007. A largely similar investigation was then opened in 2008, which remains open today.⁹ The UC Santa Cruz investigation began with a 2009 complaint that alleged *inter alia* that university-sponsored events critical of Israel had created an

⁵ See e.g. Zionist Organization of America press release, "After Six-Year ZOA Campaign, the U.S. Dep't of Education Announces it Will Protect Jewish Students from Anti-Semitic Harassment Under Title VI," Oct. 26, 2010, available at <http://zoa.org/2010/10/102797-after-six-year-zoa-campaign-the-u-s-department-of-education-announces-it-will-protect-jewish-students-from-anti-semitic-harassment-under-title-vi/>.

⁶ This argument is illogical. Criticism of Israeli state policy is political speech; conflating all such speech with anti-Semitism would be akin to labeling all speech critical of the Iranian government as anti-Muslim.

⁷ While these lobbying groups' perspectives on the threat of campus anti-Semitism, defined to include criticism of Israel, helped to frame the policy change, students and student groups whose speech and expressive rights have been most impacted by the changes were neither consulted nor given an opportunity to provide input.

⁸ See Letter from Alan L. Schlosser, Northern California ACLU Legal Director, to Gemini McCasland, "Re: Case No. 09-12-2259," Dec. 10, 2012 (included as Attachment 1) [hereinafter "Attachment 1"].

⁹ See Zionist Organization of America Press Release, "Federal Government Initiates New Investigation into UC Irvine's Response to Campus Anti-Semitism," June 6, 2008, available at http://www.zoa.org/sitedocuments/pressrelease_view.asp?pressreleaseID=651.

“emotionally and intellectually hostile environment” for Jewish students.¹⁰ It was opened in March 2011 and is still pending to this day, with no explanation offered as to why.

Finally, the investigation at UC Berkeley began with a lawsuit¹¹ which alleged that the speech and expressive activities of two student groups – Berkeley’s Students for Justice in Palestine and Muslim Student Association – created a hostile environment for Jewish students because of the groups’ criticisms of Israel. In dismissing the original complaint, the presiding judge stated that “a very substantial portion” of the alleged misconduct was pure political speech and expressive conduct, entitled to special protection under the Constitution.¹² The complainants nonetheless amended their complaint, which eventually ended in a benign settlement for the university.¹³

On July 9, 2012, the same day that the complainants signed the settlement agreement, they filed a Title VI complaint with the OCR. This complaint contains facts and legal claims largely identical to allegations that the court had just dismissed. Furthermore, nowhere does the complaint allege that any unlawful harassment occurred during the 180-day period prior to the complaint’s filing that the OCR has jurisdiction to investigate. The San Francisco office nonetheless opened an investigation in response to the complaint, and it remains open to this day.

The harm done by the mere pendency of these and other similar investigations is significant and ongoing. The courts have long recognized that even government scrutiny – let alone full-blown investigations such as those at issue here – has a marked potential to chill speech and other expressive activities.¹⁴ We are particularly concerned about this as numerous, serious examples of the chilling of students’ First Amendment speech and association rights have already been reported.¹⁵ Furthermore, the overlong pendency of these investigations also violates US obligations under the International Covenant on Civil and Political Rights (ICCPR), which guarantees the right to freedom of expression. On March 18 and 19 of this year, we met with representatives of the United Nations Human Rights Committee – which is tasked with ensuring US compliance with the ICCPR – in Geneva, Switzerland, to discuss the role of DOE investigations in the chilling of student speech.

The excessive pendency of these investigations also conflicts with OCR policy, which aims to complete investigations within 180 days. The investigations in all three of the examples discussed above go far beyond that internal benchmark, with no explanation or justification

¹⁰ See Tammi Rossman-Benjamin, “Why I Filed a Title VI Complaint,” Jewish Daily Forward, Feb. 08, 2012, available at <http://forward.com/articles/150968/why-i-filed-title-vi-complaint/>.

¹¹ *Felber v. Regents of the University of California* (N.D. Cal. CV-11-1012-RS (Mar. 4, 2011)).

¹² *Felber v. Yudof*, 851 F.Supp.2d 1182, 1188 (N.D. Cal. 2011) (emphasis added).

¹³ The settlement was “benign” for the university because it did not change university policy or in any way limit the activities of the two student groups at issue in the complaint. The university was merely obliged to *consider* changes to two campus policies, with no obligation to actually alter them; in return, the complainants were obliged to dismiss their complaint without any compensation or return of legal fees. Settlement Agreement, *Felber v. Yudof*, No. 3:11-CV-01012 (N.D. Cal. Mar. 4, 2011).

¹⁴ See e.g. *Sweezy v. New Hampshire*, 354 U.S. 234, 248 (1957). See also Attachment 1, supra note 2 at 6.

¹⁵ See Declaration of Elizabeth Jackson (included as Attachment 2); Declaration of Emiliano Raphael Huet-Vaughn (included as Attachment 3). See also Attachment 1, supra note 6.

offered as to why. While we understand that you may not be able to discuss the details of these investigations, we would like to meet with you to discuss these concerns in more detail, as well as ways in which OCR can alleviate the chilling impact these investigations are causing and remedy the other concerns raised in this letter.

Excluding Impacted Students from Investigations Implicating their Speech is Unsound Policy

A further concern is that OCR policies provide no mechanism for affected third-party participation or input into investigations of alleged Title VI violations. This likely has to do with the fact that the complaints discussed here bring unprecedented scenarios before the OCR. Although other complaints may bring allegations tangentially related to the activities of certain groups, few allege that an organization's legitimate First Amendment activity – such as advocacy for a particular political position critical of Israeli policies – itself creates a hostile climate in violation of Title VI. This is the case in all of the above-mentioned complaints. While the complaining party is included in the process, the student groups whose speech and activity is alleged to be discriminatory are excluded. We believe that this reality has led to an incomplete understanding at all levels of the OCR and the DOE more broadly – from investigators to policy-makers – about the nature of the student activism involved and the implications of these investigations.

Because these complaints raise unique situations, pitting the interests of two student groups against one another, we believe OCR has a greater burden to ensure that it has a full understanding of the wider context at play. As investigations proceed without outreach to the impacted student groups, those students' accounts, perspectives and evidence are not included in the OCR's analysis. We hope to meet with you to discuss the possibility of the development of an OCR policy for seeking the input of other parties when their rights are directly implicated by an investigation, or finding other ways to protect their interests.

DOE Headquarters Should Take Action to Ensure OCR Policies, Practices, and Procedures Do Not Stifle Students' Speech Rights

We fully support the DOE's obligation to vigorously defend the civil rights of students and to thoroughly investigate plausible claims of discrimination. We are alarmed, however, that seemingly politically motivated complaints have led to unwarranted investigations that are interfering with the First Amendment rights of students who advocate for Palestinian human rights. We believe this represents a profound misuse of Title VI and compromises the mission of the DOE, with particularly devastating consequences for already marginalized Arab, Muslim and Palestinian students.

We therefore respectfully request that the DOE take the following steps:

- Meet with impacted student groups and civil rights organizations to discuss the manner in which OCR policies and practices are impeding students' civil and constitutional rights;
- Publish a "Dear Colleague" letter addressed to university administrators that clearly states that student speech about political issues, including domestic and foreign

government policies and practices, is unequivocally protected by the First Amendment, and clarifies that advocacy for Palestinian human rights and criticism of Israeli government policies are not anti-Semitic;

- Direct OCR field offices not to investigate complaints where the facts alleged, even if true, constitute pure political speech or expressive activity;
- Work with the regional field offices with pending complaints such as those discussed above to expeditiously and fairly resolve them; and
- Adopt a mechanism whereby students or student organizations whose speech rights are directly implicated by a complaint are provided a chance to provide their input.

We thank you in advance for your prompt attention to these matters and look forward to working with you to ensure that the civil rights of all students are equally respected and defended. Please contact Christina Sinha at christinas@asianlawcaucus.org, or at (415) 848-7711 to discuss the possibility of a meeting with the Assistant Directors at the earliest practicable time.

