



## Kenneth Marcus' Anti-Free Speech, Anti-Civil Rights Record

President Trump's nominee for Assistant Secretary for Civil Rights at the U.S. Department of Education (DOE), Kenneth Marcus, would be a disaster for freedom of speech and civil rights.

Marcus has a long record of targeting First Amendment-protected speech and scholarship of people with whom he disagrees.

Marcus' history also reflects a hostility towards civil rights, including making racially-charged accusations and opposing affirmative action.

Reasons to oppose the appointment of Kenneth Marcus:

- He has a history of attempting to dismantle policies aimed at remedying racial discrimination, including affirmative action.
- As Staff Director of the U.S. Commission on Civil Rights, he opposed investigating violations of the rights of LGBT persons.
- He filed baseless Title VI complaints in order to censor and chill speech supporting Palestinian rights on college campuses.
- He lobbied Congress to defund Middle East Studies programs not sufficiently supportive of Israeli policies.
- He lobbied for state and federal legislation that would redefine antisemitism to include criticism of Israeli policies, a move that would encourage universities to violate the First Amendment.
- He sued academic groups to restrict their political expression supporting Palestinian rights.

In the words of First Amendment scholar and Dean of University of California Berkeley Law School Erwin Chemerinsky: “[A]ny administrator in a public university who tried to follow Professor Marcus' approach would certainly be successfully sued for violating the First Amendment.”<sup>1</sup>

We deserve an Assistant Secretary who will protect the civil rights and free speech rights of *all* students. Marcus' nomination must be opposed.

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<sup>1</sup> Erwin Chemerinsky, Unpleasant Speech on Campus, Even Hate Speech, Is a First Amendment Issue, 17 Wm. & Mary Bill Rts. J. 765 (2009), <http://scholarship.law.wm.edu/wmboj/vol17/iss3/5/>.

## THE FACTS

### 1. Who is Kenneth Marcus?

Kenneth Marcus is the president of the Louis D. Brandeis Center for Human Rights under the Law, an Israel advocacy group he founded in 2012. The Center's mission is to fight "anti-Semitism and anti-Israelism on US campuses."<sup>2</sup> As described below, the Center's work relies heavily on the conflation of antisemitism with speech critical of Israeli policy, a formulation that Marcus champions and which he has worked to codify in state legislatures and the US Congress, despite its First Amendment shortcomings.

Marcus headed the DOE's Office for Civil Rights under President George W. Bush in 2004. From 2004 to 2008, he was the Staff Director of the U.S. Commission on Civil Rights (USCCR). During his tenure, USCCR reversed "its historic mission of vigorously investigating and reporting on civil rights abuses against minority and disenfranchised communities, to a new mission, which has called into question programs designed to ameliorate the historic effects of discrimination," according to the ACLU.<sup>3</sup>

Through his Brandeis Center, Marcus has been the force behind many of the meritless complaints to the DOE attempting to censor speech supporting Palestinian rights – complaints which have been dismissed as unsubstantiated and/or on First Amendment grounds.

### 2. Marcus has demonstrated hostility towards affirmative action and other remedies for race discrimination

Under Marcus' leadership, the USCCR advocated the dismantling of affirmative action in law schools. Using the anti-civil rights "mismatch theory" (which argues that affirmative action does more harm than good) as the basis for a report, Marcus' USCCR called on the American Bar Association to "delete the requirement that law schools seeking accreditation demonstrate a commitment to diversity."<sup>4</sup>

Marcus has even criticized universities' use of "race-neutral alternatives" to achieve diversity in the classroom.

For example, Marcus has attacked the University of Texas' "ten percent" plan because the plan sought to increase enrollment of African-American and Hispanic students. Marcus called this goal "decidedly not compelling."<sup>5</sup>

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<sup>2</sup> See The Louis D. Brandeis Center, Mission and Values, available at: <http://brandeiscenter.com/about/mission-and-values/>.

<sup>3</sup> ACLU, Letter to Kenneth Marcus, Dec. 13, 2007, [https://www.aclu.org/files/images/asset\\_upload\\_file481\\_33240.pdf](https://www.aclu.org/files/images/asset_upload_file481_33240.pdf).

<sup>4</sup> U.S. Commission on Civil Rights, Affirmative Action in American Law Schools, April 2007, <http://availableat.org/sources/Davies,%203%20J.L.%201/AALSreport.pdf>.

