national lawyers guild

132 Nassau Street, Room 922, New York, NY 10038 212-679-5100 Fax 212-679-2811 nlg.org

October 4, 2011

Re: Obligations to Protect Students' First Amendment Rights

Dear Sir or Madam:

I write on behalf of the National Lawyers Guild to correct alarming misinformation recently disseminated to your university in a letter authored by Shurat HaDin, the Israel Law Centre ("the Letter"). The Letter purports to inform universities of potential criminal and civil liability if steps are not taken to single out Muslim, Arab, and pro-Palestinian student organizations for greater administrative surveillance and censorship.

It suggests a course of action that will likely lead to discrimination against Arab, Muslim, and Palestinian students on your campus and violate their and their supporters' First Amendment rights. Shurat HaDin frames the civil rights of Jewish students as being fundamentally at odds with the civil rights of Muslim, Arab, and Palestinian students. We believe that this approach is unnecessary, inadvisable, and will inevitably upset campus relations rather than improve them. Muslim, Arab, and Palestinian students have rights equal, not inferior, to their Jewish peers. Universities have a legal obligation to protect *all* students in protected groups from illegal discrimination and harassment. To meet that burden they must address both Islamophobia and anti-Semitism. Vigorous criticism of the State of Israel, however, does not constitute anti-Semitism or harassment.

Given the dangers posed by Shurat HaDin's flawed picture, our hope is to clarify the status of the law. We hope that this statement will better inform your efforts.

I. Universities Have an Obligation to Protect the Rights of Both Jewish Students and Arab and Muslim Students

Federal law mandates that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d ("Title VI of the Civil Rights Act"). Under this statute, federally funded universities have a legal obligation to prevent the creation of a hostile environment for students

based on race, ethnicity, or national origin, including religious groups like Jewish, Muslim, and Sikh students when they share perceived ethnic characteristics.[1]

Universities should take reasonable measures to ensure that institutions of higher learning are a welcoming space for students of all backgrounds. Where an Islamophobic or anti-Semitic atmosphere exists, it should be combated. Such measures should be narrowly tailored to maximize free speech protections, and should be decided upon only after extensive consultation with student and community representatives. Moreover, they should be the result of comprehensive studies, not rash or arbitrary measures borne of prejudice.

We note with concern that many of the instances of alleged anti-Semitism cited by Shurat HaDin at the University of California, Berkeley,[2] the University of California, Irvine, and Rutgers University are highly controversial and disputed factual matters that have never been settled in a court of law or by a credible and independent investigation. Other parties vigorously contest the veracity of such allegations. Moreover, the alleged conduct often involves protected political speech, not invidious discrimination.

II. Criticism of Israel is protected political speech, distinguished from anti-Semitism.

In distinguishing problematic racist speech that may constitute harassment from protected political discourse, university administrators should heed the categorical difference between criticism of Israel on the one hand and criticism of Jewish people and Jewish students (either as a whole or as individuals) on the other. Criticism of Israel is not directed at Jewish students or Jewish people but, rather, the perceived misconduct of the State of Israel. To treat the two as equivalent implies that Jewish people or Jewish students around the world are culpable for

---

[1] See Title VI of the Civil Rights Act of 1964 at 42 U.S.C. § 2000d. See, also, Dear Colleague Letter, Oct 26, 2010 p. 5 available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf. ("While Title VI does not cover discrimination based solely on religion, groups that face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith. These principles apply not just to Jewish students, but also to students from any discrete religious group that shares, or is perceived to share, ancestry or ethnic characteristics (*e.g.*, Muslims or Sikhs). Thus, harassment against students who are members of any religious group triggers a school's Title VI responsibilities when the harassment is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members' religious practices."). Although Muslims form a religious group, they cannot be denied protection under Title VI if they face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics. Muslims are often conceived of in such a racialized manner.

[2] Most recently, UC Berkeley has filed a motion to dismiss a lawsuit brought against it by Jessica Felber, alleging incidents that are prominently featured in Shurat HaDin's letter. Witnesses dispute the facts alleged by Felber. UC Berkeley argues that the plaintiffs primarily complain of political speech about Israel, and contend that censoring such speech would violate core First Amendment values. Motion to Dismiss, *Felber v. Yudof,* Case No. CV 11-01012-RS (D. N. CA July 5, 2011).