Sincerely yours,

American-Arab Anti-Discrimination Committee
American Muslims for Palestine
Arab American Institute
Asian Law Caucus
Center for Constitutional Rights
Council on American-Islamic Relations - California
Jewish Voice for Peace
National Lawyers Guild

Attachments:

- 1. Letter to Office of Civil Rights San Francisco Division re Pending Title VI Investigations Leading to the Chilling of Student Speech.**
- 2. Letter from Alan L. Schlosser, Legal Director, ACLU, to Gemini McCasland.**
- 3. Declaration of Elizabeth Jackson.**
- 4. Declaration of Emiliano Raphael Huet-Vaughn.**
- 5. Issue Submission to United Nations Human Rights Committee on Violation of ICCPR Freedom of Expression.**

Attachment 1

May 13, 2013

Arthur Zeidman
Gemini McCasland
Office for Civil Rights, San Francisco Division
U.S. Department of Education
50 Beale Street, Suite 7200
San Francisco, CA 94105-1813

RE: Pending Title VI Investigations Leading to the Chilling of Student Speech

Dear Mr. Zeidman and Ms. McCasland:

We, the undersigned civil rights organizations, write to express our concerns regarding certain investigatory practices of the San Francisco division of the Office for Civil Rights (OCR), that are leading to the suppression of student speech rights. Specifically, we are concerned about the lengthy investigations at three University of California campuses, two of which have been ongoing for years and a third which was opened despite the fact that the claims at issue had just been settled in federal court. We are also concerned that the premise of these complaints – that speech critical of Israeli policies is necessarily anti-Semitic and harmful to Jewish students – is not only false, but may lead to constitutional and international law violations.

Firstly, we would like to state that we fully support the duty of OCR to vigorously defend the civil rights of students and to thoroughly investigate plausible claims of discrimination. We are concerned, however, that politically motivated complaints – specifically by those who seek to quell speech on campuses that is critical of Israeli policies – have been filed with your office. These investigations, which are detailed further below, are having the effect of chilling student speech. We therefore respectfully request to arrange a meeting between your office and civil rights groups and impacted student groups to more fully discuss our concerns and gain a better understanding of OCR's policies and practices in this regard. An overview of the concerns we wish to discuss with you follows.

Three Pending Investigations at the University of California are Chilling Student Speech

Three complaints filed against the University of California (UC) are based on the faulty premise that political speech and expressive activity critical of Israel constitute anti-Semitic harassment. All three are currently under investigation by your office; they are filed against UC Irvine, UC Santa Cruz and UC Berkeley. The investigation of UC Irvine began with a 2004 complaint alleging a climate of anti-Semitism; it remained open for three years before its dismissal in 2007. Notwithstanding this dismissal, and despite public statements from even pro-Israel Jewish student groups that the claims of anti-Semitism on the Irvine campus were greatly exaggerated, a largely similar investigation was opened in 2008. To the best of our knowledge, it remains open to this day.

The investigation at UC Santa Cruz began with a 2009 complaint that alleged *inter alia* that university-sponsored events critical of Israel had created an “emotionally and intellectually hostile environment” for Jewish students.¹ This investigation was opened in March 2011 and is still pending to this day.

Finally, the investigation at UC Berkeley began with a lawsuit² filed in 2011, which alleged that the speech and expressive activities of two student groups created a hostile environment for Jewish students because of the groups’ criticisms of Israeli state policy. In dismissing the original complaint (with leave to amend one claim), the judge stated:

“A very substantial portion of the conduct to which [the complainants] object represents *pure political speech and expressive conduct*, in a public setting, regarding matters of public concern, which is entitled to *special protection* under the First Amendment.”³

Despite this strong rebuff, the complainants amended their complaint. It added no relevant factual allegations, and the case ended in a benign settlement for the university.⁴ On July 9, 2012, the same day that the complainants signed the settlement agreement, they filed a Title VI complaint with your office. This OCR complaint contains alleged facts and legal claims largely identical to those that the court had just dismissed. Indeed, as the ACLU of Northern California wrote to you, “it is striking (and frankly shocking) that the [c]omplaint so extensively relies on protected political speech as evidence of actionable harassment.”⁵

Further, OCR has jurisdiction to investigate allegations of Title VI violations that occurred during a 180-day period prior to the filing of a complaint. Nowhere in the Berkeley OCR complaint does it allege that any unlawful harassment occurred during this time period. An investigation was nonetheless opened in response, and is still active.

We are concerned that these investigations are inadvertently contravening the purposes of Title VI, which prohibits educational institutions that receive federal financial assistance from discriminating against students based on their race, color, or national origin. This law was certainly *not* intended to suppress constitutionally protected speech, nor is it the mission or purpose of OCR to limit this type of protected speech. Quite the contrary, OCR has made it very clear that its investigations are not intended to, and ought not to, censor or limit protected speech and expressive activity. Indeed, in a First Amendment “Dear Colleague” letter released in 2003, the assistant secretary stated in no uncertain terms:

¹ See Tammi Rossman-Benjamin, “Why I Filed a Title VI Complaint,” Jewish Daily Forward, Feb. 08, 2012, available at <http://forward.com/articles/150968/why-i-filed-title-vi-complaint/>.

² *Felber v. Regents of the University of California* (N.D. Cal. CV-11-1012-RS (Mar. 4, 2011)).

³ *Felber v. Yudof*, 851 F.Supp.2d 1182, 1188 (N.D. Cal. 2011) (emphasis added).

⁴ The settlement was “benign” for the university because it did not change university policy or in any way limit the activities of the two student groups at issue in the complaint. The university was merely obliged to *consider* changes to two campus policies, with no obligation to actually alter them; in return, the complainants were obliged to dismiss their complaint without any compensation or return of legal fees. Settlement Agreement, *Felber v. Yudof*, No. 3:11-CV-01012 (N.D. Cal. Mar. 4, 2011).

⁵ Letter from Alan L. Schlosser, Northern California ACLU Legal Director, to Gemini McCasland, “Re: Case No. 09-12-2259,” Dec. 10, 2012.

OCR's regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution. ... [T]he statutes [OCR] enforces are intended to protect students from invidious discrimination, not to regulate the content of speech.⁶

This policy statement appears at odds with the investigation and overlong pendency of the three above-referenced complaints.

The Overlong Pendency of these Investigations is Chilling Student Speech

The investigations at two of these three universities have been open for years. This goes well beyond OCR's internal benchmark of completing investigations within 180 days, though no explanation has been offered as to why. This is not a matter of mere procedure; the harm done by the simple pendency of these investigations is significant and ongoing. The courts have long recognized that even government scrutiny – let alone full-blown investigations such as those at issue here – has a marked potential to chill speech and other expressive activities.⁷ The undersigned organizations have already received reports of numerous, egregious examples of the impermissible chilling of students' First Amendment speech and association rights.⁸ While there are many examples of this chilling that we can discuss with you when we meet, here are just a few examples:

- A graduate student active with one of the groups targeted by the lawsuit against UC Berkeley (Students for Justice in Palestine) was told by his adviser that his public status as a Palestinian rights activist would hinder his career.
- An Arab Muslim student stated that he declined to get involved with the second group targeted by the Berkeley lawsuit (the Muslim Student Association), for fear that it would jeopardize his chances of getting into graduate school.
- Pro-Palestinian students frequently express anxiety about being falsely branded as anti-Semites.
- Several students declined to have their names appear on declarations to OCR regarding the UC Berkeley complaint, for fear that they would be improperly smeared as anti-Semites or otherwise targeted.⁹

These lengthy investigations have implications for all students, not just those whose speech is targeted. Indefinitely continuing these investigations contributes to the chilling of one side of a debate of international significance, thereby depriving the “marketplace of ideas” of this robust discussion on one of the most important issues of the day. This has profoundly detrimental implications for democratic discourse in general; that this type of harm is being inadvertently effected by a governmental body tasked with protecting students' educational rights is especially

⁶ Dear Colleague Letter from Ass't Sec'y, “First Amendment” (July 28, 2003), *available at* <http://www2.ed.gov/about/offices/list/ocr/firstamend.html>.

