Via Email

March 2, 2015

Nagi Naganathan
President, University of Toledo
Main Campus
University Hall
Toledo, OH 43606-3390

Re: Divestment Vote at University of Toledo

Dear President Naganathan:

We at Palestine Solidarity Legal Support and the Center for Constitutional Rights are writing to express our serious concerns with respect to the University of Toledo's decision to restrict attendance, segregate students and ultimately cancel the vote at a February 17, 2015 hearing on a resolution to divest from companies profiting from Israel's occupation. These actions appear to have been taken based on the viewpoint of the message and threaten to chill student speech on campus. We urge you to ensure that the University of Toledo meets its legal obligations under the First Amendment and Ohio's Open Meetings Act and make certain that students' political expression is protected.

The following is our understanding of the facts:

On February 16, Students for Justice in Palestine (SJP) submitted a resolution to the Student Senate calling on the University of Toledo to divest from four companies that "provide direct support for and directly profit from Israel's illegal occupation of Palestinian territories and violations of international human rights law." The Student Senate hearing on Resolution 4xxx-R-02175 was scheduled to take place on February 17, 2015.

On Sunday, February 15, Student Body President Clayton M. Notestine sent an email to five members of SJP, the Chief Executive Officer of the Jewish Federation of Toledo, Joel Marcovitch, the Director of the Jewish Federation of Toledo, Elizabeth Lane, cc'ing the Student Body Vice-President, a student senator and two student journalists. In his email, Notestine stated that: "Due to circumstances of the upcoming meeting we'll be conducting a special session to accommodate the divestment legislation" and that the Student Senate would be limiting the number of "guests" to those who received this email. Notestine also wrote:

> Some universities lose control because they allow guests who don't represent the student organizations to protest or speak during meetings . . . Steering understands that by inviting only two organizations (Student for Justice in Palestine and Toledo Hillel) we implied this issue is a religious one. Your two organizations contacted us prior to presentation and we made a hard decision to either create the implication or risk filling the room with students unaccountable for their behavior who the UT administration would count as one in broad strokes like at UC Berkeley.

Notestine went on to explain that each organization would be permitted five representatives, that neither organization would be allowed in the room while the other organization was speaking, that guests were permitted to bring a one-sided sheet of paper to give to senators, that no additional handouts would be permitted and that these terms were "non-negotiable."

On Monday, February 16, President Notestine again wrote SJP, Joel Marcovitch and Elizabeth Lane, (again cc'ing the Student Body Vice-President, a student senator and the same two student journalists), stating that they decided "to limit the meeting to . . . people who are committed to the legislation and not religious, cultural or injustice [sic]" to avoid "increasing the chances for violent protest, talking over speakers, and putting stress on an already contentious issue."

The hearing took place on the evening of February 17, 2015, and was closed to the public. A half hour before the hearing, the Student Government met with the Jewish Federation of Toledo in a closed-door session on anti-Semitism. During the hearing, the University of Toledo forced students affiliated with SJP to sit in a separate room from Hillel students. The University prohibited both groups from listening to the other group's arguments. Just before the vote was to take place, the university's Student Judicial Council summarily declared that the vote was not allowed to go forward, calling the resolution "unconstitutional," "discriminatory," and "one-sided."[1]

1. The Limits the University of Toledo Imposed on SJP Violate the First Amendment

The University of Toledo's scrutiny and limitation of SJP's speech violates the First Amendment rights of SJP and must immediately cease. As you are no doubt aware, the First

[1] Nora Barrows-Friedman, *Students allege "travesty of justice" as Ohio university muzzles debate on Israel divestment*, ELECTRONIC INTIFADA, Feb. 19, 2015 at http://electronicintifada.net/blogs/nora-barrows-friedman/students-allege-travesty-justice-ohio-university-muzzles-debate-israel.

Amendment is binding on public colleges[2] and action taken by a student government may be attributed to the University itself.[3]

By explicitly targeting a particular viewpoint being expressed by SJP—one calling for justice and accountability for human rights violations—the University of Toledo's actions strike at the heart of the First Amendment.[4] The Supreme Court has long held that "[d]iscrimination against speech because of its message is presumed to be unconstitutional."[5] Students at public universities have the right to use university facilities on a non-discriminatory basis.[6] In other words, the University of Toledo may not cherry-pick who may be present at hearings, bar students from listening to other students' arguments, or force students with differing viewpoints to sit in separate rooms.[7] To do so casts exactly the type of "disapproval on particular

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[2] *See Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."); *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.").