<sup>5</sup> Kenneth L. Marcus, Diversity and Race-Neutrality, 103 Nw. U. L. Rev. Colloquy 163, 166 (2008), <https://ssrn.com/abstract=1284652>.

Marcus also sided with white firefighters who sued the New Haven Fire Department for discrimination after the city discarded test scores that would have disqualified Black and Latino firefighters from promotions.<sup>6</sup>

### **3. Marcus violated USCCR rules in order to produce anti-affirmative action report**

USCCR commissioners serving under Marcus raised concerns that USCCR produced a report that was “compromised” and “lacking in balance and objectivity” due to an ad-hoc process that violated “the Commission’s Administrative Instructions, recent GAO recommendations to the Commission, and perhaps pending federal regulations.”<sup>7</sup>

Two commissioners serving under Marcus documented Marcus’ disregard for quality control in a joint dissent to the USCCR’s “Affirmative Action in Law Schools Report,” calling Marcus’ process “broken.”<sup>8</sup>

### **4. Marcus opposed a proposal to expand the scope of the US Commission on Civil Rights’ work to include human rights, including LGBT rights**

Marcus sharply criticized a proposal made by former USCCR commissioner Mary Frances Berry and backed by a number of civil rights organizations, including the ACLU, the Leadership Conference on Civil and Human Rights, and the American Constitution Society, to reform USCCR to enable it to investigate human rights violations, including LGBT rights.<sup>9</sup>

In an essay published by the conservative Federalist Society, Marcus opposed the proposal because, in his view, addressing issues like LGBT rights “would dilute the effectiveness of the Commission’s civil rights work by dividing its attention among competing priorities.”

Marcus further criticized the proposal because he believed it would be used by the Obama Administration to “conflat[e] human rights with social welfare policy,” leading to a commission that “would be less concerned with protecting actual human rights or civil liberties and more concerned with implementing redistributionist policies in the areas of education, health, jobs and the economy.”<sup>10</sup> This position demonstrates Marcus’ narrow interpretation of civil and human rights, except with regards to Israel, as described below.

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<sup>6</sup> See Kenneth L. Marcus, The War between Disparate Impact and Equal Protection, 2009 Cato Sup. Ct. Rev. 53 (2008–2009) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1462431](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1462431).

<sup>7</sup> Affirmative Action Report, supra note 4, at 199.

<sup>8</sup> Id.

<sup>9</sup> Kenneth L. Marcus, Civil Rights: Fixing the Civil Rights Commission, March 2010, <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/uYfnskbhJTh4PJkR12sZNTZtk5UnsqpY7dMhAId.pdf>.

<sup>10</sup> Id.

## **5. Marcus pushed for the defunding of Middle East Studies programs**

The Brandeis Center, under Marcus' leadership, pushed for defunding Middle East Studies programs funded through the Higher Education Act (HEA) on the basis that, in his view, such programs are intrinsically biased against Israel.<sup>11</sup> (The HEA is administered by the DOE, though not under the Office for Civil Rights.)

The Brandeis Center's theory is that the HEA conditions federal funding for Middle East studies programs on presenting "diverse perspectives." This is a dangerous misinterpretation of the law because it would violate First Amendment rights and threaten academic freedom if DOE officials were given authority to decide which programs should not receive funding based on the political views the programs presented.<sup>12</sup>

## **6. Marcus lobbies for legislation that would re-define antisemitism to include criticism of Israel**

Marcus has lobbied at the federal and state level to codify a widely-discredited re-definition of antisemitism, currently used for limited international monitoring purposes by the U.S. State Department. This re-definition classifies virtually all criticism of Israeli government policies as antisemitism.

Redefining antisemitism to include speech critical of Israeli policy has been widely criticized, both for its infringement on First Amendment-protected activities, and for its intended effect of maligning any advocacy for Palestinian rights as inherently antisemitic.<sup>13</sup> Even the lead author of the redefinition of antisemitism, Kenneth S. Stern, opposes its use on college campuses.<sup>14</sup>

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<sup>11</sup> See Craig Rossett, The LBD urges Congress to end or mend Middle East Studies funding, Sept. 20, 2014, <http://brandeiscenter.com/the-lbd-urges-congress-to-end-or-mend-hea-title-vi-diverse-perspectives-requirement>; See also Blogpost, Title VI and Middle East Studies: What You Should Know, Palestine Legal, Nov. 17, 2014, <https://palestinelegal.org/news/2014/11/17/title-vi-and-middle-east-studies-what-you-should-know>.