⁷ *See e.g. Sweezy v. New Hampshire*, 354 U.S. 234, 248 (1957). *See also* Attachment 1, *supra* note 2 at 6.

⁸ *See* Declaration of Elizabeth Jackson (on file with author); Declaration of Emiliano Raphael Huet-Vaughn (on file with author). *See also* Schlosser Letter, *supra* note 5.

⁹ Letter from Center for Constitutional Rights et al. to Mark Yudof, U.C. President, “The UC's Responsibility to End the Chilling of Arab and Muslim Student Speech,” Dec. 3, 2012, *available at* http://www.ccrjustice.org/files/CCR_ltr_Edley-Yudof_11%2030_Final.pdf.

concerning. Furthermore, the pendency of these claims also violates US obligations under the International Covenant on Civil and Political Rights (ICCPR), which guarantees the right to freedom of expression. On March 18 and 19 of this year, we met with representatives of the United Nations Human Rights Committee, which is tasked with ensuring US compliance with ICCPR, in Geneva, Switzerland, to discuss the role of OCR investigations in the chilling of student speech.¹⁰

The OCR Should Expeditiously Conclude these Investigations and Meet with Stakeholders

The investigations at the University of California are causing a demonstrated chilling of student speech. The undersigned organizations therefore respectfully request that your office meet with us and impacted students, so that we may convey to your office in fuller detail the harms caused by these investigations, gain a better understanding of OCR's policies and practices in this regard and hopefully work together toward an expeditious resolution of these investigations. Please do not hesitate to contact Christina Sinha at christinas@asianlawcaucus.org, or at (415) 848-7711 regarding this matter. Thank you, and we very much look forward to your prompt response.

Sincerely yours,

American-Arab Anti-Discrimination Committee
American Muslims for Palestine
Asian Law Caucus
Center for Constitutional Rights
Council on American-Islamic Relations - California
Jewish Voice for Peace
National Lawyers Guild

Attachments:

1. Letter to Department of Education Headquarters re Title VI and Chilling of Student Speech.

¹⁰ See Issue Submission of Violation of ICCPR Freedom of Expression, *available at* http://www.ushrnetwork.org/sites/default/files/26._asian_law_caucus_and_coalition.pdf.

Attachment 2



December 10, 2012

Via U.S. Mail

Gemini McCasland
U.S. Department of Education
Office of Civil Rights
50 Beale Street, Suite 7200
San Francisco, CA 94105

Re: Case No. 09-12-2259

Dear Ms. McCasland:

I am writing on behalf of the American Civil Liberties Union of Northern California (ACLUNC) with respect to Case No. 09-12-2259, a matter currently under investigation by the Office of Civil Rights of the Department of Education. A Title VI complaint ("Complaint") was filed against the University of California, Berkeley by letter dated July 9, 2012, submitted (and made public) by attorneys Joel H. Siegal and Neal M. Sher. The Complaint alleges that Jewish students at the University were harassed and subjected to "a pervasive hostile environment" on the basis of their "shared ancestry or ethnic identity as Jews." (Complaint at p.1-2).

The basic principles of the ACLUNC are to protect and promote the freedoms of liberty and equality enshrined in the Constitution and cognate statutes. We believe it is particularly important that these constitutional values be vigilantly protected on college and university campuses. Towards that end, we whole-heartedly support the civil rights mission of OCR to investigate thoroughly and vigorously complaints that students are being discriminatorily harassed and subjected to a hostile environment because of their race, national origin or other traits expressly protected by the federal civil rights laws. We have often turned, or directed others, to OCR as the first line of defense of these civil rights in the educational setting.

The ACLUNC has an equal commitment to ensuring that the free speech principles of the First Amendment are preserved and allowed to thrive on college campuses, whose central purpose is the free exchange of ideas. We are well aware of how these two values – freedom of speech and equal educational opportunity – can seemingly conflict, and how difficult it is to resolve such controversies in a way that will preserve both values.

MICHELLE A. WELSH, CHAIRPERSON | DENNIS McNALLY, AJAY KRISHNAN, FARAH BRELVI, ALLEN ASCH, VICE CHAIRPERSONS | KENNETH SUGARMAN, SECRETARY/TREASURER
ABDI SOLTANI, EXECUTIVE DIRECTOR | KELLI EVANS, ASSOCIATE DIRECTOR | CHERI BRYANT, DEVELOPMENT DIRECTOR | SHAYNA GELENDER, ORGANIZING & COMMUNITY ENGAGEMENT DIRECTOR
LAURA SAPONARA, COMMUNICATIONS DIRECTOR | ALAN SCHLOSSER, LEGAL DIRECTOR | MARGARET C. CROSBY, ELIZABETH GILL, LINDA LYE, JULIA HARUMI MASS, MICHAEL RISHER, JORY STEELE, STAFF ATTORNEYS
PHYLLIDA BURLINGAME, ALLEN HOPPER, NATASHA MINSKER, NICOLE A. OZER, DIANA TATE VERMEIRE, POLICY DIRECTORS | STEPHEN V. BOMSE, GENERAL COUNSEL

The ACLUNC has been involved in the past in a number of instances in which similar claims have arisen as a result of the activities of pro-Palestinian and/or pro-Israeli student groups on campus. We have no organizational position or policy with respect to the Israeli-Palestine conflict or the respective views of these student groups. We know that these controversies can pose very hard cases, but this Complaint *on its face* raises constitutional red flags that are significant and alarming.

We are not in a position to address factual disputes that may exist with respect to this matter, and are not basing the views in this letter on any first-hand knowledge of the campus climate at UC Berkeley for Jewish students or for any other groups of students. However, the allegations of this Title VI complaint reflect either a profound misunderstanding of the First Amendment, or an attempt to persuade the government to use its power to restrict speech based on its content and political viewpoint. As the Supreme Court has declared: “[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.”¹ *This paramount constitutional message is consistently ignored by this Complaint.*

The current OCR investigation does not take place on a blank slate. As you know, the virtually identical facts and legal claims put forward in the Complaint were also raised by the same attorneys in a federal civil rights case, *Felber v. Yudof*. We are familiar with the pleadings and briefs in that case. On a motion to dismiss, the *Felber* court assumed that the facts pled were true, but dismissed the claims, including the Title VI claim. The Court found that “a very substantial portion of the conduct to which plaintiffs object represents pure political speech and expressive conduct, in a public setting, regarding matters of public concern, which is entitled to special protection under the First Amendment.”² Because we believe that the court’s decision was absolutely correct and constitutionally compelled, it is disturbing that this “substantial” amount of “pure political speech and expressive conduct” is again under government scrutiny, and will remain so for an indefinite period of time. Given the fragility of free speech rights, that is something that must be of concern to OCR in conducting this investigation, and in particular in its duration (as will be discussed more fully below)

The Complaint Targets Core Political Speech in Violation of Fundamental First Amendment Principles

In light of the centrality of the First Amendment’s presumption against content-discrimination and viewpoint discrimination, it is striking (and frankly shocking) that the

¹ *Police Dept. of Chicago v. Mosely*, 408 U.S. 92, 95(1972).

² *Felber v. Yudof*, 851 F. Supp.2d 1182, 1188 (N.D.Cal. 2011).

Complaint so extensively relies on protected political speech as evidence of actionable harassment. The Complaint is based on two premises that are legally unsupportable:

1. That speech and expressive conduct that expresses opposition to the policies and actions of the State of Israel or the ideals of Zionism are, in and of themselves, equivalent to anti-Semitism and “hate speech;” and
2. That the University (or OCR) can sanction or prohibit core political expression because its message may be deeply offensive, disturbing or even hateful to a particular group of students, in this case Jewish students.

As the Complaint plainly demonstrates, these premises, if accepted, can foster government restriction of speech based on content and viewpoint that *goes far beyond controlling legal precedent*.

