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9 Jewish Studies Scholars

10 UNITED STATES DISTRICT COURT
11
12 NORTHERN DISTRICT OF CALIFORNIA
13
14 SAN FRANCISCO DIVISION

15 JACOB MANDEL, et al.
16 Plaintiffs,

17 vs.

18 BOARD OF TRUSTEES OF THE
19 CALIFORNIA STATE UNIVERSITY,
20 SAN FRANCISCO STATE
21 UNIVERSITY, et al.,
22 Defendants.

CASE NO. 3:17-CV-03511-WHO

JEWISH STUDIES SCHOLARS'
MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF

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1 **INTRODUCTION**

2 A select group of five Jewish studies scholars (Amici) from various academic institutions
3 respectfully move for leave to file an amicus curiae brief in support of the motion to dismiss and
4 motion to strike filed by Prof. Rabab Abdulhadi, co-defendant in the referenced lawsuit. A copy
5 of the proposed brief is attached as Exhibit A to this motion. Prof. Abdulhadi has consented to
6 the filing of this motion and the accompanying brief.
7

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9 **IDENTITY AND INTEREST OF AMICI CURIAE**

10 The Amici are based at universities throughout the United States and are experts in their
11 specific fields, all in the area of Jewish studies.

12 Given their academic work and their positions, the Amici are particularly knowledgeable
13 about the origins, history and importance of antisemitism – including current attempts to redefine
14 it for certain political ends. Moreover, since such an effort is a key element of the controversy
15 brought in the current complaint, their explanations on this matter are highly relevant to the
16 question of whether it should be dismissed for lack of a legal basis.
17

18
19 **CREDENTIALS OF AMICI CURIAE**

20 Daniel Boyarin is the Taubman Professor of Talmudic Culture at UC Berkeley and chair
21 of the rhetoric department there. He has written articles and chapters of books on the cultural
22 history of Zionism. He taught for many years at Ben-Gurion and Bar-Ilan universities in Israel,
23 where he was chair of the board of the Alternative Information Center, a resource for unbiased
24 news on Israel/Palestine for journalists and parliamentarians. He is on the Academic Advisory
25 Boards of both Jewish Voice for Peace and Open Hillel.
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1 Hasia Diner is a professor at New York University, with a joint appointment in the
2 Department of History and the Skirball Department of Hebrew and Judaic Studies. An expert in
3 the field of American Jewish history, she has written widely on various aspects of this subject.
4 Her two most recent books, both published by Yale University Press, are *Roads Taken: The*
5 *Great Jewish Migrations to the New World and The Peddlers Who Forged the Way* (2016); and
6 *Julius Rosenwald: Repairing the World* (2017), which is part of the Jewish Lives Series of YUP.
7 She has twice won the National Jewish Book Award and lectures widely around the United
8 States and abroad.

10 Marjorie N. Feld earned her B.A. in history and Judaic studies at State University of New
11 York at Binghamton in 1992 and her Ph.D. in history at Brandeis University in 2001. Her
12 research interests lie in U.S. Jewish history and the intersection of American Jewish activism
13 with global liberation and human rights movements. Her first book, *Lillian Wald: A Biography*,
14 published in 2008 by University of North Carolina Press, won the Saul Viener Book Prize of the
15 American Jewish Historical Society, an award presented biannually to an "outstanding book in
16 American Jewish History." Her second book, *Nations Divided: American Jews and the Struggle*
17 *Over Apartheid*, was published by Palgrave MacMillan in July 2014. Based on her research for
18 this book, she has been cited in popular articles as an expert on contemporary Black/Jewish
19 relations and on American Jewish anti-Zionism. She is a member of the Jewish Women's
20 Archive Academic Advisory Council and the Academic Council of the American Jewish
21 Historical Society, and is professor of History at Babson College in Massachusetts.