<sup>12</sup> See, e.g., Letter from Nathan Brown, President of Middle East Studies Association, to Kenneth L. Marcus, President of Brandeis Center, Oct. 23, 2014, <http://www.mesa.arizona.edu/pdf/US20141023B.pdf> ("Your report fails to demonstrate that all or even some of the Title-VI supported Middle East studies centers have failed to meet the mandates of that program. At the same time, your demand that Title VI be defunded, apparently in order to serve your political agenda of stifling open discussion of an issue critical to national concern, not only threatens the academic freedom rights of the scholars and teachers at those centers but also does a grave disservice to the United States."); see also The Palestine Exception to Free Speech, *supra* note 17, at <https://palestinelegal.org/the-palestine-exception-appendix#ucla4>; See also Palestine Legal et al., letter to Secretary Arne Duncan, US Department of Education, February 9, 2015, <http://tinyurl.com/Letter-to-DOE-Re-HEA-TVI-Fund>.

<sup>13</sup> See, e.g., Blogpost, Media Spotlight: Anti-Semitism Awareness Act Draws Criticism in the Media, Palestine Legal, Dec. 15, 2016, <https://palestinelegal.org/news/2016/12/14/media-spotlight-anti-semitism-awareness-act-draws-criticism>; See also *infra* notes 14-22.

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

Marcus has lobbied for or promoted the following:

- The federal Anti-Semitism Awareness Act, which would impose the re-definition of antisemitism on the DOE for purposes of investigating Title VI complaints on college campuses.<sup>15</sup> The bill failed to pass the House of Representatives<sup>16</sup> after civil liberties and civil rights groups, including Palestine Legal,<sup>17</sup> the ACLU,<sup>18</sup> the Center for Constitutional Rights, National Lawyers Guild, Foundation for Individual Rights in Education,<sup>19</sup> Jewish Voice for Peace, ADC, and others publicly opposed the bill.
- Attempts to codify the re-definition of antisemitism that includes criticism of Israel at the state level in South Carolina<sup>20</sup> and Virginia.<sup>21</sup> Both states rejected those efforts in 2017 after Palestine Legal, ACLU and others raised constitutional concerns.
- Adoption of the discredited State Department definition at the University of California, which also failed due to free speech concerns.<sup>22</sup>

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<sup>15</sup> See Kenneth Marcus, How the government can crack down on anti-Semitism on college campuses, Politico, Jan 11, 2017, <https://www.politico.com/agenda/story/2017/01/government-crack-down-anti-semitism-college-campuses-000272>.

<sup>16</sup> See Blogpost, Bill aimed at censoring Palestine advocacy on campuses fails to pass U.S. House, Palestine Legal, Dec. 12, 2016, <https://palestinelegal.org/news/2016/12/12/bill-aimed-at-censoring-palestine-advocacy-on-campuses-fails-to-pass-us-house>.

<sup>17</sup> A letter to Members of Congress opposing the Anti-Semitism Awareness Act, signed by Palestine Legal, the Center for Constitutional Rights, National Lawyers Guild, Jewish Voice for Peace, Friends Committee on National Legislation, U.S. Campaign for Palestinian Rights, Defending Rights and Dissent, American Muslims for Palestine, and ADC is available at: <https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/584eca8ee6f2e17fd89fa3ca/1481558672194/AntiSemitism+Awareness+Act+Opposition+Letter+final.pdf>.

<sup>18</sup> Blogpost, Oppose H.R. 6421/S.10, The Anti-Semitism Awareness Act of 2016, ACLU, Dec. 5, 2016, <https://www.aclu.org/letter/oppose-hr-6421s-10-anti-semitism-awareness-act-2016>.

<sup>19</sup> Joe Cohn, Problematic Campus Anti-Semitism Bill Clears Senate, Foundation for Individual Rights in Education, Dec. 2, 2016, <https://www.thefire.org/problematic-campus-anti-semitism-bill-clears-senate>.

<sup>20</sup> See Jewish News Service, South Carolina latest state to tackle campus anti-Semitism, JNS.org, Feb. 23, 2017, <http://www.jns.org/news-briefs/2017/2/23/south-carolina-the-latest-state-to-tackle-campus-anti-semitism>; See also Palestine Legal, Victory! Unconstitutional South Carolina bill aimed at censoring Palestine advocacy defeated, March 2, 2017, <http://palestinelegal.org/news/2017/3/2/south-carolina-lawmakers-considering-unconstitutional-bill-aimed-at-censoring-palestine-advocacy>.

