

PALESTINE SOLIDARITY LEGAL SUPPORT

LEGAL ADVOCACY FOR HUMAN RIGHTS ACTIVISTS

March 30, 2015

President Laura Trombley
Office of the President
president@pitzer.edu

Sent via Email

Re: Free Speech Rights for Students for Justice in Palestine

Dear President Trombley:

We write on behalf of Pitzer Students for Justice in Palestine (SJP) who seek to temporarily display a replica of the Israeli separation wall to educate the campus community about the Israeli occupation of Palestine. Displaying the wall is a form of political expression that is fully protected by the First Amendment, the laws of the State of California, and Pitzer's Demonstration Policy. Accordingly, if Pitzer interferes with the student's demonstration, or seeks to punish their political expression, it would violate SJP students' rights, and seriously threaten the College's stated commitment to open inquiry. Should such interference occur, we are prepared to represent the students to protect their rights.

You may be familiar with the events of recent weeks in which SJP's application for permission to construct the wall was considered and rejected by the Campus Aesthetics Committee. The following is our understanding of the facts.

Pitzer College SJP aims to promote justice, human rights, liberation and self-determination for the Palestinian people. Their mission statement emphasizes the importance of educating the campus community about Palestine.¹ They are especially focused on highlighting the intersections between struggles that challenge racism, militarism, global capitalism, and environmental destruction. They also highlight their dedication to human rights, international law, and equality for all people.

As part of its activism educating the campus community, SJP planned to display a replica of the Israeli separation wall.² The mock wall is made of wooden panels displaying facts,

¹ SJP's mission statement is available on its Facebook page at, https://www.facebook.com/pitzersjp/info?tab=page_info.

² The Israeli separation wall, ostensibly separating the occupied West Bank and East Jerusalem from Israel, in fact cuts into occupied Palestinian territory and has been widely criticized as violating Palestinian human rights. When finished, eighty-five percent of the wall will be built on Palestinian land inside the occupied West Bank. The wall, along with the settlements, Israeli-only highways and closed

pictures and quotes to explain the Israeli occupation and its effect on Palestinian people. SJP initially requested to display the wall in an open area of campus for several days beginning March 23rd.

On or before February 15th, the students had received information by word of mouth that a student from an opposing political organization on campus – “Claremont Progressive Israel Alliance” – sent a letter of complaint to the Aesthetics Committee, anticipating SJP’s proposal to display the mock separation wall, and claiming that the wall is anti-Semitic and would make Jewish students on campus uncomfortable. SJP does not have a copy of this letter, however they are aware of its contents because the letter was discussed during a Pitzer student senate meeting, and SJP heard about the letter’s arguments through word of mouth. The letter of complaint was also referenced in the Pitzer College Student Senate Committee Reports, dated February 15 2015.

On February 16th representatives of SJP met with Dean of Student Affairs Brian Carlisle to talk with him about their plans. He raised concerns about potential vandalism and destruction of the wall, and cautioned the students that someone could “burn it down.” He also suggested to the students that displaying the mock separation wall could be considered “discriminatory” and gave them a copy of the campus discrimination policy, noting that it was inevitable that either individual members or the club as a whole would be subject to judicial action due to anticipated student complaints, and that it can be a long and difficult process. Finally Dean Carlisle directed the students to seek approval for their plans from the Campus Aesthetics Committee.

The Campus Aesthetics Committee is a standing committee, which forms a part of the governance structure of the College. The Aesthetics Committee formulates and implements campus policy for “outdoor art/mural projects.”³ The Committee Guidelines explain the proposal process, and outline “considerations” which the Committee presumably weighs in considering whether to approve or deny a proposal.⁴ The Guidelines do not provide specific procedures regarding how proposal denials are handled, or whether an explanation will be provided. The Guidelines do not provide any detail on whether students may appeal a denial.

On approximately February 22nd, SJP was told informally, by a student member of the Aesthetics Committee, that their anticipated proposal would likely be rejected by the committee due to its political message and that this anonymous member would vote against it out of fear of upsetting certain students on campus.

military zones, are projected to cover 46% of the West Bank, effectively annexing it to Israel. In July 2004, the International Court of Justice issued an advisory opinion deeming the wall illegal and issuing a non-binding order to Israel to compensate Palestinians harmed by its construction. The Advisory Opinion is available at, <http://www.icj-cij.org/docket/files/131/1677.pdf>.)