24 Ari Y. Kelman is a social scientist with expertise in the sociology of American Jewry.
25 Since 2012 he has held the Jim Joseph Professorship in Education and Jewish Studies at Stanford
26 University's Graduate School of Education, where he is also serving as the interim director of the
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1 Taube Center for Jewish Studies. His research focuses on the intersection of education and
2 religion, and he has written three books on the subject, with a fourth currently in press. He has
3 published and presented widely, in both scholarly and popular contexts, on issues pertaining to
4 education and American Jews, including higher education. Recently, he released the first
5 qualitative study of how Jewish students on college campuses understand and engage with the
6 politics of the Israel-Palestine conflict on their campuses.¹

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11 He is also interested in the history of science among Muslims and Jews. He has written books on
12 Gersonides and Maimonides and has edited a collection of articles on general and Jewish
13 perspectives on freedom and moral responsibility. He has also edited and translated collections
14 of Jewish philosophy for Routledge and Cambridge University Press. He received a National
15 Endowment of the Humanities Collaboration Grant for translating and updating Moritz
16 Steinschneider's *The Hebrew Translations of the Middle Ages*, the first volume of which recently
17 appeared.

19 Barry Trachtenberg is a scholar of modern Jewish history and the Nazi Holocaust. Since
20 July 2016, he has been employed as The Michael H. and Deborah K. Rubin Presidential Chair of
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23 ¹ *Safe on the Sidelines: Jewish Students and the Israel-Palestine Conflict on Campus*, Ari Y.
24 Kelman et al (September, 2017), available at
25 <https://stanford.app.box.com/v/SafeandonthesidelinesReport> (Last accessed October 23, 2017).
26 The study surveys Jewish undergraduates at five California campuses, including SFSU. It finds
27 the subjects overwhelmingly felt safe, had experienced little antisemitism and had no trouble
28 differentiating it from political debate regarding Israel-Palestine, all contrary to the picture drawn
by The Lawfare Project.

1 Jewish History and Associate Professor at Wake Forest University in Winston-Salem, North
2 Carolina, where he directs the interdisciplinary program in Jewish Studies. He also serves on the
3 Board of Scholars of Facing History and Ourselves and on the Academic Council of the
4 Holocaust Educational Foundation of Northwestern University. Prior to working at Wake Forest,
5 he taught from 2003 to 2016 at the State University of New York at Albany, where he directed
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7 books, most recently *The United States and the Holocaust: Race, Refuge, Remembrance*
8 (Bloomsbury, 2018), and various articles – both scholarly and popular – on many aspects of
9 modern Jewish history and the Holocaust. For many years, he has taught academic courses and
10 given community lectures on modern Jewish history, Zionism, Israel, antisemitism and the Nazi
11 Holocaust.
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15 **REASONS WHY THE MOTION SHOULD BE GRANTED**

16 District courts have “broad discretion” to appoint amicus curiae. *Hoptowit v. Ray*, 682 F.
17 2d 1237, 1260 (9th Cir. 1982). “District courts frequently welcome amicus briefs from non-
18 parties concerning legal issues that have potential ramifications beyond the parties directly
19 involved or if the amicus has ‘unique information or perspective that can help the court beyond
20 the help that the lawyers for the parties are able to provide.’” *NGV Gaming, Ltd. V. Upstream*
21 *Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005), quoting *Cobell v. Norton*, 246
22 F. Supp. 2d 59, 62 (D.D.C.2003). If permitted to file, the Amici will fulfill “the classic role of
23 amicus curiae by assisting in a case of general public interest [and] supplementing the efforts of
24 counsel[.]” *Miller-Wohl Co. v. Comm'r of Labor & Indus. State of Mont.*, 694 F.2d 203, 204 (9th
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1 Cir. 1982). The Court should exercise its discretion to permit the Amici to file the attached
2 amicus brief.

3 Counsel for Amici is familiar with the scope of the arguments presented by the parties
4 and will not unduly repeat those arguments. Amici will draw upon their knowledge of Jewish
5 history and antisemitism to demonstrate the unacceptability of the so-called “State Department
6 Definition of Antisemitism” that plaintiffs seek to employ in establishing the viability of their
7 complaint.
8

9
10 **CONCLUSION**

11 For these reasons, the Amici respectfully request that the Court grant leave to file the
12 amicus brief attached as Exhibit A.