<sup>21</sup> See Kenneth L. Marcus, Virginia should adopt anti-Semitism legislation, Richmond Times Dispatch, Jan. 26, 2017, [http://www.richmond.com/opinion/their-opinion/guest-columnists/kenneth-l-marcus-column-virginia-should-adopt-anti-semitism-legislation/article\\_fca91ab6-d6ce-554d-97f1-d958d7e3bd3e.html](http://www.richmond.com/opinion/their-opinion/guest-columnists/kenneth-l-marcus-column-virginia-should-adopt-anti-semitism-legislation/article_fca91ab6-d6ce-554d-97f1-d958d7e3bd3e.html); See also Palestine Legal, Victory! Unconstitutional bill defeated in Virginia, Jan. 30, 2017, <http://palestinelegal.org/news/2017/1/30/virginia-lawmakers-considering-unconstitutional-bill-aimed-at-censoring-palestine-advocacy-1>.

<sup>22</sup> See Kenneth L. Marcus, Why universities need a definition of anti-semitism, The Jerusalem Post, July 6, 2015, <http://www.jpost.com/Opinion/Why-universities-need-a-definition-of-anti-Semitism-408178>; see also Palestine Legal, UC Drops Consideration of State Department Anti-Semitism Definition, July 22, 2015, <https://palestinelegal.org/news/2015/7/22/uc-drops-consideration-of-state-department-anti-semitism-definition>.

The critical work of fighting antisemitism has been clouded by the conflation of antisemitism and criticism of Israel. As Chair of Jewish History at Wake Forest University Barry Trachtenberg recently stated in testimony at a Congressional hearing on antisemitism, “[a]t a time when genuine antisemitism is threatening Jews in the United States and in many parts of the world, it is a dangerous distraction to redefine antisemitism so as to include critical discussions of Israel.”<sup>23</sup>

## **7. Marcus has promoted baseless Title VI complaints aimed at speech critical of Israeli policies**

Marcus or the Brandeis Center under Marcus’ leadership have alleged that the following speech activities violate Title VI of the Civil Rights Act of 1964 (and thus should be restricted by administrators):

- a documentary on the Israeli occupation called Occupation 101<sup>24</sup>
- street theater depicting Palestinians stopped at Israeli military checkpoints<sup>25</sup>
- a talk featuring a Holocaust survivor and an IDF soldier critical of Israeli policy<sup>26</sup>
- student advocacy for a resolution to divest from companies facilitating Israeli human rights abuses<sup>27</sup>
- a Black female student’s condemnation of white supremacy, including the statement “Fuck White Supremacy”<sup>28</sup>

On the theory that criticism of Israeli policy is inherently antisemitic, Marcus and the Brandeis Center have threatened, promoted or filed complaints against numerous universities including University of California (UC) Berkeley, UC Santa Cruz, and City University of New York - Brooklyn College. The complaints allege that political activity critical of Israeli policies create a hostile environment for Jewish students in violation of Title VI of the 1964 Civil Rights Act.<sup>29</sup> Not a single complaint has been sustained or found to have legal merit.

In its dismissals, the DOE found that the alleged instances represent “expression on matters of public concern” and not “actionable harassment.”<sup>30</sup> DOE further noted: “*in the university environment, exposure to such robust and discordant expressions, even when*

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<sup>23</sup> See Hearing: Examining Anti-Semitism on College Campuses, House of Representatives Judiciary Committee, Nov. 7, 2017, <https://judiciary.house.gov/hearing/examining-anti-semitism-college-campuses>. For further reading on this important perspective, see Blogpost, Prominent Jewish Studies Scholars File Amicus in Support of SFSU and Dr. Abdulhai, Palestine Legal, Nov. 9, 2017, <https://palestinelegal.org/news/2017/11/7/jewish-studies-scholars-file-amicus>.

<sup>24</sup> See infra note 32-33.

<sup>25</sup> See infra note 34.

<sup>26</sup> See infra notes 32-33.

<sup>27</sup> See infra notes 34-35.

<sup>28</sup> See infra note 39-40.

<sup>29</sup> Complaints were filed against University of California (UC) Irvine, UC Santa Cruz, UC Berkeley, Rutgers University, Barnard College and Brooklyn College. See, Report, *The Palestine Exception to Free Speech: A Movement Under Attack in the US*, Palestine Legal and the Center for Constitutional Rights, 2016, [www.palestinelegal.org/the-palestine-exception](http://www.palestinelegal.org/the-palestine-exception).