Israel's treatment of the Palestinians on the basis of their shared religion or perceived shared ethnic and ancestral characteristics. That notion itself is anti-Semitic.[3]

While bigotry against Jewish students or any other protected group may be actionable if it rises to the level of hate speech, criticism of Israel based upon its policies toward Palestinians is protected political speech that cannot be censored or punished by a public entity. Such speech contributes to a free and diverse political discourse, especially apt for a university campus that should welcome an open exchange of ideas. The Supreme Court has consistently affirmed that "speech on matters of public concern … is at the heart of the First Amendment's protection." *Snyder v. Phelps*, 131 S.Ct. 1207, 1215 (2011) (internal quotations and citations omitted). Because the Constitution embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotations omitted). For that reason, "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." *Snyder*, 131 S.Ct. at 1219 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

These principles apply particularly to the public university campus.[4] The Supreme Court has found that "[t]he college classroom with its surrounding environs is peculiarly the marketplace of ideas…" *Healy v. James*, 408 U.S. 169, 180 (1972), and that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools [of higher learning]." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

The First Amendment creates no exceptions for criticism of Israel. Moreover, political speech about Israel has never been found to create a hostile educational environment in the United States. To the contrary, a United States Department of Education Office of Civil Rights investigation into the University of California, Irvine concluded in 2007 that many acts complained of "were not based on the national origin of the Jewish students, but rather based on

---

[3] According to the U.S. State Department's letter clarifying when anti-Israel rhetoric becomes anti-Semitic, a contemporary example of anti-Semitism includes "Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by . . . the state of Israel . . ." (http://www.state.gov/g/drl/rls/fs/2010/122352.htm). Ironically, by equating student criticism of the Israeli state with criticism of Jews as a people, Shurat HaDin perpetuates the prejudice they purport to resist.

[4] While private universities are not bound by the First Amendment, they are contractually obligated to follow their own written policies and to refrain from discriminating on the grounds prohibited by Title VI, if they receive federal funds. Many colleges and universities have written free speech policies, because robust debate is an essential attribute of a healthy educational environment. We urge private universities without such policies to adopt policies ensuring student freedom of speech. *See, e.g.*, "Freedom of Expression at Yale College," available at http://yalecollege.yale.edu/content/freedom-expression; "Carnegie Mellon University Policy on Freedom of Expression," available at http://www.cmu.edu/policies/documents/FreeSpeech.html.

opposition to the policies of Israel."[5] The protected events and speech – which failed to constitute a hostile environment – featured speakers generally "known for strong rhetoric and criticism of the foreign policies and in some cases the existence of the State of Israel."[6] Other events included mock checkpoints and mock walls. Such speech was not found to create a hostile environment that ran afoul of Title VI of the Civil Rights Act because political criticism of a foreign state does not constitute harassment of other students.

Contrast the Department of Education's illustrative example of a true hostile environment for Jewish students. At one junior high school, "a teacher caught two ninth-graders trying to force two seventh-graders to give them money. The ninth-graders told the seventh-graders, 'You Jews have all of the money, give us some.'… At the same school, a group of eighth-grade students repeatedly called a Jewish student 'Drew the dirty Jew.'"[7] Furthermore, the behavior "caus[ed] some Jewish students to avoid the library and computer lab."[8] Such severe acts clearly target students on the basis of perceived or actual shared ethnic or ancestral characteristics and create a toxic educational environment.

On the other hand, criticism of Israel and Zionism is constitutionally protected criticism of a political ideology, policy, or viewpoint.[9] It reflects a healthy environment in which dissent and debate may thrive. Just as expressions of adoration or support for Israel cannot be banned on campus, neither can expressions of denunciation or opposition to Israel.

III. Universities who censor speech of Arab and Muslim students may be in violation of Title VI obligations and the First Amendment.

Reports indicate that Arab, Muslim, and Palestinian student organizations face unprecedented and potentially unconstitutional obstacles to fair and equitable access to university resources. Such resources include fair funding for events, access to facilities, and the ability to host events of educational, political, and religious import.

---

[5] See OCR Case Number 09-05-2013, Department of Education Office for Civil Rights, Letter to Chancellor Michael Drake, Nov 30, 2007. Note that while this investigation was concluded before the 2010 policy explicitly granting Title XI protection to Jewish and other groups of students, the analysis nevertheless proceeded as if it were the case. Id. at p. 1 ("OCR's jurisdiction under Title VI does not extend to allegations of discrimination on the basis of religion. However, the Assistant Secretary for Civil Rights has stated that OCR will carefully study the facts presented in a complaint and will proceed as appropriate with an investigation of a complaint involving a claim or issue of national origin discrimination, even if the complaint also has characteristics of religious discrimination.").

[6] Id.