The conflict between Israelis and Palestinians has been and remains today a dangerous and seemingly intractable international crisis. Thus, it is not surprising that this controversy has played itself out on college campuses in this country; in fact, it would be disturbing if it had not evoked student activism and heated controversy.

The Complaint is primarily directed against the annual “Apartheid Week” as exemplary of the conduct that constitutes the discriminatory harassment of Jewish students. During Apartheid Week, students associated with the Students for Justice in Palestine (SJP) and the Muslim Student Association (MSA) organize a mock checkpoint to simulate the checkpoints that are established in the West Bank by the Israeli military. According to public reports, students who are dressed as Israeli soldiers confront other students who portray Palestinians attempting to go through the checkpoint, and place them under arrest or restraint. Barbed wire is part of the mock checkpoint. In past years, passersby have been approached by the “Israeli soldiers” and asked for their papers. In past years, some of the “soldiers” have carried toy weapons. Significantly, the mock checkpoint takes place in Sproul Plaza, the quintessential public forum that is the historic center of free speech activity on campus.³

It is obvious from the signs that are part of the protest that the protestors intend to convey a political viewpoint about the Israeli occupation of the West Bank and Gaza – that it is discriminatory against Palestinians, and that it is unjust, coercive, oppressive. The Complaint attempts to transform Apartheid Week, and other similar expressive activities by these groups, into discriminatory harassment of Jewish students that has created a hostile environment that

³ We recognize that the Complaint includes allegations of an assault of a Jewish student, broken windows at the Hillel House, and plainly anti-Semitic graffiti (“Fuck the Jews”). While these are cause for legitimate civil rights concern, and OCR should certainly carefully consider the University’s response to these allegations, it should be kept in mind that they appear to be isolated incidents and/or carried out by unknown persons. They are not part of the expressive activities of the SJP and MSA, like Apartheid Week, which are the primary focus and concern of this Complaint.

interferes with their education. But even if some Jewish students, such as Ms. Felber and Mr. Maissy (the plaintiffs in *Felber*), feel that expressive activities such as Apartheid Week are “clearly racist and anti-Semitic” (Complaint at p.3), government or University action against such core speech activities would violate a number of fundamental First Amendment precepts:

1. Speech that criticizes the State of Israel and its policies and actions, or even questions its right to exist as a Jewish State in the region, cannot constitute the basis for government restriction or regulation. “[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”⁴ That this point of view is being heard by UC students on the Berkeley campus is a perfect example of the campus serving its highest purpose as the “the marketplace of ideas.”⁵ The Complaint’s own description of the “clear purpose” of Apartheid Week – “to delegitimize the existence of the State of Israel and to equate her system of government in South Africa between 1948 and 1993” (Complaint at p. 4) – underscores that this is speech that presents a political viewpoint and thus deserves the “special protection” afforded by the First Amendment. As the Court noted in *Felber* looking at the same allegations, the plaintiffs “appear to be attempting to draw an untenable line that would remove from protection signs and publications that are critical of Israel and supportive of Hamas and Hezbollah.” *Felber*, 851 F. Supp.2d at 1188.

2. The fact that Apartheid Week goes beyond a speech or a leaflet, and involves barbed wire and the depiction of Israeli soldiers using harsh and even coercive methods in their treatment of Palestinians, does not alter the constitutional calculus. This is expressive or symbolic conduct that is manifestly “imbued with elements of communication”⁶ and thus falls within the ambit of the First Amendment. That such expressive acts heighten and intensify the message, and may be outrageous or hateful to some, does not deprive them of constitutional protection.⁷ The First Amendment protects speech, no matter how offensive or disturbing it is to some people.⁸ In fact, First Amendment protections are most important when speakers take controversial or unpopular positions that might arouse strong feelings, passions, and hostility. There are no sacred cows when it comes to the First Amendment’s protection for political messages or viewpoints.⁹

⁴ *Connick v. Myers*, 461 U.S. 138, 145 (1983).

⁵ *Healy v. James*, 408 U.S. 169, 180-81 (1972).

⁶ *Spence v. Washington*, 418 U.S. 405, 409 (1974).

⁷ See, e.g., *Virginia v. Black*, 538 U.S. 343,365-66 (2003) (cross burning); *Texas v. Johnson*, 491 US 397, 414 (1989) (flag desecration); *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp 1200, 1203-1207 (D. Utah 1986) (construction and maintenance of shanties on university campus to protest apartheid in South Africa is constitutionally protected symbolic expression).

⁸ *Terminiello v. City of Chicago*, 337 US 1, 4(1949); *Cohen v. California*, 403 U.S. 15, 24-25 (1971).

⁹ In *Snyder v. Phelps*, 131 S.Ct. 1207, 1217 (2011), the Supreme Court concluded that the signs held by protestors at a funeral – which included messages such as “God Hates the USA/Thank God for 9/11” and “God Hates Fags” – were constitutionally protected speech on matters of “public concern”.

3. These fundamental free speech principles are entitled to “vigilant protection” in the university setting.¹⁰ The ACLUNC agrees that the government has a compelling interest in protecting students’ right to equal educational opportunity, and that this includes preventing students from being subjected to discriminatory harassment that creates a pervasive hostile academic environment. This principle –grounded in the Equal Protection guarantee – is as important to the ACLUNC as the First Amendment. While the two are not always easy to reconcile, the ACLUNC believes that the guiding principle when these values come into conflict must be that constitutionally protected speech cannot be the basis for university sanction unless it rises to the level of intentional harassment of specific persons on the basis of race, national origin, or one of the other protected categories. That some may perceive the message as deeply offensive or bigoted or hateful does not by itself transform speech into actionable harassment that can be the subject of University sanction or government restriction.¹¹

College Republicans at San Francisco State v. Reed, 523 F. Supp 2d 1005 (N.D. Cal 2007) is a case which bears a marked similarity to the instant case, except that in that case the expressive activity allegedly targeted the Muslim religion. As part of an “Anti-Terrorism” rally organized by the College Republicans at the central plaza of San Francisco State University, some members of the organization began stomping on mock versions of the flags of Hamas and Hezbollah, which they claimed were terrorist groups. Those flags incorporated the word “Allah,” in Arabic script. Some spectators became incensed at this act of stepping on the name of God; complaints were filed with the University. The resulting investigation¹² was followed by a successful facial First Amendment challenge to the University’s speech and conduct code.

In resolving the case, the court applied the three constitutional precepts discussed above:

The conduct on which the College Republicans engaged during their anti-terrorism rally was indisputably expressive. And the subjects about which plaintiffs sought to express their views are as central to First Amendment sensibilities as any could be. This was core political expression in a very public forum – indeed in one of the forums where First Amendment rights are to enjoy their greatest protection. Clearly the expressive conduct in issue here fired political passions and provoked intense debate. It even inspired a hostile newspaper article. The mode of communication that the plaintiffs chose was controversial. To many in the audience, it seemed

¹⁰ *Healy v. James*, 408 US at, 180-81.

¹¹ See Erwin Chemerinsky, *Unpleasant Speech on Campus, Even Hate Speech, Is a First Amendment Issue*, 17 Wm. & Mary Bill of Rts J. 765, 770 (2009).

¹² The College Republicans contacted the ACLUNC while this investigation was pending. We wrote to SFSU President Robert A. Corrigan that the “College Republicans intended to communicate an ‘anti-terrorist’ message by standing on Hamas and Hezbollah flags to express their condemnation of these groups and to do so in a forum where their message would be heard and understood by those attending the rally. The expressions of such political views are at the heart of First Amendment freedoms.”

disrespectful and offensive. But it is these characteristics that were critical to its effectiveness. A timid, tepid articulation of concern about terrorism likely would have been largely ignored – and certainly would not have provoked the discussion and debate that this rally precipitated.

Id. at 1019-20.