<sup>30</sup> Id.



*personally offensive and hurtful, is a circumstance that a reasonable student in higher education may experience.”*<sup>31</sup>

### UC Santa Cruz

In 2009, Marcus promoted<sup>32</sup> a Title VI complaint submitted to the DOE by Tammi Rossman-Benjamin, co-founder of the AMCHA Initiative, against UC Santa Cruz alleging institutional discrimination against Jewish students in violation of Title VI of the Civil Rights.

According to the complaint, UC Santa Cruz violated Title VI by allowing what the complaint described as “anti-Israel” and “anti-Jewish” events to take place on campus. The events included a screening of the documentary Occupation 101 and a talk by a former IDF soldier and a Holocaust survivor critical of Israeli policy.

In March 2011, the DOE’s Office for Civil Rights opened an investigation in response to Rossman-Benjamin’s 2009 complaint as part of a renewed commitment to more aggressively combat antisemitism on campuses. After a two-year factual investigation, the DOE dismissed the complaint in August 2013 in a strongly worded letter which emphasized that speech critical of Israel falls within the “robust and discordant expression” that regularly takes place on college campuses.<sup>33</sup>

### UC Berkeley

In 2012, two Brandeis Center board members filed a Title VI complaint with DOE against UC Berkeley. It alleged that campus speech activities like advocacy for resolutions to divest from companies that are complicit in Israeli human rights abuses and mock checkpoints aimed at demonstrating one aspect of Palestinian life under Israeli

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<sup>31</sup> Letter from Zachary Pelchat, Team Leader, Department of Education Office for Civil Rights, San Francisco, to UC Irvine Chancellor Michael Drake, OCR Case No. 09- 07- 2205 (Aug. 19, 2013), available at [https://ccrjustice.org/sites/default/files/assets/files/OCR-UCIrvine Letter of Findings to Recipient.pdf](https://ccrjustice.org/sites/default/files/assets/files/OCR-UCIrvine%20Letter%20of%20Findings%20to%20Recipient.pdf) (Last accessed October 23, 2017); Letter from Zachary Pelchat, Team Leader, Department of Education Office for Civil Rights, San Francisco, to Carole E. Rossi, Chief Campus Counsel, UC Santa Cruz, OCR Case 09-09-2145 (August 19, 2013), available at [http://news.ucsc.edu/2013/08/images/OCR\\_letter-of-findings.pdf](http://news.ucsc.edu/2013/08/images/OCR_letter-of-findings.pdf) (Last accessed October 23, 2017); Letter from Zachary Pelchat, Team Leader, Department of Education Office for Civil Rights, San Francisco, to UC Berkeley Chancellor Robert Birgeneau, OCR Case No. 09-2-2259 (August 19, 2013), available at [http://news.berkeley.edu/wp-content/uploads/2013/08/DOE.OCR\\_.pdf](http://news.berkeley.edu/wp-content/uploads/2013/08/DOE.OCR_.pdf) (Last accessed October 23, 2017); 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 case No. 02-11-2157 (July 31, 2014) <https://www.documentcloud.org/documents/1300803-ocr-decision-on-title-vi-complaint-7-31-14.html> (Last accessed October 23, 2017).

<sup>32</sup> Peter Schmidt, Education Dept. Investigates Complaint of Anti-Semitism at UC-Santa Cruz, March 15, 2011, <http://www.chronicle.com/article/Education-Dept-Investigates/126742>.

<sup>33</sup> See The Palestine Exception to Free Speech, supra note 28, at <https://palestinelegal.org/the-palestine-exception-appendix#santacruz1>.

occupation were “strikingly analogous to the infamous ‘Passion Play’ depicting Jews as blood-thirsty barbarians.”

