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February 24, 2015

Peter John Papadimos, Vice President and General Counsel
Janelle M,. Schaller, Associate General Counsel
University Hall, UH3620, Main Campus

Re: Student Government proceedings on student organization resolution

Dear Mr. Papadimos and Ms. Schaller:

I write for the student organization, Students for Justice in Palestine, about the University's legal duties in connection with official Student Government ("SG") proceedings on the SJP's proposed resolution for University divestment from companies profiting from the Israeli occupation. The resolution that was declared unconstitutional at last week's meeting is enclosed.

What happened at last week's SG meeting was openly hostile to democratic process and the University's educational mission. It was indeed a lesson in the political process, but hardly one a university should be modeling for its students:

- Students and the general public are entitled under Ohio's Open Meeting Act[1] to be present at SG meetings, to hear the senators' views, and to witness the deliberations and voting. Students are, at appropriate times, entitled to ask questions and share their own views with their elected senators. Instead, the entire student body was *barred* from attending the session, except for five representatives of the SJP, as the resolution proponent, and Hillel, a student organization designated by the SG as the opposition, thereby excluding other student organizations that would have testified in support of the resolution, had they been allowed to participate.[2]

[1] Ohio Rev. Code § 121.22.

[2] Betraying viewpoint discrimination (see below), the SG invited two local representatives of an *off-campus community organization, the Jewish Federation,* to attend and speak at the meeting, in the same message in which it announced that it was barring *students* from attending. The Jewish Federation is the lead organizer of the Israel Action Network, a leading opponent of the U.S. movement for Boycott, Divestment, and Sanctions against Israel, and a major funder of the IAN. The SG president later reluctantly and apologetically (to the Jewish Federation, only!) withdrew that invitation. As he candidly explained: "We cannot allow individuals to speak who are not UT students when we are barring students from coming into the meeting."

- By designating Hillel as the official opposition to the divestment resolution, the SG officially redefined the debate as a confrontation along religious lines. This action subtly but officially validated the Zionist opposition to BDS activism as being "anti-Semitic," hence warranting designation of the campus' official Jewish students' organization as the opposition. This action and the SG's invitation to the Jewish Federation to attend the meeting, in the same message that barred students from attending it, see footnote 2, above, allied the SG with Hillel and the Jewish Federation, even before it considered the merits of the resolution. The SG's rationale for closing the Student Senate meeting on a resolution proposed by the SJP chapter – an asserted concern about potential violence, without citation to any evidence that would warrant the concern – further exacerbated the evidence of bias.

- The SG violated the rights of the student proponents and opponents to make meaningful presentations of their positions and the rights of students to ensure that their senators vote on the issue on an informed basis, rather than in ignorance, by limiting each side's presentation to a total of 10 minutes. Student governments at other schools where divestment resolutions have been debated and voted have typically found it necessary to set aside hours for the opposing sides and others present to ask and receive responses to questions and present their own views. This proceeding was not designed to encourage debate and ensure an educational experience and informed voting, but to ram the resolution through without debate or opportunity for the resolution's proponents to explain their grounds.

- Exacerbating the absence of an informed basis for voting, *each side was required to leave the hearing room while the opposition testified*, depriving them of the ability to respond to each others' arguments.

- *Before the SG finished its discussion and deliberations on the resolution*, the Judicial Council ("JC") convened a meeting and, by a 5:4 margin, declared the resolution to be unconstitutional under the SG constitution's "Purpose" clause, on the vague and unexplained grounds that it was "discriminatory" and "one-sided." The SG Judicial Council thus finished the SG Student Senate's refocusing of the resolution as a religious confrontation.

- One of the Council justices who voted in the *majority* resigned immediately following the voting, suggesting the influence of coercive administration pressure on the JC to produce this outcome.

- The JC's needlessly premature action, before the conclusion of discussion, deliberations, and voting on the divestment resolution, mooted further Senate proceedings, violating students' and senators' rights to finish the discussion and deliberations and to vote on the resolution.

The SJP objects to the SG actions recited above. The chapter desires to resolve this matter, if at all possible, without acrimony, collegially, fairly, and quickly. But it will not abandon its divestment resolution and students' rights under the First Amendment and state law. Its objections follow.

1. ***The SG's closed meeting violated its own commitment to open such meetings.***

The Student Senate is the official forum where students and their elected senators may meet to discuss the issues of greatest concern to them:

> The Student Senate … is meant to be the forum where students can express their opinions, concerns, and bring forth any issues. The Student Senate works as a whole body to advocate for students via legislation and then see the legislation through by working with the administration.[3]

The SG's exclusion of the student body from the discussion of the divestment resolution at last Tuesday's regular Student Senate meeting plainly violated the SG's own commitment to an open forum.

