



*Via Email*

July 13, 2018

**Re: Investigation Re Listserve Comments Critical of Israel**

Dear Ms. Tiongson,

I write on behalf of City University of New York (CUNY) Graduate Center doctoral candidate Rafael Mutis to express concerns with respect to CUNY's investigation of Mutis after he posted emails critical of Israel on a student listserv. Mutis' emails are protected by the First Amendment, by which CUNY is bound. As such, CUNY must end its investigation which impermissibly chills the free speech rights of students. This letter offers additional context to help CUNY avoid stifling expression of political views with which some may disagree.

**I. Facts**

The following summarizes the discussions leading up to and on our meeting on July 10, 2018 – please let me know by July 20, 2018, if you believe the factual summary to be inaccurate.

**a. CUNY's Evasive Explanation for Meeting with Rafael Mutis**

On June 19, 2018, Rafael Mutis, a doctoral student in Earth and Environmental Sciences (EES), received an email from Matthew Schoengood's assistant, Sheila Berman, stating that Schoengood wanted to schedule a meeting with Mutis.<sup>1</sup> Mutis replied on June 20, mentioned his availability, gave additional dates, and asked "what is this meeting about?" Berman responded that she would ask Schoengood and get back to Mutis. On June 22, Berman, correcting an earlier response, emailed Mutis that the subject of the meeting was the EES listserv. During the course of this week, there was a back-and-forth between Mutis and Berman with respect to meeting times and availability.

On June 26, Mutis emailed Schoengood stating: "Sheila Berman emailed me on your behalf with respect to meeting about the EES listserv. Before we schedule a time to meet, I'd appreciate it if you could provide more details about what aspect of the listserv we're meeting about. Am I alleged to have broken any school rules, policies or any laws? I thought it best to communicate with you directly, as Sheila might not be aware of the details."

A couple of hours later Berman responded, stating: "Vice President Schoengood saw your message and suggests that you come meet with him tomorrow morning." Mutis responded, stating: "Please convey that I'm open to scheduling an alternative time to meet with the Vice President as soon I hear back directly from him with respect to my questions. As it's already late in the day, tomorrow no longer works, unfortunately." Schoengood then emailed Mutis directly

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<sup>1</sup> This, and the below-mentioned emails, are on file with Palestine Legal.



and asked him to schedule a meeting to “discuss the issues related to the recent events regarding the EES list serve.”

Mutis responded, asking, for the third time, if he was alleged to have violated school rules:

I am happy to talk with Sheila about scheduling another time as soon as I receive a response from you about the nature of this meeting, specifically, whether I am alleged to have broken any school rules, policies or any laws. It's troubling that I'm not receiving a response to this question. Thanks for your time.

On June 27, Schoengood finally admitted that a complaint had been filed against Mutis, **and threatened Mutis with disciplinary action if he failed to meet with him** in an email stating: “I am investigating a complaint and it is important that you meet with me as required by CUNY’s Student Conduct Code. There are no pending charges against you, but failure to meet with me may result in such.”

Mutis said that he would get back to Schoengood about scheduling a time by Friday and stated: “if I understand your last email correctly, CUNY rules require that I meet with you, and if I don't, I could be charged for not meeting with you? Can you point to the language in CUNY’s Student Conduct Code you're referring to?”

Shortly thereafter, Schoengood replied: “Thanks and I look forward to seeing you.”

**Schoengood did not retract or correct his statement that not only did CUNY rules require a student to meet in response to a complaint, but that it was permissible for an administrator to punish a student for failing to do so.** Though there is no such CUNY policy – to date, no such correction has been made.

On June 29, I wrote Schoengood on behalf of Mutis, asking him to have counsel direct all communications, including scheduling meetings, to me. On July 5, Berman asked Mutis in person if he was still interested in meeting with Schoengood. Mutis responded that his attorney had emailed Schoengood on his behalf but had not received a response. I again emailed Schoengood on July 5, informing Schoengood that Mutis would be leaving the country on July 11, asking if Schoengood still wanted to meet, and suggesting Tuesday, July 10.