The Brandeis Center board members filed the DOE complaint after a federal lawsuit they filed against the university was dismissed because the incidents cited were all political speech protected by the First Amendment.<sup>34</sup> After investigating the incidents, the DOE similarly dismissed the complaint, noting that the allegations amounted to “robust and discordant expression” that regularly takes place on college campuses, and constituted protected speech.<sup>35</sup>

### Brooklyn College

In 2013, Brooklyn College students who organized a panel discussion on BDS campaigns were investigated after Israel advocacy organizations and lawmakers falsely accused the students of antisemitism. The City University of New York’s general counsel led a two-month investigation into the discrimination claims, interviewing more than forty individuals. The investigation found no evidence that the organizers discriminated against anyone on the account of their religion.<sup>36</sup> The Brandeis Center, under Marcus, issued a statement echoing the earlier unfounded claims.<sup>37</sup>

### UC Irvine

In 2017, the Brandeis Center, under Marcus, demanded that Palestinian students and other students of color at UC Irvine (UCI) be criminally prosecuted because they chanted slogans critical of Israeli policies at the end of the “Question and Answer” portion of an event featuring Israeli soldiers.<sup>38</sup> The chanting occurred only after one of the soldiers physically assaulted a student. To support its arguments, the Brandeis Center included an attachment shared by a now-defunct website that contained pictures of seven UCI students with sniper targets on their faces. The site listed personal information about several of the students, including hometowns, a home address, email addresses and a cell phone number.

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<sup>34</sup> Felber v. Yudof, 851 F. Supp. 2d 1182 (E.D. Cal. 2011).

<sup>35</sup> See The Palestine Exception to Free Speech, supra note 28, at <https://palestinelegal.org/the-palestine-exception-appendix#berkeley2>.

<sup>36</sup> See Press Release, Brooklyn College Students for Justice in Palestine Vindicated After 2-Month CUNY Investigation into BDS event, Center for Constitutional Rights, April 15, 2013, <https://ccrjustice.org/home/press-center/press-releases/brooklyn-college-students-justice-palestine-vindicated-after-2>.

<sup>37</sup> See Blogpost, Brandeis Center Welcomes Brooklyn College Administration’s Apology for its Handling of 2013 Anti-Israel Event, <http://brandeiscenter.com/brandeis-center-welcomes-brooklyn-college-administrations-apology-for-its-handling-of-2013-anti-israel-event-jewish-pro-israel-students-vindicated-by-apology-further-action-to-protect-civil>.

<sup>38</sup> See Gabriel San Roman, Pro-Palestine Student Group Sanctioned by UCI for “Disrupting” Israeli Soldier Panel, OvC Weekly, Sept. 1, 2017, <http://www.ocweekly.com/news/uci-students-for-justice-in-palestine-sanctioned-again-8389976>; See also Press Release, UC Irvine Dismisses Allegations Against Students for Justice in Palestine, Palestine Legal, Aug. 23, 2016, <https://palestinelegal.org/news/2016/8/23/press-release-uc-irvine-dismisses-allegations-against-students-for-justice-in-palestine>.



## UW Madison

In 2017, Marcus wrote to the Chancellor of the University of Wisconsin, urging the university to take action against Students for Justice in Palestine and a diverse coalition of student groups that had spent a semester organizing for increased transparency in university investments.<sup>39</sup> The student coalition sought to raise awareness regarding university investments in companies that profited from climate change, private prisons, border walls, racial injustices, and Israeli human rights abuses.<sup>40</sup>

Marcus' letter singled out two Black student leaders, urging the university to punish one for statements she had made condemning white supremacy. Marcus' letter threatened that the university's failure to take action against the Black students and other students of color could amount to a violation of Title VI. The letter also called on the university to adopt the broad re-definition of antisemitism that classifies criticism of Israel and Israeli government policies as inherently antisemitic.<sup>41</sup>

### **8. Marcus applauded baseless Title VI complaints because they suppress speech**

Marcus has urged the continued filing of meritless complaints despite their dismissals by federal courts and the DOE because they achieve indirectly what they fail to achieve directly: the chilling of advocacy for Palestinian rights.<sup>42</sup>

Marcus openly brags about chilling campus speech. Despite the fact that his legal strategy has so far failed, Marcus has nevertheless framed these efforts as a victory. In 2013, Marcus wrote:

*"These cases – even when rejected – expose administrators to bad publicity. ... No university wants to be accused of creating an abusive environment. ... Needless to say, getting caught up in a civil rights complaint is not a good way to build a resume or impress a future employer."*<sup>43</sup>

If appointed, Marcus will try to do from the inside of the Department of Education what he has failed to do from the outside: require universities to censor and punish students who exercise their First Amendment right to advocate for Palestinian rights.

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<sup>39</sup> Letter, LBD urges further action from UW Madison, The Louis D. Brandeis Center, June 21, 2017, <http://brandeiscenter.com/lbd-urges-further-action-from-uw-madison>.

