

## THE SYSTEMATIC ATTEMPT TO SHUT DOWN STUDENT SPEECH AT THE UNIVERSITY OF CALIFORNIA

### IN BRIEF

---

Free speech is being attacked throughout the University of California (“U.C.”) and at public and private college campuses across the country. Speech and association rights of the student groups Students for Justice in Palestine (“SJP”) and the Muslim Student Association (“MSA”) are being threatened by University administrators, a baseless lawsuit, and problematic Department of Education investigations.<sup>1</sup> Speech activities clearly protected by the First Amendment that grapple with important political questions relating to Israel’s policies are being improperly characterized as anti-Semitic. These “legal bullying” tactics must be recognized and stopped. While the focus of this briefing is on speech at the University of California at Berkeley (“Cal”), other troubling incidents of repression of expressive speech have taken place across the country, including the criminal prosecution of students at the University of California at Irvine, and administrative responses to students at Columbia University, Florida Atlantic University, and many other campuses.

### THE U.C. “CAMPUS CLIMATE” REPORT

---

**Background:** In June 2010, U.C. President Mark Yudof formed the “Advisory Council on Campus Climate, Culture, and Inclusion” (“Council”).<sup>2</sup> It was ostensibly formed to address all forms of racism and religious intolerance in response to various incidents of racism on U.C. campuses (such as the so-called “Compton Cookout”). However, the timing of its formation, on the heels of the Spring 2010 Divestment campaign at Cal, coupled with the biases evident in the report issued to the Council, discussed below, indicate that its actual focus was on student speech and expressive conduct that is critical of Israel.<sup>3</sup>

**Biases in the Report:** One of the two reports issued to the Council contains highly problematic recommendations advocating for the impingement of speech critical of Israel.<sup>4</sup>

The report’s methodology indicates bias. Over the course of the year-long investigation, the Council met early on with Jewish students and faculty who expressed offense at any speech critical of Israel, and who supported the restriction of such speech. They did not, however, interview Arab, Muslim, or Palestinian students until the end of the year, nor did they give adequate representation to Jewish students expressing viewpoints critical of Israeli policies. The report’s findings were heavily critiqued by civil rights organizations,<sup>5</sup> student organizations, and members of the U.C. Jewish Community (the U.C. Ad Hoc Committee on Jewish Campus Climate) in a letter to President Yudof.<sup>6</sup>

### BASELESS LAWSUIT: FELBER v. REGENTS

---

**The Lawsuit:** In 2011, Jessica Felber and Brian Maissy, two Cal students affiliated with the pro-Israel student group Tikvah, filed a lawsuit against the University.<sup>7</sup> They alleged that the activities of Cal’s SJP and MSA created a hostile, anti-Semitic environment because the two groups were criticizing Israeli policies, and that the University was responsible for this alleged anti-Semitic environment because it failed to curtail these groups’ activities. Though the lawsuit was filed against the University, it was mostly comprised of inflammatory and unfounded allegations about Cal’s SJP and MSA.

Despite the fact that the case was in a very early stage (the Motion to Dismiss stage, during which the court must assume that all allegations in the complaint are true and must construe the facts in a manner most favorable to Felber and Maissy, [the complainants]), it was nonetheless dismissed by the court in December 2011. The judge concluded that the complainants had not alleged anything that the University could be held responsible for. The judge wrote that “a very substantial portion of the conduct to which [the complainants] object represents pure political speech and expressive conduct, in a public setting, regarding matters of public concern, which is entitled to special protection under the First Amendment.”<sup>8</sup>

In dismissing the case, the judge gave the complainants a chance to amend (change) and resubmit their complaint. At this point, the University and the complainants entered into a settlement agreement.

**The Settlement:** The University entered into a benign settlement that does not change University policy or limit the activities or speech of SJP or MSA.<sup>9</sup> The University only agreed to have a public review to consider changes to two of its existing regulations regarding toy weapons and ingress and egress (foot traffic) rules. Not only is the University **not** obligated to change these policies after the public review, the complainants did not receive any compensation or a return of legal fees, and had to agree to dismiss the lawsuit.

**Likely Motivation of the Complainants:** On the very same day that the complainants signed the settlement agreement, they filed a Title VI complaint with the Department of Education making the same false allegations that had just been thrown out of court.<sup>10</sup> The complainants would very likely have lost outright in court, and thus agreed to a benign settlement. Having failed to achieve their aim of curtailing student speech in court, the complainants decided to try their luck in another legal forum, by abusing Title VI.

The DOE opened a limited Title VI investigation into this matter in September 2012.

## TITLE VI

---

Title VI: Title VI of the 1964 Civil Rights Act states that if an entity is receiving Federal financial assistance (which U.C. does), it is prohibited from discriminating against people based on race, color, or national origin.<sup>11</sup> It was historically used to desegregate schools in the South.

Someone alleging a violation of Title VI can file their complaint in two places: one is in federal court, and the other is with the Department of Education (“DOE”). A DOE complaint is not a lawsuit, but rather an administrative review.