Prolonged Government or University Investigations Can Have a Chilling Effect on Protected Free Speech Activities

OCR has stated “in the clearest possible terms that OCR’s regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution.”¹³ However, it is important to underscore that expressive activities can be restricted and deterred by inaction as well as action. The courts have long recognized that government investigations and official scrutiny can itself under certain circumstances have a chilling effect on expressive activities, particularly when the activities are controversial and represent a minority point of view.¹⁴

Expressive activities like Apartheid Week organized by SJP and the MSA, two recognized student organizations, have been under official scrutiny at UC Berkeley since the *Felber* complaint was filed on February 4, 2011. Even though the court’s decision confirmed that Apartheid Week was core political speech, these same constitutionally protected activities are now the subject of another federal investigation – and one that is open-ended. Even students who feel strongly about these issues, and shared the views being expressed by the organizers of Apartheid Week, might have serious second thoughts about getting involved with next year’s Apartheid Week, or similar SJP and MSA activities, while there are pending charges that these activities are part of a federal law violation.

In view of the dismissal of virtually identical claims in *Felber*, and in view of the substantial amount of protected political speech that is the basis of this Complaint, this investigation should proceed expeditiously. A prolonged and protracted investigation could accomplish what the First Amendment is intended to prevent – deterring university students from engaging in the full range of expressive campus activities that are permitted and even encouraged by our constitutional system.

Our concerns in this regard are not hypothetical. OCR has been investigating allegations of an anti-Semitic educational environment at UC Santa Cruz since March 2011. That

¹³ Department of Education, Office of Civil Rights, “First Amendment Dear Colleague Letter” (July 28, 2003).

¹⁴ *Sweezy v. New Hampshire*, 354 U.S. 234, 248 (1957); *White v. Lee*, 227 F. 3d 1214, 1228-29 (9th Cir. 2000) (Eight month HUD investigation for violation of Fair Housing Act chilled First Amendment activities)

investigation is based on a 29-page complaint that almost exclusively references expressive activities and campus debate about the Israeli-Palestinian conflict. That such protected free speech activities have been part of an investigation for 20 months is disturbing in view of the chilling effect that it can have on students who want to join, or continue to participate in, similar political activities in the future. The possibility that students at UC Santa Cruz (and now UC Berkeley) may feel reluctant or deterred from engaging in such activities at this moment, when these issues have returned to the world's center stage, is troubling and should impel OCR to expedite the resolution of both investigations.

Very truly yours,



Alan L. Schlosser
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Attachment 3

Declaration of Elizabeth Jackson

Declaration of Elizabeth Jackson

I, Elizabeth Jackson, declare:

1. I respectfully make this declaration based on personal knowledge, except for any items stated on information and belief, which I am informed and believe are true. If called as a witness, I would competently testify to the facts set forth below.
2. I am a civil rights attorney working with the Center for Constitutional Rights, the National Lawyers Guild, the Asian Law Caucus, and Council on American-Islamic Relations San Francisco Bay Area Chapter to defend student speech rights. I am a graduate of UC Berkeley School of Law, Class of 2011. From January 2008 through May 2011, I was a member of University of California Students for Justice in Palestine (“Cal SJP”).
3. Since the filing of the complaint in *Felber v. Yudof* litigation in March 2011, and continuing into the recent announcement of a Title VI investigation, I have been actively monitoring the chilling effect on the political speech of Arab and Muslim students, and other students interested in Palestinian human rights. I have attended Cal SJP meetings, and have been in frequent conversations with students about their reputational interests and the effects of intimidation. The specific accounts of intimidation described below were all told to me in person or by email.
4. I submit this declaration on behalf of students from Cal SJP who desire to remain anonymous. They fear submitting documents in their name, or speaking publicly because they believe themselves to be vulnerable in a society and a campus climate that commonly conflates pro-Palestinian, or Muslim, with Muslim extremist (or “pro-terrorist” as the allegation was phrased in the *Felber* litigation). They are concerned about further federal investigations, their professional interests, and their personal reputations. Numerous students have told me they wish to share their direct experience of intimidation resulting from the *Felber* litigation and the Title VI investigation underway by the Department of Education Office of Civil Rights. Those students are not providing declarations at this time because they are intimidated from using their names.
5. I have direct knowledge that students fear speaking out publicly to defend their speech rights.
6. For example, a Palestinian student who is active with Cal SJP and the University of California Muslim Students Association (“Cal MSA”) co-authored a public statement by student groups and civil rights organizations concerning efforts to repress student speech critical of Israel. But he did not want to sign his name to the statement for fear of backlash. He asked me for advice about the risks of signing his name and decided he preferred to remain anonymous. Ironically, his letter addressed the chill on student speech.

Declaration of Elizabeth Jackson

7. Another student of Arab heritage told me she was afraid to sign the opinion pieces she authored which were published in the student newspaper. The pieces critiqued efforts to chill student speech. She told me she was afraid to sign her name for fear of backlash and intentionally misspelled her name to protect herself from smear.
8. Another student of Arab heritage told me she wrote a letter to the editor protesting the chilling of her speech about Palestinian rights but refused to give her full name. She told me she was concerned her family would be hurt for being associated with what she wrote.
9. Students told me that recently at a Cal SJP meeting, the group had trouble finding a volunteer willing to sign his or her name to the group's open letter to the student newspaper. The letter addressed the student paper's biased coverage of Cal SJP's effort to defend its speech rights. The students decided to sign the letter in Cal SJP's name.
10. I have direct knowledge that the students who speak out about Palestinian human rights face threats to their professional advancement. For example, one PhD student active with Cal SJP told me his professor told him his public status as a Palestinian rights activist would be detrimental to his career.
11. Muslim and Arab students at Berkeley Law are reluctant to join Law Students for Justice in Palestine because they fear their reputational interests are at risk if such membership is public.
12. A Palestinian student who is active with Cal SJP told me that when she asks other Palestinian students why they aren't involved with Cal SJP, they tell her that they "don't want to risk anything." Although more than twenty students participate actively in Cal SJP, there are only two or three Palestinian members.
13. A recent transfer student of Arab heritage told me her mother said not to get involved in Cal SJP. Her father told her "If you get involved in these things you won't be able to advance academically or professionally."
14. A European immigrant student active with Cal SJP told me that when she tried to discuss Palestinian rights with a friend who is also an immigrant student, her friend said something like, "You need to be careful where you say these things because there are people who disagree with you in high places. You should avoid it. It could affect your internship. I am also pro-Palestinian, but when I've said stuff like that to people in high places, it has affected my opportunities, so it's better not to bring it up."
15. The *Felber* litigation branded Cal SJP and Cal MSA activities as "pro-terrorist." I have direct knowledge that being branded "pro-terrorist" seriously impacts students' lives. For example, one former and one current Cal SJP member each asked me for advice related to their immigration status. The current Cal SJP student asked me for a

Declaration of Elizabeth Jackson

referral to an immigration attorney, fearing that her participation in Cal SJP and the allegation in the *Felber* litigation would jeopardize her citizenship application.

16. The former Cal SJP student has direct knowledge of many of the factual allegations in this Title VI complaint but was unwilling to submit a declaration in his name because he feared it would interfere with his VISA application.
17. I have direct knowledge that students fear expressing their political views regarding Israeli state policy because they are concerned about being falsely branded as anti-Semites. I have been witness to numerous student discussions about this issue at Cal SJP meetings, small group discussions, and in private. Students are concerned that basic facts about their political activities critical of state policy are repeatedly misrepresented. For example, accusations implying that Cal SJP students are responsible for swastikas appearing on campus, or that Cal SJP students dress as religious Jews are blatantly false accusations and yet oft repeated.
18. Students also express physical intimidation. Recently at an off campus political protest about Israel state policies, members of an Israel-aligned organization were there to counter-protest. Students from Cal SJP were taking part in the protest and felt physically threatened. When three onlookers from the street intervened to mediate, two counter-protestors from off campus Israel-aligned organizations pepper sprayed the three people who intervened. Cal SJP students who were present afterwards felt rattled and concerned for their safety. They expressed fear because the pepper-sprayers had taken video and so knew who the students were. The SJP students were also fearful because the pepper sprayers were eager to use violence.
19. Cal SJP students also describe intimidation by surveillance. Counter protestors from Israel-aligned organizations – both on campus and off campus organizations – frequently attend SJP events and take video. Cal SJP students told me they feel physically unsafe after being videoed at Cal SJP events because their identities as pro-Palestinian activists are known.
20. A former officer of Cal MSA last year also shared the following stories told to her recently of Cal MSA students not wanting to be involved with Cal MSA because of the speech environment on the Cal campus:
 - a. A Saudi international student rejected his nomination for Cal MSA board for fear that his student visa would be threatened by being associated in any way with Cal MSA.
 - b. A Muslim student of Arab descent informed that he would not get involved with Cal MSA, and in particular not get involved in Cal MSA's political activities, for fear that it would jeopardize his chances of getting into graduate school.