Schoengood replied on July 7 that he had been away on vacation. The email further stated that the complaint against Mutis “alleges an interference with educational opportunities as a result of discriminatory statements made on a student list serve . . . I will expect to see Mr. Mutis in my office before he leaves the country; if he continues to refuse to meet with me, he will be deemed to have waived his opportunity to do so.”

On Monday, July 9, I emailed Schoengood. My email set a time to talk, stated that Mutis never refused to meet with Schoengood and reiterated my request to speak with counsel. In a follow-up email, I asked CUNY to provide: 1) the specific allegations against Mutis; 2) the policies or regulations the complainant claimed Mutis violated and 3) a list of possible penalties.



That evening, Schoengood responded by emailing the complaint, a City University of New York Charge of Discrimination Form.

### **b. Charge of Discrimination**

On June 8, 2018, you received a CUNY Charge of Discrimination Form from CUNY graduate student [REDACTED] (hereinafter “the complainant”). The complainant checked three boxes alleging discrimination based on “race or color,” “national origin” and “religion/creed.” The complaint stated that the alleged discrimination took place between June 5-7, 2018, and checked a box stating that the discrimination was not continuing. Under the section stating: “Briefly summarize the events, facts or other basis of your complaint (attach extra sheets if necessary),” the complainant wrote: “emails were sent to Stacy Tiongson.”<sup>2</sup> No other words, facts or allegations were stated. The complaint did not identify the race or color of the complainant or her national origin, religion or creed. Attached to the complaint was an 18-page discussion between several individuals on the EES student listserv.

The 18-page email discussion began with a June 1, 2018 email posting an advertisement for a Fulbright scholarship to Israel. The posting called Israel:

- “a society that embraces people of all religions, cultures, ethnicities, and nationalities”
- “a culture that treasures children” and
- A place “surrounded by the extraordinary hospitality embedded in middle-eastern culture [sic]”

Mutis responded on June 5, stating: “Thanks for passing this on, but this is some sick Zionist propaganda. Is this a Trump initiative? Maybe there are post docs in Palestine? Free Free Palestine!”

A second student responded with an 1196-word email stating that she was “100% against the atrocious occupation of Palestine/ the myriad of consistent human rights violations that are committed in the name of defending a Jewish state (free, free Palestine!)” but that Fulbright scholarships were not Trump initiatives and that the ideology of Zionism should not be conflated with Israel’s occupation. The email included numerous links and citations.

Over the course of the next day, Mutis, the complainant and at least six other members of the listserv engaged in extensive debate on the meaning of the political ideology of Zionism, Israel’s recent killing of Palestinian protesters in Gaza and Israel’s occupation. The discussion included a debate on “triggers” and “micro-aggressions.” Other discussion topics included comparisons of Israel’s treatment of Palestinians to white settler colonialism in the United States and the experience of Native Americans, capitalism, and colonialism in general. Statements were also made expressing support and disapproval of using boycotts, divestment and sanctions (BDS) to pressure Israel to comply with international law.

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<sup>2</sup> Compl. at p. 3



The 18-page email discussion ended with an email from a student named “Sam” stating:

Thanks for the full dramatic reenactment of my family dynamic, colleagues. Really makes me feel at home when I'm away.

-Sam (anti-Zionist, anti-Nazi, pro-BDS, pro-Jewish solidarity)

### c. Meeting on July 10, 2018

At the start of the meeting, you mentioned the complaint filed against Mutis and asked Mutis to state his response. I explained that the complaint contained no allegations and asked CUNY to inform Mutis of the allegations against him so that he could respond. You stated that CUNY was not alleging any wrongdoing. You again asked for a response from Mutis. I stated that without any factual allegations, there was nothing to respond to. You then stated that the complainant told you that that Mutis’ initial response to the Fulbright posting was “triggering” and “made her feel unsafe.” You did not say what language the complainant was alleging discriminated against her race, color, religion, national origin or creed. You did not state the complainant’s race, color, religion, national origin or creed.

I asked what CUNY rule or policy Mutis’ email was alleged to violate. You could not cite any rule or policy. I asked if Mutis was being investigated for policies governing listserves. Schoengood said that Mutis was not. I asked what penalties were on the table. You said that no penalties were on the table.