<sup>40</sup> See Blogpost, University of Wisconsin-Madison Students of Color Targeted for Organizing Against White Supremacy and Zionism, Palestine Legal, Nov. 6, 2017, <https://palestinelegal.org/news/2017/11/6/wisconsin-students-of-color-targeted>.

<sup>41</sup> See Maggie Chandler, Former ASM chair faced harassment, discrimination after divestment, letter says, The Daily Cardinal, Nov. 9, 2017, <http://www.dailycardinal.com/article/2017/11/former-asm-chair-faced-harassment-discrimination-after-divestment-letter-says>; Emilie Burditt, Palestine Legal Calls on UW to recognize 'harassment and discrimination' against former ASM chair, The Badger Herald, Nov. 9, 2017, <https://badgerherald.com/news/2017/11/09/palestine-legal-calls-on-uw-to-recognize-harassment-and-discrimination-against-former-asm-chair>.

<sup>42</sup> See Kenneth Marcus, Standing up for Jewish students, The Jerusalem Post, Sept. 9, 2013, <http://www.jpost.com/Opinion/Op-Ed-Contributors/Standing-up-for-Jewish-students-325648>.

<sup>43</sup> Id.

## **9. Marcus has targeted scholars in court for their political expression.**

In 2016, Marcus, along with co-counsel, sued the American Studies Association (ASA) after it endorsed a resolution to boycott Israeli academic institutions. According to Marcus, the boycott resolution is “illegal” and *ultra vires* because such resolutions promote social justice and “[the ASA] is not a social justice organization.”<sup>44</sup> This argument was swiftly dismissed by a federal court judge.<sup>45</sup>

Marcus used McCarthyist and racist dog-whistles to characterize the diverse group of professors who overwhelmingly voted for the resolution, calling them a “handful of radicals” who “hijacked the ASA.”<sup>46</sup> A recent Brandeis Center press release regarding a newly-proposed complaint used similarly coded words, accusing professors interested in passing the resolution of a “covert campaign,” “a secret agenda” and using “unsavory means” to “abuse[,]” “capture and exploit” the ASA.<sup>47</sup>

## **10. Marcus has made false, racially-charged accusations against students and faculty of color**

Marcus has accused students and faculty of wrongdoing based on racially-charged assumptions and false facts. This is particularly troubling for Black, Palestinian, Arab, and Muslim students and scholars, already under heightened suspicion and surveillance by the government and by their university administrations.

### University of Michigan

In 2014, Marcus targeted an Arab student leader at the University of Michigan, incorrectly claiming that a satirical picture on the student’s Facebook profile showing him with a Palestinian keffiyeh scarf wrapped around his face, holding a knife next to a pineapple, threatened Jewish students.<sup>48</sup> Marcus stated that the pineapple likely represented an antisemitic symbol and that “it appears to be a gesture of warning or a threat towards Zionists.” Marcus’ accusations were false. In fact, the student’s post referenced an intramural basketball game against his friends’ basketball team (called

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<sup>44</sup> Kenneth Marcus, Are anti-Israel boycotts legal? Doesn’t look like it, Newsweek, May 19, 2016, <http://www.newsweek.com/anti-israel-boycott-legal-doesnt-look-460843>.

<sup>45</sup> See Elizabeth Redden, Mixed Opinion in Suit on Group’s Israel Boycott, Inside Higher Ed, April 4, 2017, <https://www.insidehighered.com/quicktakes/2017/04/04/mixed-opinion-suit-groups-israel-boycott>.

<sup>46</sup> See supra note 44.

<sup>47</sup> Press Release, Public interest lawsuit reveals plot by BDS activists to take over academic associations, Louis B. Brandeis Center, Nov. 9, 2017, <http://brandeiscenter.com/public-interest-lawsuit-reveals-plot-bds-activists-takeover-academic-associations>.

<sup>48</sup> See Adam Kredo, BDS Leader Posts ‘Overtly Threatening’ Photo on Facebook, Washington Free Beacon, March 26, 2014, <http://freebeacon.com/issues/bds-leader-posts-overtly-threatening-photo-to-facebook>.

*Ananas*, or “pineapple” in Arabic), and “was intended to make fun of racial stereotypes of Arabs as violent and extreme.”<sup>49</sup>

The student noted that as a result of the false accusation, his Twitter account was “flooded with hateful and racist messages” and that the baseless accusations “will negatively affect [him] for the rest of [his] life.”