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- c. A Pakistani international student says he was told that he should not get involved in Cal MSA, because if he did, his VISA status would be threatened.
21. I have had extensive conversations with current and former members of Cal SJP, who were active in the checkpoint protests of 2009, 2010, and 2011. I myself was present at the checkpoint protests in 2010 and 2011. A current Cal SJP student describes the details of the 2012 protest in a declaration submitted concurrently with this declaration. On information and belief, based on my participation in Cal SJP and the conversations I have had with current and former members, the mock checkpoint protests in previous years were substantially similar to the 2012 protests.
22. No realistic looking weapons used in 2011, and participants in 2011 did not engage with non-participants except to hand them flyers, and answer questions and in engage in dialogue about important political issues on the Cal campus when approached by non-participants.
23. Fake plastic guns with orange tips were used at the beginning of the mock checkpoint protest in 2010. On information and belief, these were the same plastic toy guns with orange tips that were used in previous years. In 2010, the campus police asked the protestors to put the toy guns away. The protestors complied. For the remainder of the protest, students dressed as Israeli soldiers used black sticks instead of fake guns. Photos depicting the 2010 checkpoint protest, labeled Exhibits A – U are attached hereto.
24. For about one hour in 2010, student protestors engaged non-participants in the theater by stopping students to ask them for their I.D. This was done in an attempt to depict the actual conditions at Israeli military checkpoints. No Jewish students were targeted. No one ever asked a non-participating student if he or she was Jewish, nor did they ask about religion. Out of an abundance of caution, the students decided to stop the practice of engaging non-actors in the protest after about one hour in 2010, to prevent it being misconstrued.

I declare under penalty of perjury that the foregoing is true and correct and was executed this 17 day of October, 2012 at Berkeley, California.



Elizabeth Jackson

Attachment 4

Declaration of Emiliano Raphael Huet-Vaughn

Declaration of Emiliano Raphael Huet-Vaughn

I, Emiliano Raphael Huet-Vaughn, declare:

1. I respectfully submit this declaration to clarify the facts regarding the activity of University of California Students for Justice in Palestine ("Cal SJP") and the University of California Muslim Students Association ("Cal MSA") with regards to the mock checkpoint protest of 2012. I make this declaration based on personal knowledge. If called as a witness, I would competently testify to the facts set forth below.

2. I am a PhD student at the University of California Berkeley ("Cal") in the economics department.

3. I am a member of Cal SJP. I have been a member of Cal SJP since fall of 2009. I was an organizer of the 2012 Apartheid Week Checkpoint Protest ("2012 checkpoint protest"). I helped plan, implement and then attended the 2012 checkpoint protest.

4. Cal SJP's checkpoint protests are an educational, non-violent form of demonstration, aimed at educating the campus community about the everyday lives of Palestinians living under Israeli military occupation. The protests are not intended or created to intimidate or harass any members of the Cal community.

5. A video of the 2012 Checkpoint Protest taken by the student newspaper, the Daily Cal, shows how the protest was conducted: http://www.youtube.com/watch?feature=player_embedded&v=3q63T8OtTfE.

6. An article in the Daily Cal also covered the mock checkpoint event. The article may be found at <http://www.dailycal.org/2012/02/28/students-for-justice-in-palestine-holds-mock-military-checkpoint-event/>.

7. The 2012 checkpoint protest was held on February 28, 2012. The protest lasted for several hours in the middle of the day. Cal SJP staged the demonstration on Sproul Plaza to simulate the conditions at military checkpoints in occupied Palestinian territory. The theatrical performance attempted to show what it is like for Palestinian civilians trying to pass through Israeli military checkpoints. Students set up a fake checkpoint near Sather steps, holding a line of rope stretched between two students acting as soldiers. The line served as a visual buffer through which students acting as Palestinians could not pass. The total area obstructed by the protest was at most 25 feet, with ample room for anyone to pass by on either side of Sproul Plaza, itself at least 75 feet wide at this location. One student dressed as a soldier held one end

Declaration of Emiliano Raphael Huet-Vaughn

of the rope and held a sign saying "Palestinians line up here." Another student dressed as a soldier held the other end of the rope and a sign that said "others may pass freely." The actors posing as soldiers refused to allow the students posing as Palestinians to pass through the mock checkpoint. The soldier costumes consisted of camouflaged clothing, a helmet, and shirts labeled "IDF" for the Israeli Defense Forces.

8. The checkpoint protest was primarily planned and implemented by members of Cal SJP. Students from the Cal MSA participated as volunteers in the protest, as did other students concerned with Israel's human rights violations.

9. Attached hereto are photos of the 2012 mock checkpoint. Exhibit A is a photo from the 2012 mock checkpoint that depicts the rope wall through which students acting as Palestinians could not pass. Exhibit B is a photo from the 2012 mock checkpoint that depicts a student actor dressed as an Israeli soldier holding a sign that says "Palestinians Line Up Here." Exhibit C shows two photographs of a student actor dressed as an Israeli soldier holding a sign that says "Others May Pass Freely."

10. The 2012 mock checkpoint also involved a role-play in which the students acting as soldiers forced other students acting as Palestinian civilians to the ground (something well documented at actual Israeli checkpoints). Exhibit D, attached hereto, shows two photographs of student actors forcing other student actors to the ground and handcuffing them with rope.

11. In addition to the role-play, students carried signs and distributed flyers with statements about the unequal treatment of Palestinians and Israelis. A flyer that was distributed in 2012 is attached hereto as Exhibit E.

12. The students also set up several large boards off to the side, to simulate the border wall in the Palestinian territories, often called the "apartheid wall." The boards had graffiti and spray painted pictures similar to the graffiti and pictures spray painted on the actual border wall in the Palestinian territories. The boards displayed a picture of a real checkpoint in the Palestinian territories with Palestinians being detained by Israeli soldiers. They also showed pictures of Palestinian college students, with their names and information about who they are and how the occupation affects their ability to get an education. These pictures mimic the pictures of Cal students that appear on campus walkways, and they were meant to humanize Palestinians as people similar to Cal students. Attached hereto as Exhibit F are two photographs of the boards used to simulate the border wall in the 2012 mock checkpoint. Attached hereto as Exhibit G is a photograph of a Palestinian college student that was pasted to the mock border wall.

Declaration of Emiliano Raphael Huet-Vaughn

13. The Daily Cal video link provided in paragraph 5 also shows that a crowd of counter protesters gathered around the mock checkpoint. The counter protesters held signs denying the assertions made by Cal SJP. The counter protesters yelled at the SJP student actors. SJP leaders stressed to checkpoint participants in trainings conducted prior to the event that we should avoid at all costs engagement with any counter protesters. Though these counter protesters were very aggressive, the checkpoint participants exercised restraint and attempted to continue the simulation despite the frequent interruptions. At times, heated conversations about the substantive arguments concerning the political issues occurred, as is common on Sproul Plaza.

14. In advance of the 2012 checkpoint protest I gave all participants explicit instructions that the participants were only to interact and engage with designated participants during the checkpoint simulation, and that under no condition should non-participants be approached as part of the 2012 checkpoint protest other than to hand out informational flyers and answer questions that the non-participants might have.