13 Dated: October 25, 2017

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15 Respectfully submitted,

16 /s/ David L. Mandel

17 DAVID L. MANDEL,

18 Attorney for Amici Curiae
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EXHIBIT A

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[PROPOSED] BRIEF OF AMICI CURIAE
JEWISH STUDIES SCHOLARS

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2 *The Palestine Exception to Free Speech: A Movement Under Attack in the U.S.*,

3 Palestine Legal and the Center for Constitutional Rights (September 2015),

4 available at <http://palestinelegal.org/the-palestine-exception/>..... 4

5 Letter from Zachary Pelchat, Team Leader, Department of Education Office for

6 Civil Rights, San Francisco, to UC Irvine Chancellor Michael Drake, OCR Case

7 No. 09-07-2205 (Aug. 19, 2013), available at

8 [https://ccrjustice.org/sites/default/files/assets/files/OCR-](https://ccrjustice.org/sites/default/files/assets/files/OCR-UCIrvine%20Letter%20of%20Findings%20to%20Recipient.pdf)

9 [UCIrvine Letter of Findings to Recipient.pdf](https://ccrjustice.org/sites/default/files/assets/files/OCR-UCIrvine%20Letter%20of%20Findings%20to%20Recipient.pdf)..... 5

10 Letter from Zachary Pelchat, Team Leader, Department of Education Office for

11 Civil Rights, San Francisco, to Carole E. Rossi, Chief Campus Counsel, UC Santa

12 Cruz, OCR Case 09-09-2145 (August 19, 2013), available at

13 http://news.ucsc.edu/2013/08/images/OCR_letter-of-findings.pdf 5

14 Letter from Zachary Pelchat, Team Leader, Department of Education Office for

15 Civil Rights, San Francisco, to UC Berkeley Chancellor Robert Birgeneau, OCR

16 Case No. 09-2-2259 (August 19, 2013), available at

17 http://news.berkeley.edu/wp-content/uploads/2013/08/DOE.OCR_.pdf. 5

18 Letter from Emily Frangos, Compliance Team Leader, Department of Education

19 Office for Civil Rights, New York, to Morton A. Klein, President, Zionist

20 Organization of America, re case No. 02-11-2157 (July 31, 2014), available at

21 [https://www.documentcloud.org/documents/1300803-ocr-decision-on-title-vi-](https://www.documentcloud.org/documents/1300803-ocr-decision-on-title-vi-complaint-7-31-14.html)

22 [complaint-7-31-14.html](https://www.documentcloud.org/documents/1300803-ocr-decision-on-title-vi-complaint-7-31-14.html) 5

23 *Standing Up for Jewish Students*, Kenneth Marcus, *Jerusalem Post* (September 9,

24 2013), available at [http://www.jpost.com/Opinion/Op-Ed-Contributors/](http://www.jpost.com/Opinion/Op-Ed-Contributors/Standing-up-for-Jewish-students-325648)

25 [Standing-up-for-Jewish-students-325648](http://www.jpost.com/Opinion/Op-Ed-Contributors/Standing-up-for-Jewish-students-325648)..... 6

26 *Israel lawfare group plans “massive punishments” for activists*, Ali Abunimah,

27 *Electronic Intifada* (June 25, 2016), available at [https://electronicintifada.net/](https://electronicintifada.net/blogs/ali-abunimah/israel-lawfare-group-plans-massive-punishments-activists)

28 [blogs/ali-abunimah/israel-lawfare-group-plans-massive-punishments-activists](https://electronicintifada.net/blogs/ali-abunimah/israel-lawfare-group-plans-massive-punishments-activists)..... 7

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David Friedman, Trump's Ambassador to Israel, on the Issues, New York Times (December 16, 2016), available at <https://www.nytimes.com/interactive/2016/12/16/world/middleeast/David-Friedman-Israel-Palestinians-Trump-quotes.html> 13

Will Campus Criticism of Israel Violate Federal Law? Kenneth Stern, New York Times (December 12, 2016), available at <https://www.nytimes.com/2016/12/12/opinion/will-campus-criticism-of-israel-violate-federal-law.html>..... 14

Letter to Members of Congress, Kenneth Stern, Justus & Karin Rosenberg Foundation (Dec. 6, 2016), available at <http://jkrfoundation.org/wp-content/uploads/2016/12/Stern-Letter-links-corrected.pdf>. 15