[3] *See, e.g., Roman Catholic Found., UW-Madison, Inc. v. Regents of Univ. of Wisconsin Sys.*, 578 F. Supp. 2d 1121 (W.D. Wis. 2008) *aff'd sub nom. Badger Catholic, Inc. v. Walsh*, 620 F.3d 775 (7th Cir. 2010) (attributing viewpoint discriminatory decisions made by the Student Government to the university); *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988) (holding that a student government's decision not to fund a student group was attributable to the state, because such funding decisions could be appealed to the Vice Chancellor for Student Services); *Sellman v. Baruch Coll. of City Univ. of New York*, 482 F. Supp. 475 (S.D.N.Y. 1979) (finding that the actions of a student government at a public college could be attributed to the state because student government meetings were held on campus during hours set aside by the college for student activities, its branches were advised by faculty members, its constitution was required to be compatible with the Board of Higher Education, the Dean of Students was a final arbiter of election disputes and it received money from mandatory student fees collected by the college).

[4] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.").

[5] *Id.*; *see also, Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983) ("In a public forum . . . all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject.").

[6] *See, e.g., Healy*, 408 U.S. at 169.

[7] *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."); *See also Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 235 (2000) ("Access to a public

viewpoints" the Supreme Court warned "risks the suppression of free speech and creative inquiry [on] university campuses."[8]

Moreover, there is longstanding legal precedent that a public college may not impede a student group's right to expression based on vague and unsupported fears of disruption or violence.[9] As the Supreme Court has made clear:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. . . That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.[10]

President's Notestine's vague and unsupported reasoning for barring SJP from the divestment hearing does not pass constitutional muster, and appears to be based on fear-mongering from non-student groups such as the Jewish Federation of Toledo, which have spent immense resources combating what they label as efforts to "delegitimize" Israel, particularly on campuses.[11]

Lastly, there is no justification for handpicking which students may be present at a hearing or limiting who is heard from on an issue to ideological opponents and no one else. The Supreme Court has recognized that "exclusion of several views on [a] problem is just as offensive to the First Amendment as exclusion of only one."[12] In other words, the University of Toledo may not discriminate against "an entire class of viewpoints."[13] It is also particularly concerning that the opposing viewpoint was provided with additional private forums to voice its views on SJP's divestment effort, to which SJP was not given the opportunity to respond.

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forum, for instance, does not depend upon majoritarian consent."); *Rosenberger*, 515 U.S. at 828 ("Discrimination against speech because of its message is presumed to be unconstitutional.").

[8] *Rosenberger*, 515 U.S. 819 at 835.

[9] *Healy*, 408 U.S. at 186 (1972).

[10] *Terminiello*, 337 U.S. at 4-5 (1949) (internal citations and quotations removed).

[11] In October 2010, the national Jewish Federations of North America and the Jewish Council for Public Affairs launched the Israel Action Network, a $6 million campaign to counter "delegitimization" activities and monitor groups advocating for Palestinian rights through BDS and other activities. Jewish Federation of Central Massachusetts, "The Launch of the Israel Action Network," *Jewish Central Voice*, February 2011, http://jewishcentralvoice.com/2011/02/the-launch-of-the-israel-action-network/.

[12] *Rosenberger*, 515 U.S. 819 at 831. ("It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.").

[13] *Id*.

2. The Judicial Council's Nullification of SJP's Resolution Violates the First Amendment

The Judicial Council's declaration that the divestment resolution could not proceed also raises constitutional red flags. Recently, expression about Israel, Palestine, and the United States' role in the Middle East has been a flashpoint for university administrators and student government representatives who have been asked to censor, condemn and penalize students for expressing a view supportive of Palestinian rights. These pressure campaigns on universities disguise Israel advocacy groups' attempts to stifle constitutionally protected speech with which they disagree by mislabeling speech that criticizes Israeli policies as hateful and anti-Semitic and, therefore, subject to condemnation and suppression.

The Judicial Council's justification for its decision to block student senators from voting on the divestment resolution—which it called "discriminatory" and "unconstitutional"—reveals a basic misunderstanding of the resolution and the law. The Supreme Court has held that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."[14] Boycotts "to bring about political, social and economic change" involve speech, association and petition activities unquestionably protected under the First Amendment.[15]

The United States itself is a product of a colonial boycott against British, Irish, and West Indian goods, issued by the First Continental Congress on October 20, 1774, in an effort to avoid war, persuade British lawmakers, and influence British public opinion.[16] Since then, our country has had a long tradition of boycotts and divestment campaigns, from pre-Civil War protests against slavery to the Montgomery bus boycott led by Dr. Martin Luther King, Jr., to boycott and divestment campaigns against apartheid South Africa. Indeed, SJP's divestment resolution takes inspiration from the divestment campaign against the apartheid regime in South Africa.[17] Had a decision such as this been made during that era, the University of Toledo may never have divested from South African apartheid.[18]