15. I was present during the entire 2012 checkpoint protest. I was actively monitoring the 2012 checkpoint protest.

16. Not once during the entire 2012 checkpoint protest did I witness any of the Cal SJP or Cal MSA or other participants attempt to detain any of the non-participating persons. Nor did I witness any of the Cal SJP, Cal MSA, or other participants ask non-participating passersby to declare their religion or ethnicity. Mock checkpoint participants engaged with non-participating persons to hand them educational flyers about Israel's discrimination against Palestinians. After watching the political theater some non-participants approached the participants handing out flyers and in some instances student actors directly to ask about more about why the protest was being held. The participants took these opportunities to educate our Cal community members about the inequity of the checkpoints and asked them to take a flyer. The result was dialogue about important political issues on the Cal campus. The mock checkpoint participants also engaged with counter protesters to respond when the counter protesters swarmed the checkpoint and initiated verbal exchanges. The Daily Cal article whose link is provided in paragraph 6 confirms that non-participants were not compelled in any way to participate in the simulation.

17. During the entire 2012 checkpoint protest no realistic looking guns, nor any toy guns, were used at any point. As can be seen in the pictures and videos provided, student actors have nothing resembling a gun in their possession. One student actor used his crutch, like a gun, to point at other students acting as Palestinians. The student actor was injured and had the crutch

Declaration of Emiliano Raphael Huet-Vaughn

for medical purposes and used it as a pointing device on his own initiative. This is depicted in the photos in Exhibit D, referenced above at paragraph 10.

18. During the entire 2012 checkpoint protest, no student actor or anyone affiliated with Cal SJP or Cal MSA wore yarmulkes (skull caps) or fringed garments (tsizit). No one displayed religious insignia or orthodox apparel or other symbols associated with the Jewish faith in an attempt to represent the Jewish community for theatrical effect. As can be seen in the pictures and videos provided, student actors dressed only as Israeli soldiers, or as Palestinian civilians. To my knowledge, no one wore a Star of David. If any student actor or other Cal SJP member wore a Star of David during the checkpoint protest, it is because the student is Jewish and he or she normally wears a Star of David. Cal SJP has many members who are Jewish.

19. The Daily Cal article whose link is provided in paragraph 6 reported on the 2012 mock checkpoint and described the following props: “mounds of fake barbed wire and rope ... spray-painted cardboard walls ... students outfitted in olive-brown army uniforms, aviator sunglasses and plastic gas masks....” There is no mention of fake guns or religious garb because none were present.

20. Cal SJP has the following explicit anti-racism policy: “[W]e reject any form of hatred or discrimination against any religious, racial, or ethnic group. Our great strength lies in the great diversity of our membership. We welcome individuals of all ethnic and religious backgrounds to join in solidarity with the struggle for justice for all in Palestine.” This statement is presented prominently on Cal SJP’s website as a “Guiding Principle,” available at http://calsjp.org/?page_id=483. The anti-racism principle is also stated prominently on Cal SJP’s Facebook page, available at <https://www.facebook.com/groups/2200472824/members/>.

21. Cal SJP has stated explicitly and repeatedly that as an organization it condemns anti-Semitism. For example, at an event October 26, 2010, entitled “What Can American Academia Do to Realize Justice for Palestinians” (see, <http://www.mecaforpeace.org/events/berkeley-ca-what-can-american-academia-do-realize-justice-palestinians>), Cal SJP handed out a statement to audience members stating that it condemns all forms of racism including anti-Semitism. The handout is attached as Exhibit H. (This is the same event mentioned by the complainants in the Title VI complaint as an example of Cal SJP’s activity that allegedly endangers Jewish students).

22. I am active with Cal SJP because I embrace our opposition to all forms of racism, including the racism against Palestinian people, Islamophobia, and anti-Semitism. I oppose anti-

Declaration of Emiliano Raphael Huet-Vaughn

Jewish animus.

I declare under penalty of perjury that the foregoing is true and correct and was executed this 17th day of October, 2012 at Berkeley, California.

A handwritten signature in black ink, appearing to read "Emiliano Huet Vaughn", written over a horizontal line.

Emiliano Raphael Huet Vaughn

Attachment 5

**ICCPR ISSUE STATEMENT SUBMISSION:
THE MISUSE OF UNITED STATES LAW TO SILENCE PRO-PALESTINIAN STUDENTS' SPEECH
DECEMBER 17, 2012**

I. Reporting Organizations

This Issue Statement is being submitted by a coalition of five organizations: Asian Law Caucus,¹ American Muslims for Palestine,² Council on American Islamic Relations-San Francisco Bay Area,³ Center for Constitutional Rights,⁴ and National Lawyers Guild, International Committee.⁵

II. Summary of Issue

In recent years, pro-Israeli organizations and individuals have escalated what appears to be a coordinated campaign to silence the speech of individuals expressing pro-Palestinian viewpoints on college campuses.⁶ These efforts are part of a still broader trend, involving government surveillance of student groups,⁷ criminal prosecution of peaceful protestors,⁸ and

¹ ALC seeks to promote, advance, and represent the legal and civil rights of Asian Pacific Islander communities. As part of its mission, ALC challenges national laws, policies, and practices that lead to racial and religious profiling of African, Arab, Middle Eastern, Muslim, and South Asian communities in the United States. Though based in the state of California, it addresses these issues at a national level. See <http://www.asianlawcaucus.org/>.

² AMP's mission is to educate the public about the Palestine cause and the rights of self-determination, liberty, and justice. Through providing information, training, and networking with like-minded individuals and organizations that support peace, AMP aims to raise awareness of the issues pertaining to Palestine and its rich cultural heritage. See <http://www.ampalestine.org/>.

³ CAIR-SFBA is an office of CAIR, America's largest Muslim civil liberties and advocacy organization. Its mission is to enhance the understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote justice and mutual understanding. See <http://ca.cair.com/sfba/>.

⁴ CCR is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. CCR uses litigation proactively to advance the law in a positive direction, to empower poor communities and communities of color, to guarantee the rights of those with the fewest protections and least access to legal resources, to train the next generation of constitutional and human rights attorneys, and to strengthen the broader movement for constitutional and human rights.

⁵ NLG IC supports legal work around the world to the end that human rights shall be regarded as more sacred than property interests. NLG IC seeks to change U.S. foreign policy that threatens, rather than engages, or is based on a model of domination rather than respect. NLG IC provides assistance and solidarity to movements in the U.S. and abroad that work for social justice. See <http://www.nlginternational.org/>.

⁶ For a detailed description of some of the methods by which speech is being silenced at the University of California, one of the largest public university systems in the U.S., see Letter to University of California President Regarding the Chilling of Arab and Muslim Students' Speech, Dec. 03, 2012, available at <http://www.ccrjustice.org/update:-letter-university-of-california-president-advising-him-of-need-protect-protect-palestinian-s/> (hereinafter Letter to UC President). See also Fact Sheet: The Systematic Attempt to Shut Down Student Speech at the University of California, available at <http://ucsjp.posterous.com/fact-sheet-the-systematic-attempt-to-shut-dow> (hereinafter Fact Sheet).

⁷ There are numerous examples of the surveillance of Muslim student groups and pro-Palestinian student groups. See, e.g., Highlights of AP's Pulitzer Prize-winning probe into NYPD intelligence operations, available at <http://www.ap.org/media-center/nypd/investigation>.

⁸ The most notable example of this is the so-called "Irvine Eleven," a group of non-violent student protestors who briefly interrupted an Israeli political figure who was speaking at the students' campus, and who were singled out for criminal prosecution for their actions, despite the fact that such minor interruptions of political speeches is common practice across U.S. campuses. See generally <http://www.irvine11.com/>; Letter from Civil Rights Organizations

University stigmatization of Palestinian human rights activism, but are particularly alarming because they seek to use United States law designed to end discrimination – Title VI of the Civil Rights Act of 1964 (“Title VI”) – in a manner that singles out speech that is critical of Israel. One of the great dangers of these efforts is that they falsely equate speech critical of Israeli policies as inherently anti-Semitic.