I expressed concerns that Mutis was being singled out for investigation because of his viewpoint supporting Palestinian rights. I briefly went through recent events at CUNY where Israel advocates attempted to punish, censor or otherwise threaten speech supporting Palestinian rights. I explained that CUNY Chancellor Milliken appointed an independent task force in 2016 after the Zionist Organization of America complained that speech critical of Israeli policies and the political ideology of Zionism created an unsafe environment for Jewish students.<sup>3</sup> I explained how the task force found that **criticism of Zionism was not tantamount to antisemitism**.<sup>4</sup> I mentioned that at least six Title VI cases were brought by Israel advocacy groups alleging that campus speech critical of Israel created a hostile environment for Jewish students. I stated that none of these cases were found to have merit.<sup>5</sup> I paraphrased the Department of Education Office

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<sup>3</sup> Palestine Legal, CUNY: Independent Investigators Clear SJP (Oct. 31, 2016), <https://palestinelegal.org/case-studies/2016/10/31/city-university-of-new-york-independent-investigators-clear-sjp>

<sup>4</sup> Barbara Jones and Paul Shechtman, REPORT TO CHANCELLOR MILLIKIN ON ALLEGATIONS OF ANTI-SEMITISM (2016), <http://www2.cuny.edu/wp-content/uploads/sites/4/page-assets/news/newswire/assets/CUNYReport.pdf>.

<sup>5</sup> See, e.g., Letter from Emily Frangos, Compliance Officer, Office for Civil Rights to Morton A. Klein, President, ZOA (July 31, 2014) (writing that the incidents alleged grew out of political disagreements and not racial, ethnic, or religious bias, that it could not corroborate the facts alleged in the ZOA complaint, and the ZOA “failed to substantiate any specific incidents” where Jewish students were specifically targeted), <https://www.documentcloud.org/documents/1300803-ocr-decision-on-title-vi-complaint-7-31->



for Civil Rights’ decisions that speech critical of Israel is protected by the First Amendment and that “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.”<sup>6</sup>

Schoengood stated that the CUNY Graduate Center abides by the First Amendment and is a place for debate and exchange of ideas.

I asked you multiple times if Mutis had done anything wrong, should have conducted himself differently on the listserv or should conduct himself differently in the future. You stated several times that you have “no opinion either way” and that you were “gathering facts.” I stated that the factual record speaks for itself, as the complaint was limited to the contents of the emails attached to the complaint. You repeated that you were “gathering facts” and “looking at relevant material.”

Towards the end of the meeting, you stated that you would let us know in two weeks whether the complaint against Mutis was dismissed. In closing, Mutis stated that as a Latinx student of color, he felt that he was being unfairly investigated: He was respectful on the listserv, invited differing opinions, many other students sent long messages both supporting and defending Israel’s policies, and the complainant herself had told Mutis on the same EES listserv thread “FUCK YOU.”

## **II. Speech critical of Israel is protected by the First Amendment**

Rafael Mutis’ comments on the EES listserv are protected by the First Amendment. As you are no doubt aware, the First Amendment is binding on public colleges.<sup>7</sup> Speech that criticizes Israeli state policies and actions, and the U.S. government’s support of them, is protected First Amendment speech. By explicitly targeting a particular viewpoint being expressed—one expressing disgust with Israel’s policies and President Trump’s support of

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[14.html](#); Office for Civil Rights, determination letter, November 30, 2007, (concluding that the majority of incidents of alleged discrimination or harassment that the ZOA complained of involved disagreements “based on the students’ political views,” not the national origin of the complainant), on file with Palestine Legal; Letter from Morton A. Klein, President, ZOA to Joseph Aoun, President, Northeastern University, (July 5, 2013) (arguing that protected speech criticizing Israeli policy should be restricted, including, for example, student messages such as “ISRAEL IS AN APARTHEID STATE,” stickers equating Zionism with racism, and “one-sided” course readings “hostile to Israel”), <http://49yyp92imhtx8radn224z7y1.wpengine.netdna-cdn.com/wp-content/uploads/2013/10/ZOA-letter-to-Northeastern-Univ-President-Aoun-7-5-13.pdf>.