³ See Aesthetics Committee Guidelines, available at, <http://www.pitzer.edu/governance/committees/aesthetics/guidelines.asp>. The link to the “Aesthetics Committee Bylaws” is empty (<http://www.pitzer.edu/governance/committees/aesthetics/bylaws.asp>), and no other information about the Committee’s bylaws is readily available online.

The week of February 23rd 2015, SJP submitted their proposal to display the mock Israeli separation wall to the Aesthetics Committee. During a March 4 meeting of the Aesthetics Committee, committee members requested pictures of the panels of the wall, and SJP showed the Committee pictures of the wall on their computer from Google images. The Aesthetics Committee also raised concerns about indemnification, to which SJP did not know how to respond. The Committee in no way communicated to SJP that its proposal hinged upon providing more pictures or an indemnification contract. SJP did not know the College was waiting for more information, and the students received no follow-up requests from the Committee, in writing, or verbally.

In a March 27 email from Dean Carlisle to SJP member Noah Latkin, Dean Carlisle twice repeated the claim that “to date no information requested by the Aesthetics Committee has been received by the College or the committee.” This claim is both inaccurate (SJP did provide pictures during its meeting with the Aesthetics Committee), and disingenuous, because if SJP had understood that the fate of its political expression hinged upon providing further information, it would have made an effort to provide it.

On March 9, SJP was informed that their proposal was denied by the Aesthetics Committee in a vote of 4-2. They did not receive any official written explanation for why their proposal was denied, but received a message, informally, from a student member of the committee, Liam Brooks, who explained that, “I can't speak for my fellow members, and please keep in mind that it was a 4 to 2 vote. But from the notes, the main concern was that the wall wasn't student created art. If you wanted to do a mural or something, my guess is we'd pass it. Please keep in mind that it wasn't a political choice, which would be outside of our jurisdiction, but more a choice based on the artistic merit of the wall.”

In his March 27 email to SJP member Noah Latkin, Dean Carlisle cautioned SJP against going forward with its “plans to demonstrate on campus and display the wall in blatant defiance of [the College's] shared governance principles” and that displaying the mock separation wall would be considered a violation of College policy. Curiously, this same email also emphasized that the College has a “compelling interest in unfettered inquiry and the collective search for knowledge. The College thus affirms, and indeed embraces, principles of protected free speech and expression.”

1. The First Amendment applies with full force at Pitzer College.

As affirmed by Dean Carlisle's March 27 email and Pitzer College policy,⁵ principles of free speech are highly valued at Pitzer, and enforceable under California law.⁶ This means Pitzer

⁵ General College Policies at 82-3, “The faculty and other academic appointees, staff, and students of Pitzer College **enjoy significant free speech protections guaranteed by the First Amendment of the United States Constitution and Article I, Section I of the California Constitution** . . . In addition, consistent with California Education Code Section 94367, the definition of harassment contained in this policy and its application to student speech shall be subject to the limitations of the First Amendment to the United States Constitution and Article 1, Section 2 of the California Constitution.” (Emphasis added).

must grant political and other expressive student organizations equal access—on a viewpoint-neutral basis—to school resources,⁷ and must not punish students for speech protected by the First Amendment. Censoring the political speech of SJP because other students may find it uncomfortable or objectionable is precisely the kind of viewpoint discrimination the Supreme Court of the United States has found to be unconstitutional in decades of rulings.

2. SJP does not need approval from the Aesthetics Committee to engage in free speech expression.

Dean Carlisle’s assertion that the decision of the Aesthetics Committee bars SJP from displaying the wall is flawed. SJP submitted an application to the Aesthetics Committee only because it was advised to do so by Dean Carlisle himself. There was no basis for that advice, given that the Aesthetics Committee has no jurisdiction to consider the propriety of students exercising their right to political expression.