Title VI prohibits universities that receive federal financial assistance (which represents most universities in the country) from discriminating against persons on the basis of race, color or national origin.⁹ It is an important law designed to protect racial and religious minorities from unequal treatment. The United States Department of Education (“DOE”), an agency of the U.S. federal government, is responsible for investigating valid complaints of Title VI violations by Universities.

We are deeply concerned that the DOE is using Title VI to investigate allegations of anti-Semitism on several campuses for activity that on its face only concerns purely political criticism of Israeli state policy by student groups that advocate for Palestinian human rights. Groups targeted by these investigations include the various chapters of Students for Justice in Palestine as well as the many Muslim Students Associations / Muslim Student Unions. These federal investigations are conducted in secret, without the input of the student groups whose speech is being mislabeled. As of December 2012, there are no less than four separate Title VI complaints being investigated by the DOE (a fifth¹⁰ was thrown out in 2012) that allege that speech critical of the state of Israel is anti-Semitic and creates a hostile environment for Jewish students; these complaints are against the University of California (“UC”) at Berkeley, UC Irvine, UC Santa Cruz, and Rutgers University. These government investigations have, as a consequence, significantly chilled the speech and expression of student groups who wish to draw attention to issues of major public concern.

The investigation at UC Berkeley is illustrative of the problematic and damaging nature of these investigations. The UC Berkeley investigation began as a lawsuit in federal court, when two students affiliated with a pro-Israel student group sued the university, claiming that advocacy on campus that criticized Israeli policies created an anti-Semitic environment for Jewish students; it was dismissed by the judge very early on. In dismissing the case,¹¹ the judge wrote that “a very substantial portion of the conduct to which [the complainants] object represents *pure political speech* and expressive conduct, in a public setting, regarding matters of public concern, which is entitled to special protection under the [U.S. Constitution].”¹² Despite the fact that a federal court had just ruled that that the activity being complained of was protected political speech, the DOE nonetheless opened a Title VI investigation upon the complainants’ request. This means that this instance of political expression will be subject to governmental

Condemning Recommended Suspension of U.C. Irvine’s Muslim Student Union, July 23, 2010, *available at* <http://archive.constantcontact.com/fs013/1103244704062/archive/1103583415011.html>.

⁹ 42 U.S.C. §§ 2000d *et seq.*

¹⁰ The investigation against Barnard College was thrown out for lack of evidence on January 11, 2012.

¹¹ After dismissing the case, the judge gave the complainants an opportunity to change and resubmit their complaint, which they did. At that point, the complainants and the university entered into a largely symbolic settlement; the complainants agreed to drop the lawsuit in exchange for the university considering clarifying two of its existing policies, with no obligation on the university to actually change those policies. *See* Fact Sheet, *supra* note 6, at 1.

¹² *Felber v. Yudof*, 851 F. Supp. 2d 1182, 1188 (N.D. Cal. 2011) (emphasis added).

scrutiny a second time, for an indeterminate length of time. As U.S. courts have long recognized, this type of governmental scrutiny can lead to the chilling of speech and other expressive activity.¹³ The chilling and other negative repercussions of this intentional and continuous attack on speech critical of Israeli policy can already be seen. For example, many students have reported that they deliberately stay silent on this issue for fear of reprisals, harassment, immigration consequences, criminal investigations into their activities, being labeled anti-Semitic, or other stigmatization.¹⁴

At the same time, the DOE has failed to resolve pending investigations at other college campuses expeditiously, apparently drawing them out despite the demonstrated harm such investigations are having on the targeted students.¹⁵ The complaint against UC Irvine was filed in October 2004 and was not dismissed by the DOE until three years later; a similar investigation was then opened in April 2008.¹⁶ The investigation against UC Santa Cruz¹⁷ has been pending since March 2011, and the investigation against Rutgers¹⁸ has been open since October 2011. Many of these investigations have been going on for years, and thus affect a significant portion of students' time at these institutions. The indefinite duration of these investigations as well as their marked lack of transparency prolongs and intensifies the chilling of speech and expression by students whose political viewpoints are targeted by these investigations.¹⁹

III. Prior Concluding Observations and U.S. Government Reports

The U.S. has not addressed this specific issue in its December 2011 report or any previous reports, nor have there been any prior recommendations by the Committee. However, the Committee's General Comment No. 34, discussed in Section V, details at length the importance of the rights implicated by this issue.

¹³ *Sweezy v. New Hampshire*, 354 U.S. 234, 248 (1957).

¹⁴ See Letter to UC President, *supra* note 6, at 10-12.

¹⁵ *Id.*

¹⁶ The investigation against UC Irvine alleged that campus administrators had failed to adequately address incidents of anti-Semitism and that the campus environment was hostile to Jewish students, even though these allegations were refuted by many of the campus' Jewish students. See generally Saul Elbein, *Who Speaks for Jewish Students at UC Irvine?*, New Voices, May 2008, available at <http://cosmos.ucc.ie/cs1064/jabowen/IPSC/php/art.php?aid=137669>.

¹⁷ The Title VI complaint against UC Santa Cruz was opened in March 2011. It was filed by a Hebrew lecturer who claimed *inter alia* that university sponsored events critical of Israeli policies created an "emotionally and intellectually hostile environment" for UCSC Jewish students. See <http://mondoweiss.net/2011/03/dept-of-education-opens-investigation-into-anti-semitism-at-uc-santa-cruz-following-events-protesting-the-occupation.html>. It stated specifically that "Pulse on Palestine" and "Understanding Gaza" are two recent examples of University sponsored Israel bashing, which has had the effect of creating an emotionally and intellectually hostile environment for Jewish students at UCSC."

¹⁸ The Rutgers investigation has been open since October 2011 in response to a complaint alleging that the university had failed to adequately respond to complaints of anti-Semitism. See *Rutgers University Anti-Semitism Allegation Investigated by U.S. Department of Education*, Huffington Post, Dec. 2, 2011, available at http://www.huffingtonpost.com/2011/12/02/department-of-education-investigates-rutgers-for-anti-semitism_n_1125898.html.

¹⁹ For a general overview of these investigations, see Naomi Zeveloff, *Coming Up Empty on Title VI: Little Success in Applying Civil Rights Law to Anti-Israel Activity*, Jewish Forward, Mar. 13, 2012, available at <http://forward.com/articles/152691/coming-up-empty-on-title-vi/?p=all>.

IV. Legal Framework

Article 19 of the ICCPR relates directly to this issue. It states in relevant part:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

As pointed out in General Comment No. 34,²⁰ actions by any branch of the State, including all public or governmental authorities of all levels, can implicate the responsibility of the State party with respect to the ICCPR. Thus, the U.S. is responsible for the actions of the DOE, and is required to provide adequate remedies to prevent violations of Article 19.

V. Human Rights Committee General Comments

General Comment No. 34 discusses the importance of Article 19, and points to the broad scope of the rights ensured by it, in the interest of preserving free and democratic societies.²¹ It also specifically states that Article 19's freedom of expression provision includes political discourse discussions of human rights, which undeniably encompasses the speech at issue.

VI. Recommended Questions

We recommend that the Committee pose the following questions to the U.S.:

1. How will you ensure that federal agencies, such as the U.S. Department of Education, do not use Title VI to conduct investigations that are based on the false premise that political speech critical of Israeli policies is racist speech, or prolong investigations unnecessarily?
2. What steps will you take to ensure that the pending Department of Education complaints that threaten student speech rights are expeditiously resolved?
3. How will you mitigate the harm already done, and the harm currently being done, to students across the country, whose speech rights continue to be chilled or otherwise adversely impacted by the DOE's investigations?
4. More broadly, how will you ensure that Title VI and other federal laws are not misused in a manner that runs afoul of Article 19's freedom of opinion and freedom of expression provisions?

²⁰ HRC Gen'l Comments, 102nd Sess., U.N. Doc. CCPR/C/GC/34 (July 11-29, 2011) at 2, *available at* <http://www2.ohchr.org/english/bodies/hrc/comments.htm> (hereinafter GC/34).

²¹ GC/34, *supra* note 20.