#### UC Irvine

In addition to the UC Irvine incident described above, in 2016, Marcus’ Brandeis Center called a diverse group of students, most of whom were Black, Latinx, and Native American, an “angry mob” when they protested an event featuring Israeli soldiers. Marcus alleged that they “terrorized” the students attending the event, and demanded harsh punishment, including criminal prosecution.<sup>50</sup> A months-long factual investigation by the university determined that Marcus’ allegations of threatening and violent behavior were unfounded.<sup>51</sup>

#### San Francisco State University

In 2014, the Brandeis Center under Marcus’ direction broadcast false and racially charged allegations that Palestinian professor Rabab Abdulhadi misused taxpayer funds to meet with terrorists.<sup>52</sup> Marcus/Brandeis Center re-broadcast the false allegations after San Francisco State had already investigated, determined the allegations to be false, and made its findings publicly known.<sup>53</sup>

### **CONCLUSION: Marcus’ Agenda**

Marcus’ record indicates that he will bring his political agenda, his disdain for First Amendment protections and disrespect for meaningful civil rights initiatives, to his role at the Office for Civil Rights.

With respect to the Title VI complaints targeting Palestinian rights advocacy, Marcus has dedicated at least 13 years to promoting such complaints, and he will now shift from the role of advocate to adjudicator.

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<sup>49</sup> See Yazan Kherallah, Viewpoint: Pineapple Express, The Michigan Daily, March 28, 2014, <https://www.michigandaily.com/opinion/03viewpoint-pineapple-express28>.

<sup>50</sup> Statement, LDB Responds to UC Irvine’s SJP Decision and Calls for Stronger Action, May 25, 2016, <http://brandeiscenter.com/ldb-responds-to-uc-irvines-sjp-decision-and-calls-for-stronger>.

<sup>51</sup> See Press Release, UC Irvine Dismisses Allegations Against Students for Justice in Palestine, Palestine Legal, Aug. 23, 2016, <https://palestinelegal.org/news/2016/8/23/press-release-uc-irvine-dismisses-allegations-against-students-for-justice-in-palestine>.

<sup>52</sup> Letter to State Controller John Chiang, <http://brandeiscenter.com/brandeis-center-and-amcha-initiative-seek-answers-in-potential-misuse-of-taxpayer-dollars/>.

<sup>53</sup> San Francisco State News, Allegations of Improper Faculty Travel Investigated; No Merit Found, June 24, 2014, <http://news.sfsu.edu/allegations-improper-faculty-travel-investigated-no-merit-found>.

He will have the authority to investigate universities that allow First Amendment-protected advocacy for Palestinian rights.

He will find universities that allow student speech critical of Israel to be in violation of Title VI of the Civil Rights Act and force such schools to enter “resolution agreements” or “enforcement agreements.” Such agreements would force universities to restrict speech favorable to Palestinian rights, in violation of the First Amendment. Even the threat of an investigation by the federal government is likely to cause universities to interfere with campus speech activity to avoid being investigated.

Marcus will use his publicity platform to broadcast the threat of “federal investigations of antisemitism” as a way to pressure universities to restrict protected speech. In Marcus’ own words, no administrator wants “bad publicity.”<sup>54</sup>

With respect to the definition of antisemitism, Marcus is likely to unilaterally adopt the State Department definition against the better judgement of the definition’s original author, Congress, First Amendment experts and many Jewish studies professors who oppose the definition for being inaccurate and overbroad. He is likely to require universities to adopt and apply the definition as part of enforcement agreements.

Marcus’ agenda to cloud the definition of antisemitism will make it harder to identify and address antisemitism when it occurs. Confusing the definition of antisemitism subjects all Jewish students to increased risk at a time when they are particularly vulnerable to increasing white supremacist harassment.

Marcus is likely to use his publicity platform to reinforce harmful racial stereotypes by continuing to broadcast false facts against students of color, exploiting anti-Muslim, anti-Arab and anti-Black tropes.

With respect to complaints of race discrimination against Black, Latinx, LGBTQ, and other vulnerable students, Marcus’ record of hostility towards affirmative action indicates he will deprioritize complaints of discrimination against these communities and use his platform to attack policies designed to remedy discrimination.

Finally, Marcus is likely to drain the department’s already-strained resources for civil rights enforcement by rerouting investigators away from the myriad discrimination complaints to focus on his singular priority: repressing speech critical of Israel.

**For the foregoing reasons, Marcus’ nomination to be Assistant Secretary for Civil Rights at DOE must be opposed.**

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<sup>54</sup> See supra note 42.