[7] Id. at p. 5.

[8] Id.

[9] We note as well that Shurat HaDin relies in part on an alleged quotation by the Reverend Martin Luther King, Jr., although serious questions have been raised about its authenticity. See, e.g., http://electronicintifada.net/content/israels-apologists-and-martin-luther-king-jr-hoax/4955.

The Supreme Court has stated that, "[i]f an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students…. [Its ability to participate in the campus debate] is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students." *Healy v. James*, 408 U.S. 169, 181 (1972).

Yet student groups around the country report selective scrutiny by university administrators of events that address Israeli violations of human rights or Palestinians' history of dispossession. In many cases, student organizations have been unfairly placed on suspension or their events have been cancelled.[10] Such treatment has been harsher and more repressive than the treatment of other student organizations. Such discriminatory treatment of student groups based on national origin or perceived or actual shared ethnic or ancestral characteristics may run afoul of Title VI's conditions for federal funding and, in public entities, may constitute prior restraints on speech and unlawful limitations on the right of association under the First Amendment.

Shurat HaDin's letter is an integral aspect of a campaign to harass and intimidate and chill the exercise of free speech rights by American students and student organizations whose work addresses Israeli violations of human rights and international law. The Letter's suggestion that Muslim student organizations be subjected to enhanced scrutiny rests on accusations that such organizations may have ties to designated "foreign terrorist organizations," but without citing supporting evidence. Instead, Shurat HaDin relies on Islamophobic innuendo and encourages unwarranted suspicion and investigation of Muslim students. Shurat HaDin's efforts coincide with the goals of what the *New York Times* has called "the work of a growing and organized movement to stop Muslim citizens who are seeking an expanded role in American public life."[11] We caution your university against adopting policies or practices that infringe the constitutional rights of students or perpetuate anti-Muslim and anti-Arab bigotry.

As Muslim, Arab, and Palestinian students seek an expanded role on American campuses, they must not be subjected to discriminatory and potentially unconstitutional restrictions that unfairly marginalize them on the basis of their religion, race, national origin, or political views. Shurat HaDin urges colleges and universities to construe Title VI of the Civil Rights Act to permit or even mandate such discriminatory treatment by urging increased surveillance of Muslim, Arab and Palestinian student organizations. Such discriminatory

---

[10] For example, Columbia Students for Justice in Palestine (CSJP) was placed on suspension in Spring 2011 and the group was barred from reserving rooms and hosting events without notice. For weeks prior, the administration had followed a practice of notifying the campus Hillel in advance of any CSJP event, a rule applied to no other student organization. The suspension was lifted after the intervention of supportive faculty, attorneys, and meetings with administrators in which it became clear that the administrators had not followed Columbia University's own written policies.

[11] "Muslim Educator's Dream Branded a Threat in the U.S.", New York Times, April 28, 2008 available at: https://www.nytimes.com/2008/04/28/world/americas/28iht-28school.12386630.html. See also, Jihad Against Islam, Southern Poverty Law Center, available at http://splcenter.org/get-informed/intelligence-report/browse-all-issues/2011/summer/jihad-against-islam

treatment does not enforce Title VI obligations, but rather transgresses them. Public schools may also violate these students' First Amendment speech and association rights.

IV. Humanitarian aid to besieged populations does not constitute "material support"

There is absolutely no precedent in the United States for the criminal prosecution of any institution of higher learning or university administrator for providing material support to a designated organization on the basis of student or student group activity. In fact, as Shurat HaDin itself acknowledges, there is no proof that any student organization in the United States has knowingly rendered material support to a designated foreign terrorist organization.[12] To support its fear-mongering about potential criminal liabilities, Shurat HaDin relies on a mix of latent Islamophobia and a broad misreading of a recent U.S. Supreme Court ruling, *Holder v. Humanitarian Law Project*, 561 U.S. ____, 130 S. Ct. 2705 (2010), which itself has drawn widespread criticism for threatening this country's First Amendment tradition.[13]

In *Holder*, the Supreme Court confirmed the constitutionality of 18 U.S.C. 2339B, which authorizes the Secretary of State to designate "foreign terrorist organizations" (FTOs) and to criminalize the provision of "material support" to them. The plaintiffs in the case sought to aid a specific designated foreign terrorist organization by advising it on how to use nonviolent, legal means to achieve its ends. The Court controversially held that such actions could be criminally punishable under the statute because such support for lawful activities by designated organizations might nevertheless free resources for their unlawful activities. "Material support" could therefore include "expert advice or assistance," "training," and "service" in engaging in legal activities.