Resolutions such as SJP's are core political speech and thus deserve the highest level of protection afforded by the First Amendment. A public university violates students' constitutional rights if it censors or chills protected expression.[19] Furthermore, the Supreme Court has made it

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[14] *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotations and citations removed).
[15] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982).
[16] Cong. Journal, 1st Cont'l Cong., 1st Sess. (Oct. 20, 1774), reprinted in 1 Journals of the Cont'l Congress 75-81 (Worthington C. Ford et al. eds., 1903); *see also* David Ammerman, In the Common Cause: American Response to the Coercive Acts of 1774 (1974).
[17] SJP's Resolution notes that "the University of Toledo was noticeably late in divesting from South African apartheid, with other universities nearby, such as the University of Michigan, divesting as early as 1978."
[18] Vanessa McCray, *UT student senate considers divesting from companies tied to Israeli occupation of Palestine*, THE BLADE, Feb. 16, 2015 at www.toledoblade.com/news/2015/02/16/UT-student-senate-considers-divesting-of-Israel.html.
[19] *See Healy*, 408 U.S. at 169; *Rosenberger*, 515 U.S. at 819.

clear that access to a public forum such as a referendum vote may not depend upon majoritarian consent."[20]

Moreover, speech like that of SJP's at issue here is neither anti-Semitic, nor anti-Jewish.[21] Allegations that expression criticizing the state of Israel is harassment or intimidation that targets and creates a hostile educational environment for Jewish students on campus on the basis of race or national origin have been soundly rejected by the U.S. Department of Education's Office for Civil Rights.[22] To date, no such complaint has been sustained or found to have legal merit. Please find attached an advisory and letter our organizations and others sent you last December regarding the DOE's decisions, and their implications on your obligations to protect student speech.

3. Prohibiting the Public From Attending the Divestment Hearing Violates Ohio's Open Meetings Act

Finally, the University of Toledo violated Ohio's Open Meetings Act by barring the public's attendance at the divestment hearing, and restricting attendance of SJP members. As you are no doubt aware, Ohio Rev. Code Ann. Sec. 121.22 (2010) requires that all public meetings of all public bodies be open to the public at all times. As a public body,[23] the University of Toledo is bound by the act and may not restrict SJP or the public's attendance at divestment hearings, which are considered public meetings under the purview of the Code. [24] Bodies that violate this statute may be liable for $500, court costs and reasonable attorneys' fees.

4. Conclusion

Universities' increased scrutiny and censorship of speech critical of Israel in response to pressure from groups opposed to such speech harms all campus community members, especially those who are interested in exploring the critical issue of Israel/Palestine. It threatens to shut

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[20] *Bd. of Regents of Univ. of Wisconsin Sys.*, 529 U.S. at 233-235. ("When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others . . . To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent.").

[21] We strongly object to the notion that any ethnic or religious group monolithically holds a single political opinion about this subject, as such complaints suggest. To the contrary, Jewish communities, like Christian, Muslim, and other communities, are diverse and are home to a spectrum of perspectives on this and other issues.

[22] A federal judge has also dismissed a lawsuit making similar allegations. *See Felber v. Yudof*, 851 F.Supp.2d 1182, 1188 (N.D. Cal. 2011) ("A very substantial portion of the conduct to which [the complainants] object [i.e., speech critical of Israel] 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.").

[23] University Council Bylaws, § A.3 (Feb. 10, 2014).

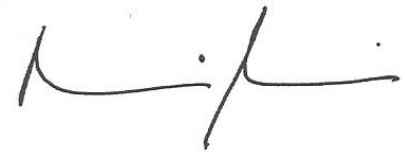
[24] Ohio Rev. Code Ann. Sec. 121.22 (b)(2) ("'Meeting' means any prearranged discussion of the public business of the public body by a majority of its members.").

down robust debate on one of the most urgent foreign policy, moral and political questions of our time. Needless to say, students, faculty and university programs that openly advocate for Israel and defend its actions, many of which human rights bodies and organizations have determined to be in violation of international law, do not face the same obstacles. The First Amendment and well-established values of higher education that envision the university as the "marketplace of ideas" do not permit this type of viewpoint discrimination.

As a university dedicated to providing a diverse intellectual environment and "[improving] the human condition," the University of Toledo should live up to the highest ideals of free speech and inquiry. We urge you to stand firmly in support of student speech rights, and to refuse to accede to demands to burden some speech in order to appease critics. The University of Toledo must also ensure that students are not burdened, punished or policed for protected political expression.

Thank you for your prompt consideration of this matter.

Sincerely,



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