The JC's departure from its customary procedure, without forewarning, in calling its meeting and conducting its vote *before the SG Student Senate finished its discussion and deliberations, and before it was able to vote on the resolution*. In so doing, the JC violated the rights of student senators to complete their deliberations and vote on the resolution and of the students who elected them to have their senators vote on a resolution formally declared properly before the Student Senate by the SG's Steering Committee.

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[3] http://www.utoledo.edu/studentaffairs/sg/senate.html

2. ***The SG's actions violated the most highly protected First Amendment free speech and association rights of students and student senators to discuss, debate, and vote on matters of public concern.***[4]

The SG's closed meeting violated the students' and senators' most fundamental and important First Amendment rights of speech and association. No speech is more highly protected than speech on matters of public concern. "[S]peech on matters of public concern…is at the heart of the First Amendment's protection." *Snyder v. Phelps*, 131 S.Ct. 1207, 1215 (2011) (quotations and citations omitted). "[I]f 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." *Id.* at 1219 (quotations and citations omitted).

Such speech includes advocacy of boycott and divestment as lawful and nonviolent forms of pressure to remedy human rights violations. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Campus boycott, divestment, and sanctions campaigns for justice for Palestinians are squarely protected by the First Amendment, as held by federal court and U.S. Department of Education decisions in the context of Title VI complaints of harassment and anti-Semitism. *Felber v. Yudof,* 851 F. Supp.2d 1182 (N.D. Cal. 2011) (University of California at Berkeley); U.S. DOE Case Nos. 09-12-2259f (UC Berkeley), 09-09-2145 (UC Santa Cruz), (August 19, 2013):

> [I]n order to be prohibited by the statutes and regulations that OCR enforces, the harassment must include something beyond the mere expression of views, words, symbols or thought that a student finds personally offensive. … Under OCTR's standards, in order to establish a hostile environment conduct must be sufficiently severe, persistent or pervasive as to limit or deny the student's ability to participate in or benefit from the educational program. This requires

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[4] The Student Government is an officially designated agent of the University, and the University, as well as SG itself, is responsible and liable for its actions:

> The authority and power of the Student Government to take actions set forth herein have been delegated and, in the ordinary course of events, will continue to be delegated from the Board of Trustees through the President and Officers of the University to the Student Government.

SG Constitution, art. I, § 3.

The University's constitution designates the University Council to consider the "reports and recommendations" of the Student Government. UT Constitution, § (C). The SG president, vice president, and chief justice serve as University Council members. *Id.* (D), and its president also serves as a member of the University Council's executive committee. *Id.* (H).

> that conduct be evaluated from the perspective of a reasonable person in the alleged victim's position.

U.S. DOE Case No. 09-12-2259, *supra*, at 2.[5]

Vague, abstract, and subjective concerns about discrimination – the basis for the JC's decision in this case – fall far short of the objective evidence of a "hostile environment" required to overcome First Amendment free speech rights on campus and elsewhere, that protect peaceful expression – including vigorous and argumentative expression -- on matters of public concern. "In the university environment, exposure to such robust and discordant expressions, even when personally offensive and hurtful, is a circumstance that a reasonable student in higher education may experience." *Id.* 3.

First Amendment free speech rights are fully applicable to public colleges and universities. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981). The university community owes, if anything, the highest duty of any community to protect its population's – its students' -- free speech rights: "The college classroom with its surrounding environs is peculiarly the marketplace of ideas..." *Healy v. James,* 408 U.S. 169, 180 (1972), and "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).

Here, the SG violated the free speech and association rights of all students and the interested public to attend the discussion, deliberations, and voting on the divestment resolution, and the rights of students to participate by asking questions, hearing the senators' responses, and expressing their own views on the matter to their elected senators. These rights are deemed so fundamental under the First Amendment that Ohio and most or all other states have enacted so-called sunshine laws to ensure these rights are honored by public decision-making bodies, such as the Student Government's Student Senate and Judicial Council.