The applicable guidelines of the Aesthetics Committee do not clearly define what is “public art” requiring the committee’s approval before it is displayed. The guidelines say that, “outdoor art/mural projects consist of sculptures or art installations, landscaping, painting, mosaic or relief artwork applied to exterior walls, facilities or structures.”⁸ Based on the examples of “past and current art and murals Pitzer College,”⁹ (a link provided by the Aesthetics Committee,¹⁰) all of the projects under the Committee’s purview appear to be permanent or semi-permanent art displays affixed to campus infrastructure. None appear to be temporary displays incorporated as part of a political demonstration. SJP’s proposed mock separation wall is a political expression to be displayed temporarily. It is not a semi-permanent painting affixed to campus infrastructure.

Moreover, and regardless of how the Aesthetics Committee interprets its jurisdiction, basic principles of free speech prohibit the campus from requiring students to receive prior approval of their message from the Aesthetics Committee before engaging in a political demonstration. This would mean that students could not engage in expression that is not pretty, or in the words of the Aesthetics Committee, political expression that does not “demonstrate

⁶ California Education Code § 94367 provides that “No private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.”

⁷ See *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 836 (1995) (“For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”).

⁸ <http://www.pitzer.edu/governance/committees/aesthetics/guidelines.asp>

⁹ <https://www.flickr.com/photos/pitzercollege/sets/72157623216929124/>

¹⁰ <http://www.pitzer.edu/governance/committees/aesthetics/index.asp>

community identity and pride,” or “provide a sense of aesthetic pleasure.” Enforcing such criteria would prohibit protests related not only to Israel/Palestine but also protests related to Black Lives Matter, U.S. Immigration policy, and many other pressing social issues, which can be jarring and even upsetting to some in the campus community who disagree with the message of a political demonstration. Such a standard for determining whether an act of political protest will be permitted is legally untenable.¹¹

3. The decision of the Aesthetics Committee to deny SJP’s display because of its controversial message constitutes unlawful viewpoint discrimination.

There is ample evidence that the decision of the Aesthetics Committee was motivated, at least in part, by the message that SJP intended to convey by the construction of the wall. It is well known that public complaints against the proposed mock wall claimed it was anti-Semitic. Members of the committee also made it known to SJP that the proposal would be denied because the message was controversial. Thus the justification offered to SJP for the denial of their application (that “the wall wasn’t student created art”) appears pretextual.

More likely is that SJP’s speech was censored because it caused offense to some members of the Pitzer community. But the principle of freedom of speech does not exist to protect only non-controversial speech; it exists precisely to protect speech that some members of a community may find controversial. The Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends some listeners.¹² Justice Douglas famously wrote, “[F]ree speech . . . may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.”¹³

A decision to curtail political expression based on the viewpoint it conveys violates fundamental principles of constitutional and state law and Pitzer’s own policy.

¹¹ The offensiveness of a message to some does not deprive it of constitutional protection. *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). Given “the dependence of a free society on free universities,” these principles apply equally to college campuses. *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 836 (1995) (“For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”).

¹² *See, e.g., Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)

¹³ *Id.*

4. Under the Demonstrations Policy, SJP is free to display the wall.

Since the wall is a form of political protest, SJP, according to the college's Demonstration Policy, is not required to obtain any advance approval. Dean Carlisle's March 27 email to SJP acknowledges this. The only limitation on expression in the Demonstrations Policy is the prohibition against "material and substantial interference with education activities." SJP fully intends that the wall will not interfere in any manner with such activities. If opponents of SJP's position cause such interference, the actions of such persons may not be a basis for curtailing SJP's right to peaceful political expression.¹⁴

5. Labeling SJP's expression of criticism of Israeli state policy as "anti-Semitic" is a mischaracterization that puts vulnerable Arab and Muslim students at further risk.

Speech like that of SJP's at issue here is neither anti-Semitic, nor anti-Jewish.¹⁵ SJP's proposal to display a replica of the Israeli separation wall forms a part of their mission to educate the campus about the Israeli occupation from a Palestinian perspective. This is straightforward political speech focused on a critical examination of Israeli state policy. It is not criticism of Jews, Jewish students, or Israel as a "Jewish state," but criticism of Israeli state policies towards Palestinians, which are the focus of international debate. While some Jewish students who strongly identify with the state of Israel may find this discussion uncomfortable or offensive to their tightly held beliefs, that does not mean the political expression targets them on the basis of their religious, ethnic or national origin identity.