1 Together, the six scholars in the field of Jewish studies identified below respectfully
2 submit this amicus curiae brief in support of Defendant Rabab Abdulhadi’s and the Board of
3 Trustees of California State University, San Francisco State University’s motions to dismiss and
4 motions to strike the plaintiffs’ referenced case.
5

6 **INTRODUCTION**

7 Our primary focus in this amicus curiae brief is on the plaintiffs’ use and abuse of the
8 so-called “State Department definition of antisemitism,” which is actually a misleading and
9 dangerous redefinition of partisan origins that fails to comport with the overwhelming
10 consensus of scholars on the subject of anti-Jewish hate. We shall proceed to explain, but first,
11 the issue should be placed in its proper context as part of a broader effort in pursuit of certain
12 political goals.
13

14 The present lawsuit is but the latest front in an all-out offensive by groups determined
15 to stigmatize and when possible, suppress advocacy for Palestinian rights and its corollary,
16 criticism of Israeli policies and U.S. support for them.
17

18 Israel-aligned groups already have a history of flooding officials, including legislators,
19 state attorneys general and especially, university administrators, with complaints that political
20 activity critical of Israeli policies is antisemitic and must be stopped. The Center for
21 Constitutional Rights and Palestine Legal have published a report documenting the extent and
22 nature of incidents of censorship that have resulted from such pressures.¹ Although these
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25 ¹*The Palestine Exception to Free Speech: A Movement Under Attack in the U.S.*, Palestine
26 Legal and the Center for Constitutional Rights (September 2015), available at
<http://palestinelegal.org/the-palestine-exception/> (Last accessed October 23, 2017).
27

1 complaints have consistently been found to be without merit, they are costly in terms of time
2 and resources expended investigating and defending against false accusations.

3 Israel-aligned groups have also filed numerous Civil Rights Act Title VI complaints
4 nationwide with the U.S. Department of Education’s Office for Civil Rights (DOE), alleging
5 that political activity on campus critical of Israeli policies creates a “hostile” environment for
6 Israel-identified Jewish students.² Allegations explicitly invoked the State Department
7 definition of antisemitism to argue that advocacy for Palestinian rights constitutes harassment
8 of Jewish students. To date no such complaint has been sustained or found to have legal merit.
9 DOE dismissed cases against University of California (UC) Irvine, UC Santa Cruz and UC
10 Berkeley in 2013 and Rutgers in 2014 with written determination letters stating that the First
11 Amendment protects speech critical of the state of Israel and that such speech does not
12 constitute a civil rights violation.³ DOE noted that “in the university environment, exposure to
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16 ² Complaints were filed against University of California (UC) Irvine, UC Santa Cruz, UC
17 Berkeley, Rutgers University, Barnard College and Brooklyn College. *See*, Palestine Legal,
18 *Palestine Exception to Free Speech*, supra.

19 ³ Letter from Zachary Pelchat, Team Leader, Department of Education Office for Civil Rights,
20 San Francisco, to UC Irvine Chancellor Michael Drake, OCR Case No. 09-07-2205 (Aug. 19,
21 2013), available at [https://ccrjustice.org/sites/default/files/assets/files/OCR-
22 UCIrvine Letter of Findings to Recipient.pdf](https://ccrjustice.org/sites/default/files/assets/files/OCR-UCIrvine Letter of Findings to Recipient.pdf) (Last accessed October 23, 2017);

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24 San Francisco, to Carole E. Rossi, Chief Campus Counsel, UC Santa Cruz, OCR Case 09-09-
25 2145 (August 19, 2013), available at [http://news.ucsc.edu/2013/08/images/OCR_letter-of-
26 findings.pdf](http://news.ucsc.edu/2013/08/images/OCR_letter-of-findings.pdf) (Last accessed October 23, 2017);

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Letter from Emily Frangos, Compliance Team Leader, Department of Education Office for
Civil Rights, New York, to Morton A. Klein, President, Zionist Organization of America, re

(continued . . .)