3. ***The JC's ruling was unconstitutional viewpoint discrimination, in violation of basic First Amendment free speech dogma.***

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[5] DOE's determination letters in these three cases, explaining its legal findings, can be downloaded at the following URLs: UC Berkeley (http://bit.ly/doeucb); UC Santa Cruz (http://bit.ly/doeucsc); UC Irvine (http://bit.ly/doeucirvine). *See generally*, the National Lawyers Guild letter to more than 100 U.S. colleges and universities in response to coercive and intimidating threats of Title VI prosecutions against them by Shurat HaDin (the Israeli Law Center): http://www.nlginternational.org/report/NLG_Students_Rights_1011.pdf

The First Amendment prohibits viewpoint discrimination by a public entity. *Terminiello v. Chicago*, 337 U.S. 1 (1949). In that decision, the Court sternly admonished that free speech may "best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.." *Id.* 4. *See also Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973).

Neither the University administration nor the SG may dictate to a student organization what topics it may discuss or what its positions must be. To the contrary, under the First Amendment, "[d]iscrimination against speech because of its message is presumed to be unconstitutional…." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829–31 (1995). "For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses." *Id.* at 836; *see also Board of Regents of the University of Wisconsin System v. Southworth,* 529 U.S. 217, 233 (2000) ("When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others.").[6]

This bedrock principle of First Amendment dogma against viewpoint discrimination has been recently enforced in the context of fierce Zionist opposition, such as we have just seen on the UT campus, against student boycott, divestment, and sanctions activism against the Israeli occupation: "The offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment." U.S. DOE Case No. 09-12-2259, *supra*, at 2; *see* page 4 and associated footnote 4, above.

The Judicial Council ruled the divestment resolution to be unconstitutional under the Student Government constitution's "Purpose" clause. The majority 5:4 decision was explained by Justice Christopher Miller, who voted in favor of it, as based on the existence of an opposing viewpoint: "We felt that because there was an opposing viewpoint on this proposal, that it wouldn't necessarily protect against discrimination within the student body." "We felt that they definitely expressed their opinions early on that they felt it would lead to their discrimination."

The resolution, then, was struck down as unconstitutional because it was opposed. The free speech rights of the resolution's proponents were sacrificed to the free speech rights of its opponents to express their opposition. The JC's decision is a classic illustration of a First Amendment free speech violation. In the

[6] UT requires its students to pay such fees.

JC's view, all that is required to invalidate a resolution is for its opponents to express their opposition to it. The only "constitutional" resolutions are those that are so tame that there is either no opposition or no interest in them. The JC violated the core holding of *Terminiello v. Chicago*, that "free speech . . . may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." 337 U.S. at 4.

Even if the resolution had expressed offensive advocacy -- and it did not, as explained below – it would have been protected: "("[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Board of Curators of the University of Missouri, supra,* 410 U.S. at 670.

But there is no basis in the resolution or any of the SJP's comments in support of it for the JC's rationale that the resolution is "discriminatory." Anti-Semitism is hatred of Jewish people based on their identity as Jews. But the resolution does not criticize "Jews." It criticizes the policies and practices of a foreign country, the State of Israel.[7] The divestment for which it calls would end upon Israel's compliance with the resolution's demands for compliance with international law and an end to Israel's human rights violations.

The accusation of discrimination by the adversaries of the divestment resolution is designed to impose the heavy and fearful freight of bigotry on legitimate criticism of the misconduct and overreaching of a nation state. The critics of the resolution seek to carve out a unique status for Israel and its nearly half-century occupation, making criticism of it an unspeakable act of bigotry. But no country is above the international law or norms of human rights, and none is immune from criticism.

The absurdity of the accusation becomes manifest when it is compared to the parallel premises of other civil rights movements. The American grape boycott of the 1950s did not "discriminate" against the grape growers, but instead sought to enforce the workers' right under the federal labor laws to organize into labor unions without being fired in retaliation. The U.S. civil war did not "discriminate" against Southern slave owners by seeking to free the slaves from slavery. The U.S. civil rights movement of the 1960s and 1970s did not "discriminate" against whites by seeking equal rights for all.

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[7] It is not factually accurate to equate criticism of Israeli policies and practices with criticism of Jews, generally. Twenty percent of the Israeli population is native Palestinian, and the overwhelming majority of Jews don't live in Israel, but elsewhere around the world.

"Discrimination" occurs every time a person makes one choice, rather than another. There's nothing unlawful about such acts of "discrimination." Discrimination is unlawful only when it is based on prohibited classifications, such as race, sex, national origin, or religion. In this case, SJP argues that it is the Israelis who are engaging in discrimination based on bases that would be unlawful under the Fourteenth Amendment, U.S. civil rights laws, and international law, because the Israelis have created a society in which only Jews enjoy democracy, while Palestinian citizens of Israel struggle daily, typically without success, to enforce their legal rights under Israeli law, and where Palestinians having the tragic misfortune of living in the occupied Palestinian territories, under military law, have no rights at all.