<sup>6</sup> Office for Civil Rights, determination letter, August 19, 2013, [http://news.berkeley.edu/wp-content/uploads/2013/08/DOE.OCR\\_.pdf](http://news.berkeley.edu/wp-content/uploads/2013/08/DOE.OCR_.pdf).

<sup>7</sup> See *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”); *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.”).



them—your investigation strikes at the heart of the First Amendment.<sup>8</sup>

The Supreme Court has emphasized that the ability to criticize government policy is “the central meaning of the First Amendment.”<sup>9</sup> When a point of view that criticizes government policy is heard on campus, the college is serving its highest purpose as a “marketplace of ideas.”<sup>10</sup>

Moreover, the Supreme Court has long held that “[d]iscrimination against speech because of its message is presumed to be unconstitutional.”<sup>11</sup> Students at public universities have the right to use university forums on a non-discriminatory basis.<sup>12</sup> In other words, CUNY may not cherry-pick which student emails are permissible based on the viewpoint they convey.<sup>13</sup> To do so casts exactly the type of “disapproval on particular viewpoints” that the Supreme Court warned “risks the suppression of free speech and creative inquiry [on] university campuses.”<sup>14</sup>

It is clear, as reflected by comments from the complainant to you, that the complainant disagreed with the viewpoint of Mutis’ message. The record shows that Mutis in no way targeted the complainant personally on the basis of a protected characteristic. Rather, Mutis expressed his viewpoint that the comment that the State of Israel “treasures children” “embraces people of all religions, cultures, ethnicities and nationalities” and is extraordinarily hospitable was ideological propaganda – specifically Zionist propaganda of the type supported by President Donald Trump.

Speech that criticizes Zionism is speech that criticizes a set of policies, not Jews or Israelis as a people. The use of the term “Zionist propaganda” does not become anti-Jewish or anti-Israeli simply because some students interpret this as a personal attack on their identity because they hold a strong personal identification with the State of Israel. The personal offense of some campus members cannot change the fact that Zionism is a deeply contested political ideology.

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<sup>8</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”).

<sup>9</sup> *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964).

<sup>10</sup> *Healy*, 408 U.S. at 180-81.

<sup>11</sup> *Id.*; see also, *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 55 (1983) (“In a public forum . . . all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject.”).

<sup>12</sup> See, e.g., *Healy*, 408 U.S. at 169.

<sup>13</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”); See also *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (“Access to a public forum, for instance, does not depend upon majoritarian consent.”); *Rosenberger*, 515 U.S. at 828 (“Discrimination against speech because of its message is presumed to be unconstitutional.”).

<sup>14</sup> *Rosenberger*, 515 U.S. 819 at 835.



Furthermore, as it is not clear whether the complainant is alleging national origin discrimination based on Israeli or U.S. citizenship, it must also be said that charging Mutis because of his criticism of President Donald Trump would also be unconstitutional.

It is inappropriate for a university that values academic freedom and unfettered debate to investigate a student based on criticism of Israel, U.S. policy or the ideology of Zionism. CUNY's shifting responses to Mutis' questions, its threats and its investigation into a listserv debate is antithetical to the democratic values CUNY professes to support. CUNY must immediately end its investigation of Rafael Mutis. The implicit threat of discipline unconstitutionally chills the speech of all CUNY campus members who wish to speak out for Palestinian human rights.

### **III. Conclusion**

Universities' scrutiny and censorship of speech critical of Israel harms all campus community members, especially those who are interested in exploring the critical issue of Israel and Palestine. It threatens to shut down robust debate on one of the most urgent foreign policy, moral and political questions of our time. The First Amendment and well-established values of higher education that envision the university as the "marketplace of ideas" do not permit this type of viewpoint discrimination.

There is no constitutionally-sound justification for investigating Rafael Mutis, and we expect CUNY will live up to its obligations under the U.S. Constitution and dismiss the complaint against him. We respectfully request a response by Tuesday, July 24, 2018.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Sainath".

Radhika Sainath  
Senior Staff Attorney  
Palestine Legal

cc: Matthew Schoengood, Vice President of Student Affairs; Jane Sovern, CUNY Deputy General Counsel