1 such robust and discordant expressions, even when personally offensive and hurtful, is a
2 circumstance that a reasonable student in higher education may experience.”⁴

3 Although these complaints were meritless, each resulted in lengthy investigations and
4 caused reputational damage to students and faculty as they dragged on. Kenneth Marcus,
5 director of the Brandeis Center, which has filed numerous Title VI complaints, encouraged
6 others to continue to file cases in order to chill campus speech. He wrote, “These cases – even
7 when rejected – expose administrators to bad publicity. ... No university wants to be accused
8 of creating an abusive environment. ... Needless to say, getting caught up in a civil rights
9 complaint is not a good way to build a resume or impress a future employer.”⁵

10
11 At a June 2, 2016, conference organized by major Israel lobby leaders, titled “BDS –
12 the New Anti-Semitism,” plaintiffs’ lead attorney, Lawfare Project director Brooke Goldstein,
13 called on supporters to “make the enemy pay.” She disclosed that the group was preparing
14 more Title VI complaints, naming San Francisco State University and UC Irvine as targets, and
15 that it and other groups were encouraging Jewish students to file police complaints against
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22 (continued ...)
23 case No. 02-11-2157 (July 31, 2014) [https://www.documentcloud.org/documents/1300803-ocr-](https://www.documentcloud.org/documents/1300803-ocr-decision-on-title-vi-complaint-7-31-14.html)
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25 ⁴ Letter from DOE to Chancellor Drake, *supra*, at page 6; Letter from DOE to Carole E. Rossi,
26 *supra*, at page 3; Letter from DOE to Chancellor Robert Birgeneau, *supra*, at page 3.

27 ⁵ *Standing Up for Jewish Students*, Kenneth Marcus, *Jerusalem Post* (September 9, 2013),
28 available at [http://www.jpost.com/Opinion/Op-Ed-Contributors/Standing-up-for-Jewish-](http://www.jpost.com/Opinion/Op-Ed-Contributors/Standing-up-for-Jewish-students-325648)
[students-325648](http://www.jpost.com/Opinion/Op-Ed-Contributors/Standing-up-for-Jewish-students-325648) (Last accessed October 23, 2017).

1 Palestine solidarity activists. Israeli Ambassador to the UN, Danny Danon, assured attendees
2 that such efforts have the full support of the Israeli state.⁶

3 The current lawsuit is a continuation of the effort to chill campus speech through legal
4 complaints.

5 6 CREDENTIALS OF AMICI CURIAE

7 Daniel Boyarin is the Taubman Professor of Talmudic Culture at UC Berkeley and
8 chair of the rhetoric department there. He has written articles and chapters of books on the
9 cultural history of Zionism. He taught for many years at Ben-Gurion and Bar-Ilan universities
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26 *Intifada* (June 25, 2016), available at <https://electronicintifada.net/blogs/ali-abunimah/israel-lawfare-group-plans-massive-punishments-activists> (Last accessed October 23, 2017).

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10 Black/Jewish relations and on American Jewish anti-Zionism. She is a member of the Jewish
11 Women's Archive Academic Advisory Council and the Academic Council of the American
12 Jewish Historical Society, and is professor of History at Babson College in Massachusetts.

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4 the author two books, most recently *The United States and the Holocaust: Race, Refuge,*
5 *Remembrance* (Bloomsbury, 2018), and various articles – both scholarly and popular – on
6 many aspects of modern Jewish history and the Holocaust. For many years, he has taught
7 academic courses and given community lectures on modern Jewish history, Zionism, Israel,
8 antisemitism and the Nazi Holocaust.
9

10 ARGUMENT

11 **A. The so-called "State Department definition" of antisemitism included in the Lawfare** 12 **complaint is in fact a deceitful distortion of the actual State Department definition.** 13

14 The case against San Francisco State University (SFSU) and Professor Rabab
15 Abdulhadi rests upon a deceitful distortion of the State Department’s definition of
16 antisemitism.⁸ The Lawfare Project is unquestionably misrepresenting the definition in order to
17 advance a claim that there is systemic and institutional antisemitism at San Francisco State
18 University. In paragraph 43 of the First Amended Complaint against SFSU, The Lawfare
19 Project claims that “among the examples of anti-Semitism listed by the State Department on its
20 website *are* [our emphasis]:” and proceeds to provide several examples taken from the State
21 Department’s description. But contrary to what The Lawfare Project claims, the State
22 Department’s definition of antisemitism does not state that these examples “are” in fact
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26 ⁸ *Defining Anti-Semitism*, United States Department of State (January 20, 2017), available at
27 <https://www.state.gov/s/rga/resources/267538.htm> (Last accessed October 23, 2017)