Finally, the SG constitution imposes no rule against allegedly "one-sided" resolutions. The proponents have no duty to honor the entity they see as the oppressor equally with the perceived oppressed group. No oppressor is entitled to compensation for ending its oppression.

Under the First Amendment, the proponents have no duty to incorporate other people's desires into their resolution. Other students are equally free to create their own resolution, if they are dissatisfied with this one.

In sum, the JC's rationale for its decision is incoherent, arbitrary, and capricious. In a word, its ruling is indefensible.

4. ***The SG's actions violate Ohio's Open Meeting Act.***

Ohio's Open Meetings Act requires every meeting of a decision-making public body to open its meetings to the public. Ohio Rev. Code § 121.22.[8] The University admits its status as a public body, subject to the Act.[9] As a decision-making University council, the SG is bound by the Act's notice and open meeting requirements and has admitted its obligation to hold all of its regular meetings open to the public.[10]

But the SG Student Senate and Judicial Council failed to comply with the open meeting requirement, by barring both the student body and the general public

[8] "With narrow exceptions, the Ohio Open Meetings Act requires the members of a public body to discuss and deliberate on official business only in open meetings." Ohio Sunshine Laws: An Open Government Resource Manual, page 87 (2014). None of the statutory exemptions exempt the SG.

[9] University Council Bylaws, § A.3 (Feb. 10, 2014); Minutes of the Board of Trustees, at 7 (Sept. 16, 2013).

[10] "[E]very regular SG meeting … is an open public meeting." SG Handbook, at 20.

from attending. Instead, the SG allowed attendance only by the designated interested parties -- a few representatives of the SJP, as the resolution's proponent, and Hillel, as the SG's designated opponent. The Judicial Council committed the same violation, as well as a second violation in convening its meeting, without prior notice, in the middle of the ongoing Student Senate meeting.

These notice and open meeting violations are particularly egregious because they robbed the public and student body of the opportunity to be present and for students to participate in an important matter of great public concern, both on and off campus.

The SG's Open Meetings Act violations render all actions at last Tuesday evening's meetings of the Student Senate and Judicial Council invalid. *See* Ohio Rev. Code § 121.22(H).

CONCLUSION

As indicated at the outset of this letter, the SJP desires an amicable, collegial, nonconfrontational resolution of this dispute. Its intention is to resubmit its resolution at the next SG meeting, with edits that will explicitly clarify the absence of discriminatory intent or discriminatory effect of the resolution's requested divestment action. To comply with the First Amendment and Ohio's Open Meetings Act, the meeting needs to meet each of the following criteria:

- The SG needs to declare all proceedings on the SJP's divestment resolution at last week's meeting invalid, void, and of no effect, as having taken place in violation of student free speech rights under the First Amendment and the Ohio Open Meetings Act.

- The SG needs to agree to put the revised divestment resolution on its next regular meeting agenda on March 3, 2015.

- There needs to be a promptly issued remedial SG notice to the public and student body, inviting all to attend the next regular meeting on Tuesday, March 3, 2015 and assuring students that they will be allotted sufficient time to ask questions, receive answers to them, and inform their senators of their own views on the divestment resolution.

- The meeting needs to be conducted in accordance with the foregoing criterion.

- Ample time must be allocated for the SJP, as the resolution's proponent, to explain its rationale fully and to respond to all questions; and for all supporting and opposing student organizations to state their own positions on the issue.

- All senators need to feel confident that they are fully informed on the issue and on the sentiments of the student body on it, before voting.

- The Senate vote is required by law to be an open vote, during which both students and the general public are entitled to be present and observe how each senator votes. Secret ballot voting is prohibited.[11]

While we have so far been unable to make telephone contact, I continue to look forward to it and believe it would be valuable. In the interests of a speedy resolution of this dispute before the close of business tomorrow, February 25th, the SJP will refrain from distributing and publicizing this letter until then. Given the time that has been lost while I have been unsuccessfully attempting to make telephone contact with you, the SJP cannot delay any longer than until close of business tomorrow.

Very truly yours,

/s/

Barbara Harvey

cc: UT President Naganathan
SG President Notestine

[11] 2011 Ohio Op. Att'y Gen. No. 038 (secret ballot voting by a public body is antagonistic to the ability of the citizenry to observe the workings of their government and to hold their government representatives accountable).