The U.S. Department of Education's Office for Civil Rights (OCR) agrees with this view. OCR has repeatedly considered complaints of anti-Semitic harassment and discrimination based on student advocacy for Palestinian rights, and has soundly rejected allegations that expression criticizing the state of Israel, standing alone, 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.¹⁶ In August 2013, OCR closed three investigations into the University of California

¹⁴ Censoring speech to protect certain audiences is a classically prohibited "heckler's veto." *see Reno v. American Civil Liberties Union*, 521 U.S. 844, 880 (1997); *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011).

¹⁵ 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. Pitzer SJP also includes members that are Jewish.

¹⁶ 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.").

Berkeley, Irvine, and Santa Cruz that had been opened under Title VI of the Civil Rights Act of 1964.¹⁷ OCR concluded that such activities:

constitute[] expression on matters of public concern directed to the University community. **In the university environment, exposure to such robust and discordant expressions, even when personally offensive and hurtful, is a circumstance that a reasonable student in higher education may experience.** In this context, the events that the complainants described do not constitute actionable harassment.¹⁸

It is important for Pitzer College administrators to help educate the campus community on the distinction between criticism of the Israeli state and anti-Semitism. Campus authorities – including the Dean of Students and the Aesthetics Committee – should understand this distinction. Rather than discouraging students from engaging in speech on the issue because they risk triggering “discrimination complaints,” or censoring their message because it may cause controversy, administrators and governing committees should embrace their commitment to free speech values.

Moreover, Pitzer administrators should be aware that when political opponents brand SJP activists as anti-Semitic, it causes severe reputational harm to Arab and Muslim students who already operate in a dangerously Islamophobic society that looks upon them with suspicion.¹⁹ SJP activists are routinely (and needless to say, falsely) smeared as supporters of terrorism.²⁰ Pitzer students, like other SJP activists in California and nationwide, are subjected to violent threats and harassment.²¹ Pitzer SJP hopes that your administration will be sensitive to this vulnerability and do what it can to offer protection to students so that they can engage in human rights activism without risking their physical safety and liberty.

¹⁷ DOE’s determination letters in these three cases, explaining its legal findings, can be downloaded at the following URLs: UC Berkeley (<http://bit.ly/doeucb>); UC Santa Cruz (<http://bit.ly/doeucsc>); UC Irvine (<http://bit.ly/doeucirvine>).

¹⁸ See UC Santa Cruz and UC Berkeley determination letters. (Emphasis added.)

¹⁹ Again, not all SJP activists are Arab and Muslim, and many are Jewish, but Arab and Muslim students are particularly vulnerable to threats of reputational smear and its consequential chilling effects.

²⁰ To name one example among many, the David Horowitz Freedom Center in February of 2015 posted flyers on campuses nationwide painting SJP as equivalent to violent terrorists. See, Jewish Journal, *Conservative activist admits responsibility for #JewHaters posters at UCLA*, February 24, 2015, http://www.jewishjournal.com/los_angeles/article/conservative_activist_david_horowitz_admits_responsibility_for_posters. See also, a new video claiming to establish SJP “ties to terrorism” at, http://www.jewishjournal.com/los_angeles/article/conservative_activist_david_horowitz_admits_responsibility_for_posters. <http://www.jewhatredoncampus.org/news/preview-americans-peace-tolerances-new-film-students-justice-palestines-ties-terrorism>

²¹ We believe you are familiar with at least one recent incident where a Palestinian Pitzer student who vocally protested an incident of verbal harassment, then had his tires slashed and his study carrel vandalized with threatening comments. This was not an isolated incident.

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It is our opinion that SJP can proceed with its plans to display the mock wall given the Aesthetics Committee's lack of jurisdiction, its apparent discrimination against SJP's message, and the Demonstration Policy's green light for free political expression.

We intend to do whatever is necessary to ensure respect for the rights of the SJP students. Pitzer has a well-established tradition of respect for student political activism and it is our hope that this tradition will be the basis for an amicable resolution of this matter. We are available to college officials if we can be helpful in that regard.

Given that the students' plan to immediately proceed with their political expression, we look forward to receiving a prompt response.

Sincerely,

Liz Jackson
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