



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.

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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,



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