Recent Title VI Policy Change by the DOE: In October 2010, despite the fact that the text of Title VI does not include “religion” as a protected category, the DOE announced it would investigate Title VI discrimination claims brought by members of religious groups, if the claims are based on the group’s shared ancestry or ethnic characteristics.<sup>12</sup> This change allows Jewish students (and potentially Muslim and Sikh students as well) to file Title VI complaints with the DOE. The Supreme Court has not ruled on whether Title VI can be used for religious groups.

Attempts to Use Title VI to Shut Down Speech Critical of Israel Have Failed Thus Far: Every attempt thus far to use Title VI to shut down criticism of Israel has failed. As of October 2012, ten complaints alleging anti-Semitism were filed under Title VI, five of which involved speech critical of Israel. Only one of those ten complaints was successful – and it had nothing to do with Israel or a university (it involved a high school student who was subjected to racial slurs and harassment by his classmates).

The five Title VI complaints involving speech critical of Israel are:

- U.C. Berkeley (discussed above);
- U.C. Santa Cruz (ongoing);
- Barnard College (administrative case that was thrown out in 2012);
- Rutgers University (most allegations in the complaint were dismissed, while one allegation around a particular event where Jewish students alleged that they had to pay an admissions fee remains under investigation);
- U.C. Irvine (a 2004 complaint that was thrown out in 2007, but which we believe is being reconsidered in light of the new DOE policy change in 2010).<sup>13</sup>

## POLITICS AT PLAY IN TITLE VI

---

Kenneth Marcus is the driving force behind the abuse of the Title VI complaint process.<sup>14</sup> As the former head of the DOE’s Office for Civil Rights, he authored and subsequently championed the adoption of the Title VI policy allowing religious groups to claim Title VI protection. Since leaving the DOE, Marcus founded and now heads the Louis D. Brandeis Center,<sup>15</sup> which has been involved in the formulation of some of the anti-Semitism complaints to the DOE. The two attorneys who filed the Felber Title VI complaint at the DOE both served as Legal Advisors to the Center.

## FIGHT FOR SPEECH

---

The University of California has once again become a battleground for free speech. Stand on the right side of history and fight for students’ right to speak freely and critically about important human rights issues.

---

<sup>1</sup> Yaman Salahi, “Behind the Scenes with Israel’s Campus Lobby,” Al Jazeera, Sept. 26, 2011, *available at* <http://www.aljazeera.com/indepth/opinion/2011/09/201192384847314840.html>.

<sup>2</sup> Letter from Henry T. Yang, Chancellor, to Campus Community, June 18, 2010, *available at* <https://chancellor.ucsb.edu/memos/details.cfm?V=9E9BE852B87133FD>.

<sup>3</sup> Letter from the Council on American-Islamic Relations and the National Lawyers Guild to Mark Yudof, President of the University of California, July 10, 2012, *available at* <http://www.nlginternational.org/report/LtrYudofFreeSpeech.pdf>.

<sup>4</sup> Letter from the U.C. Ad Hoc Committee on Jewish Campus Climate to Mark Yudof, President of the University of California, *available at* <http://www.change.org/petitions/letter-to-pres-yudof-in-response-to-jewish-campus-climate-report>.

<sup>5</sup> Letter from the Council on American-Islamic Relations and the National Lawyers Guild to Mark Yudof, President of the University of California, July 10, 2012, *available at* <http://www.nlginternational.org/report/LtrYudofFreeSpeech.pdf>.

<sup>6</sup> Letter from the U.C. Ad Hoc Committee on Jewish Campus Climate to Mark Yudof, President of the University of California, *available at* <http://www.change.org/petitions/letter-to-pres-yudof-in-response-to-jewish-campus-climate-report>.

<sup>7</sup> Second Amended Complaint, Felber v. Yudof, No. 3:11-CV-01012 (N.D. Cal. Mar. 4, 2011).

<sup>8</sup> Felber v. Yudof, 851 F.Supp.2d 1182, 1188 (2011).

<sup>9</sup> Settlement Agreement, Felber v. Yudof, No. 3:11-CV-01012 (N.D. Cal. Mar. 4, 2011).

<sup>10</sup> Complaint to U.S. Dep’t of Educ. on behalf of Jessica Felber and Brian Maissy (July 9, 2012), *available at* <http://s3.documentcloud.org/documents/399604/title-vi-complaint.pdf>

<sup>11</sup> 42 U.S.C. §§ 2000d *et seq.*

<sup>12</sup> Dear Colleague Letter from Russlynn Ali, Assistant Sec’y for Civil Rights (Oct. 26, 2010), *available at* <http://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201010.html>.

<sup>13</sup> Naomi Zeveloff, “Coming Up Empty on Title VI,” Jewish Daily Forward, Mar. 16, 2012, *available at* <http://forward.com/articles/152691/coming-up-empty-on-title-vi/?p=all>.

<sup>14</sup> See Kenneth Marcus, “Anti-Semitism at the OCR?,” Sept. 1, 2010, *available at* <http://octaskforce.wordpress.com/2010/09/01/anti-semitism-at-the-ocr/>.

<sup>15</sup> Louis D. Brandeis Center, About the President, <http://brandeiscenter.com/index.php/about/president> (last visited Oct. 4, 2012).