But that does not mean that all expressions of political support have been criminalized by *Holder*, particularly those related to countries in which some organizations designated as terrorist operate. Shurat HaDin grossly distorts a particular campaign by one student organization at Rutgers University to support the U.S. Boat to Gaza. The U.S. Boat to Gaza was a solidarity mission established in the wake of Israel's assault on an international humanitarian aid flotilla in the winter of 2010.[14] That assault led to the killing of nine unarmed people by Israeli

---

[12] There is similarly no proof that students on U.S. campuses are at risk of violating 18 U.S.C. § 956, which makes it a crime to "conspire[]… to damage or destroy specific property situated within a foreign country and belonging to a foreign government… with which the United States is at peace." There is simply no evidence that students on U.S. campuses have hatched plans to spray paint the wall, much of which lies not in Israel but in the Occupied Palestinian Territories.

[13] See, e.g., http://www.aclu.org/national-security/supreme-court-rules-material-support-law-can-stand.

[14] Shurat HaDin alleges that such missions may violate The Neutrality Act, 18 U.S.C. § 960, which prohibits certain forms of support for military and naval expeditions against U.S. allies. The suggestion that civilian ships carrying no arms and transporting only humanitarian aid, lacking intent to make war, may be considered a "military or naval expedition or enterprise" has no credence. *See, e.g., U.S. v. Khan*, 309 F.Supp.2d 789, 818-9 (E.D. Va. 2004), *aff'd in part, remanded in part* 461 F.3d 477 (violation of Neutrality Act found

commandos, including a 19-year-old American citizen. BAKA: Students United for Middle Eastern Justice at Rutgers University sought to fundraise in support of the U.S. Boat to Gaza. They solicited advice from the Center for Constitutional Rights (CCR) on the legality of their activities. CCR advised them that "as long as the aid is not being provided to Hamas (or to someone you have reason to believe is owned or controlled by or acting on behalf of Hamas or another designated entity), you are not violating 18 U.S.C. 2339B. The law does not bar aid to individuals who are not designated, and does not prohibit the provision of aid to persons in Gaza, as long as they do not fit the above description."[15]

Thus, support for humanitarian aid convoys and solidarity groups has not been criminalized by *Holder* and constitutes a legitimate exercise of the First Amendment right to freedom of speech. *Holder* instead criminalized the provision of "material support" to designated "foreign terrorist organizations," not the work of political activists and non-profit organizations in the Occupied Palestinian Territories.

In sum, material support knowingly provided to designated "foreign terrorist organizations," or to someone reasonably believed to be under their control, creates criminal liability. But aid to other individuals and organizations that are not so designated is not prohibited by the material support laws.

V. Conclusion

The National Lawyers Guild was founded in 1937 and is the oldest and largest civil rights bar organization in the United States. Its headquarters are in New York and it has chapters in every state. The National Lawyers Guild stands firmly for the notion that American universities have a legal obligation to protect Jewish students from racial discrimination and harassment where it exists. Universities have the same obligation to protect *all* other students from such discrimination. Above all, universities must refrain from themselves engaging in discrimination and harassment based on students' national origin or ethnic background. Students of Arab, Muslim, and Palestinian background are entitled to be free of such discrimination. Protecting those rights includes ensuring equal access to university resources like funding and room reservations. It includes barring Islamophobic hate speech meant to malign, isolate or chill the speech of Arab, Muslim, and Palestinian students. It also warrants vigilance in preventing the adoption of rules and regulations that abridge freedom of speech rather than allow it to flourish.

---

when co-conspirators trained "combat skills through paintball games and the acquisition of weapons, with the knowledge that some co-conspirators already traveled to Kashmir and fired on Indian positions, and with the expectation that other co-conspirators would do the same."); *U.S. v. Hart*, 78 F. 868, 870 (E.D. Pa. 1897) ("any combination of men, organized in this country, to go to Cuba and make war upon its government, provided with means, -- with arms and ammunition… constitutes a military expedition."); *U.S. v. Lumsden*, 26 F.Cas. 1013, 1014 (S.D. Ohio 1856) (implicitly accepting lower court's jury instruction that "[t]he word expedition is used to signify a march or voyage with martial or hostile intentions.").

[15] Letter from Center for Constitutional Rights to BAKA: Students United for Middle Eastern Justice, Rutgers University, November 12, 2010 (attached).

A university may not single out a student group for scrutiny simply because it is critical of Israel or supportive of the Palestinians.

Sincerely,

David Gespass
President