1 antisemitism. Rather, it asserts that the examples related to Israel (such as “Using the symbols
2 and images associated with classic anti-Semitism to characterize Israel or Israelis; Drawing
3 comparisons of contemporary Israeli policy to that of the Nazis; Blaming Israel for all inter-
4 religious or political tensions; Applying double standards by requiring of it a behavior not
5 expected or demanded of any other democratic nation; Multilateral organizations focusing on
6 Israel only for peace or human rights investigations”) “*could*” [our emphasis] be antisemitic
7 when “taking into account the overall context” in which they occur. What The Lawfare Project
8 has done, by substituting “are” for “could be” and by omitting reference to the overall context,
9 is to declare that any criticism of Israel that conceivably falls within these parameters is
10 inherently antisemitic, irrespective of its context.
11

12 This is, of course, an absurd misrepresentation of the text. The drafters of the State
13 Department expressly included an instruction that the overall context must be taken into
14 account. Omitting this instruction renders that language superfluous.
15

16 Moreover, context is what matters most in such situations. Removing context subjects
17 what should be protected speech to a high risk of unjustified censorship. It matters whether
18 criticisms of Israel and its supporters are made at a rally advocating political change or made as
19 part of a meeting of a hate group advocating violence with anti-Jewish overtones. There is a
20 difference between criticism directed against a state – even of its founding principles – and
21 attacks on the entire people whom that state purports to represent. One can point easily, for
22 example, to many instances – dating back at least a century – of Jews who have made forceful
23 criticisms of Zionism and (since the state’s founding in 1948) of Israel, even comparing them
24 to Nazism. One famous example was Albert Einstein’s letter published in the New York Times
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1 on December 4, 1948, comparing future Prime Minister Menachem Begin’s Herut party, then
2 competing in Israel’s first parliamentary election, to “Nazi and Fascist parties.”⁹

3 By willfully misrepresenting the State Department’s insistence on context, The Lawfare
4 Project is improperly asking the court to redefine what are protected instances of free speech
5 and political protest against the state of Israel as antisemitic speech.
6

7
8 **B. The State Department definition is overly expansive.**

9 The State Department definition is both flawed and overly expansive, and should not in
10 any case serve as the basis for legal findings. For example, the State Department’s definition
11 posits as an example of antisemitism, “Accusing Jewish citizens of being more loyal to Israel,
12 or to the alleged priorities of Jews worldwide, than to the interest of their own nations.”

13 While applying such an accusation sweepingly to Jews in general would clearly be a
14 classic example of antisemitism, it could be seen as an accurate descriptor with regard to
15 certain individuals. Again, context is everything, and here, the State Department definition fails
16 to distinguish.
17

18 Elsewhere, the State Department’s definition is far too broad and encompasses what in
19 other contexts would easily be classified as political speech against the behavior or policies of
20 a foreign government. For example, while we agree that using “classic” antisemitic symbols
21 and images is inappropriate in any context (although not illegal), there is nothing *necessarily*
22 inappropriate with comparing actions of Israel to those of the Nazis, especially since
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25 ⁹ *This Day in Jewish History 1948: N.Y. Times Publishes Letter by Einstein, Other Jews*
26 *Accusing Menachem Begin of Fascism*, Ha’aretz, December 4, 2014, available at
<https://www.haaretz.com/jewish/features/.premium-1.629813> (Last accessed October 25,
2017).

1 “comparing” two things means analyzing both their similarities and their differences. In fact,
2 comparisons of foreign leaders and countries to Nazism are made regularly. President George
3 W. Bush in 2002 compared Iraqi leader Saddam Hussein to Adolf Hitler. More recently,
4 former White House spokesperson Sean Spicer compared actions by Syrian President Bashar
5 Assad to those of Hitler, stating (erroneously), “You know, you had someone as despicable as
6 Hitler who didn’t even sink to using chemical weapons.” Given that comparisons of foreign
7 leaders and governments to Nazism occur regularly, creating a “special status” for such speech
8 concerning Jews and Israel would only reaffirm otherwise antisemitic claims that Jews are
9 exceptional and therefore need to have a special category of laws that apply only to them.
10

11 In fact, among Jews, one often hears Nazi-era imagery in accusations leveled against
12 critics of Israel, like the oft-repeated slur of “kapo” to refer to other Jews accused of not being
13 loyal to Israel. See, for example, the recent debate over the nomination of U.S. Ambassador to
14 Israel David Friedman, who famously criticized even liberal supporters of Israel as being
15 “worse than kapos” for not taking a sufficiently hard line in defense of the state.¹⁰
16

17 Finally, the State Department’s offering as another example of antisemitism, “Denying
18 the Jewish people their right to self-determination, and denying Israel the right to exist,”
19 ignores the facts that a) for many Jews now and since its founding, the state of Israel is
20 decidedly *not* an expression of self-determination by or for Jews everywhere; and b) Israel’s
21 “right to exist” is not the same thing as its asserted “right to exist as a Jewish state.”
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24 ¹⁰ *David Friedman, Trump’s Ambassador to Israel, on the Issues*, New York Times (December
25 16, 2016), available at
26 <https://www.nytimes.com/interactive/2016/12/16/world/middleeast/David-Friedman-Israel-Palestinians-Trump-quotes.html> (Last accessed October 23, 2017).
27

1 Though the State Department definition does not use the latter phrase, the term “right to
2 exist” is commonly understood to mean “right to exist as a Jewish state.” In recent years, the
3 Israeli government and its supporters have insisted on that meaning, demanding that any
4 potential negotiating partners affirm it. Growing numbers of advocates for equal rights,
5 however, including many U.S. Jews, reject the “existence” of a state that is predicated on the
6 displacement and oppression of non-Jews within its borders.
7

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9 **C. The State Department definition has no place on campus as a speech code. Even the**
10 **author of the definition opposes its application to campuses in the United States.**

11 Given the flaws in the State Department’s definition of antisemitism, it must *not* form
12 the basis for any legal sanction or even for campus speech codes. Kenneth S. Stern, the author
13 of the “Working Definition of Anti-Semitism” issued in 2005 by the European Monitoring
14 Center on Racism and Xenophobia, upon which the State Department’s definition of
15 antisemitism was based, agreed. Addressing federal legislation that would adopt the State
16 Department definition as broadly applied policy, Stern wrote in a December 2016 New York
17 Times op-ed: “The worst remedy is to prohibit speech deemed offensive, disparaging or
18 bigoted that would otherwise be protected by the First Amendment.”¹¹ He further stated that
19 the purpose of the definition he formulated was “intended for data collectors writing reports
20 about anti-Semitism in Europe. It was never supposed to curtail speech on campus.”
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25 ¹¹*Will Campus Criticism of Israel Violate Federal Law?* Kenneth Stern, New York Times
26 (December 12, 2016), available at <https://www.nytimes.com/2016/12/12/opinion/will-campus-criticism-of-israel-violate-federal-law.html> (Last accessed October 23, 2017).
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1 As academics with decades of teaching experience at the college level, we agree fully
2 with Stern, who stated in a letter to Congress that “antisemitism – like all forms of bigotry –
3 has an impact on some campuses. The worst way to address it is to create a de facto hate
4 speech code, which is what this bill proposes to do.”¹²

5
6 Although discussions around Israel and Zionism may often be uncomfortable for their
7 supporters and detractors alike (as we witness in our classes), it is the responsibility of students
8 and educators to foster dialogue and not limit it, to understand the historical implications of our
9 speech, and to allow for the meaning and definition of fraught terms to develop and change as
10 a consequence of informed deliberation and debate.

11
12 **D. The definition of antisemitism is deeply contested among Jewish studies scholars. A**
13 **judge should not create legal authority on an issue when even those most directly affected**
14 **have no consensus.**

15
16 Scholars of antisemitism do not agree on a standard definition of the term. It dates back
17 to the late 19th century and was first advanced as a means to insist upon the fundamental
18 incompatibility of Jews with European society. Since that time, it has come to have a range of
19 negative and often hurtful associations, from a relatively “mild” distaste for the imagined over-
20 identification of Jews in certain areas of culture, politics and the economy, to viewing Jews as
21 a biological threat to “white races.” At other times, antisemitic characterizations have not been
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24 ¹² *Letter to Members of Congress*, Kenneth Stern, Justus & Karin Rosenberg Foundation (Dec.
25 [http://jkrfoundation.org/wp-content/uploads/2016/12/Stern-Letter-links-](http://jkrfoundation.org/wp-content/uploads/2016/12/Stern-Letter-links-corrected.pdf)
26 [corrected.pdf](http://jkrfoundation.org/wp-content/uploads/2016/12/Stern-Letter-links-corrected.pdf) (Last accessed October 23, 2017).

1 limited to Jews but have included non-Jewish people believed to have originated from the
2 Middle East.

3 The root of current debates on antisemitism lies in a seemingly intractable problem of
4 how to critique Jewish collective power in a way that does not immediately resonate with a
5 long history of antisemitism. Throughout the last thousand years of European history, Jews
6 were regularly characterized as an incommensurate and exceptionalist element who sought to
7 undermine the established religious, political or economic order. They were accused of being
8 killers of Christ and of seeking to repeat this offense through the murder of innocent Christian
9 children. Such accusations led at times to blood libels (the classic antisemitic allegation that
10 Jews used non-Jewish children’s blood to make matza, the ritual flatbread of Passover) and
11 pogroms, (violent and often deadly mob attacks on Jewish communities). In more recent
12 centuries, Jews have been characterized simultaneously as disloyal citizens, capitalist schemers
13 and revolutionary subversives. Such allegations led to discriminatory legislation, riots,
14 expulsions and physical violence. In the early 20th century, Jews were branded as a
15 biological/racial threat and entire armies rose up to exterminate them. In each of these
16 moments, Jews were imagined as a united group that possessed power and authority far beyond
17 their actual numbers.

18 Yet, in 1948, with the founding of Israel as a Jewish state, the calculus changed. For the
19 first time, some Jews – identifying as a national group – gained actual, not imaginary, state
20 power. The state of Israel has borders, police, courts, a military, a nuclear arsenal, political
21 parties and a (mostly) representative and (somewhat) democratic system of government. Like
22 all other states, its actions are – and must be permitted to be – a matter of public debate and
23 discourse. But speech that is critical of Israel still strikes many as inherently antisemitic.
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1 The problem, quite simply, is that it remains a challenge to criticize Israel's *actual*
2 political power and its claim to represent Jews around the world in ways that do not, for some,
3 echo much older, antisemitic depictions of *imaginary* Jewish power. This is not only on
4 account of the long history of anti-Jewish hatred in the West. It is also because to characterize
5 any speech critical of Israel as intrinsically antisemitic has been a highly effective tool
6 employed by those who uncritically support any action of Israel and seek to stigmatize all
7 critics.
8

9 It would be inappropriate for a federal judge to create legal authority on a definition of
10 antisemitism that is so complex and deeply contested among Jewish studies scholars, both
11 historically and in contemporary debates.
12

13 CONCLUSION

14
15 The attempt by The Lawfare Project to limit critical discourse on Israel and challenges
16 of its supporters' views is detrimental to public debate. Ironically, it serves only to once again
17 affirm the antisemitic belief that Jews are fundamentally different: that the Jewish state cannot
18 be protested or objected to, that collective Jewish power cannot be analyzed or debated, or that
19 Jews, because they were once victims of one of humanity's greatest genocidal crimes, are
20 somehow immune from becoming perpetrators of acts of violence against other peoples.
21

22 Moreover, and perhaps most dangerously of all, attempts to broaden the definition of
23 antisemitism to encompass phenomena that are clearly not anti-Jewish can only make it more
24 difficult to recognize, isolate and oppose actual antisemitic hatred when it really does appear.

25 For the reasons discussed herein, we respectfully submit that this court should grant
26 Defendant Rabab Abdulhadi's and the Board of Trustees of California State University, San
27

1 Francisco State University's motions to dismiss and motions to strike the plaintiffs' referenced
2 case.

3 Dated: October 25, 2017
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6 Respectfully submitted,

7 /s/ David L. Mandel

8 DAVID L. MANDEL

9 Attorney for Amici Curiae
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