COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT DEPARTMENT
C. A. No.

JOHN DOE 1, JOHN DOE 2, and JOHN DOE 3,
Plaintiffs

v

ROBERT J. MANNING, R. NORMAN PETERS, MARY L. BURNS, ROBERT EPSTEIN, DAVID G. FUBINI, MARIA D. FURMAN, STEPHEN R. KARAM, MICHAEL V. O'BRIEN, KERRI E. OSTERHAUS-HOULE, IMARI K. PARIS JEFFRIES, JAMES A. PEYSER, ELIZABETH D. SCHEIBEL, HENRY M. THOMAS, STEVEN A. TOLMAN, VICTOR WOOLRIDGE, CHARLES F. WU, NOREEN C. OKWARA, SILAVONG PHIMMASONE, MARY L. BURNS, BRIAN J. MADIGAN, KATHERINE E. MALLETT, JIYA NAIR, SARA TARIQ, EACH IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE BOARD OF TRUSTEES OF THE UNIVERSITY OF MASSACHUSETTS; MARTY MEEHAN, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF MASSACHUSETTS; KUMBLE R. SUBBASWAMY, IN HIS OFFICIAL CAPACITY AS CHANCELLOR, UNIVERSITY OF MASSACHUSETTS AMHERST
Defendants

SUPPLEMEMNTAL MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs hereby submit this Supplemental Memorandum of Law in Support of their Emergency Motion for Preliminary Injunction and the Accompanying Affidavit of Rabbi Yaacov Menken.

I. Massachusetts Law Prohibits Unlawful Discrimination by Educational Institutions Because of Race…Religious Creed, National Origin, or Ancestry

G.L. 151B (2)(d) states that it shall be an unfair educational practice for an educational institution:

> (d) To exclude, limit or otherwise discriminate against any person seeking admission to a program or course of study leading to a degree, beyond a bachelor's degree, because of *race, religion, creed,* color, age, sex or national origin, or to *so discriminate against any*

student admitted to such program or course of study in providing benefits, privileges…. services (emphasis supplied).

A. Plaintiffs are A Protected Class under this Statute

The Plaintiffs here, Jewish students, are a protected class under this statute because they are a race. *Sherman v. Town of Chester,* 752 F.3d 554, 567 (2d Cir.2014) (holding that "Jews are considered a race – there for the purposes of §§ 1981 and 1982"); *United States v. Nelson,* 277 F.3d 164, 177 (2d Cir.2002) (holding that "Jews count as a `race' under certain civil rights statutes enacted pursuant to Congress's power under the Thirteenth Amendment"); *Bachman v. St. Monica's Congregation,* 902 F.2d 1259, 1261 (7th Cir.1990) (finding that Jews constitute a race within the meaning of federal civil rights statutes); *Lenoble v. Best Temps, Inc.,* 352 F.Supp.2d 237, 247 (D.Conn.2005) (noting that "Jews are a distinct race for § 1981 purposes"); *Powell v. Independence Blue Cross, Inc.,* No. 95-CV-2509, 1997 WL 137198, at 6 (E.D.Pa. Mar. 26, 1997) (finding that "[§] 1981 must be read to encompass discrimination against a plaintiff because of his Jewish ancestry or ethnicity"); *Singer v. Denver Sch. Dist. No. 1,* 959 F.Supp. 1325, 1331 (D.Colo.1997) (noting that Jews are "a distinct racial group for the purposes of § 1981"). Educational benefits "include an academic environment free from racial hostility." *Zeno v. Pine Plains Cent. Sch. Dist.,* 702 F.3d 655, 666 (2d Cir.2012; *see also Hayut v. State Univ. of N.Y.,* 352 F.3d 733, 750 (2d Cir.2003) (holding that conduct that "simply created a disparately hostile educational environment relative to [the student's] peers. . . could be construed as depriving [that student] of the benefits and educational opportunities available at [the school]"); *Oliveras v. Saranac Lake Cent. Sch. Dist.,* No. 11-CV-1110, 2014 WL 1311811, at 14 (N.D.N.Y. Mar. 31, 2014) (Educational benefits include an

academic environment free from racial hostility); *T.Z. v. City of New York,* 634 F.Supp.2d 263, 272-73 (E.D.N.Y. 2009) (even where a plaintiff's academic performance does not suffer but the conduct simply creates a disparately hostile educational environment relative to her peers, the issue of whether the harassment deprived the plaintiff of educational opportunities and benefits is one for the trier of fact). Here, at a minimum, if the event is allowed to proceed, in spite of Defendants' assurances in multiple statements to the contrary, they will be deprived of a "supportive, scholastic environment free of racism. T.E. V Pine Bush, 58 F.Supp.3d 332, 358 (2014).

B. The Event's Speakers are Anti-Semitic and will present Anti-Semitic Views

As detailed in the Complaint, all of the speakers at the event have, and have loudly expressed their anti-Semitic views. A statement published 2 days ago by Students for Justice in Palestine, said this:

> To the UMass Community & Beyond, We…are writing to address the extreme backlash both in number and in nature regarding the upcoming panel event on May 4th titled: "Not Backing Down: Israel, Free Speech, and the Battle for Palestinian Rights." This past week, a letter signed by numerous organizations was delivered to UMass Chancellor Subbaswamy requesting the university to rescind all support and sponsorship of the event. It stated that this event violates the university's academic mission and will encourage violence on campus… there is no response like this to any other political events UMass holds on campus. UMass and its academic departments regularly sponsor speakers on all sides of the political spectrum… We need to make this very clear: Anti-Zionism is not the same as anti-Semitism.

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But that statement is not true. Anti-Zionism IS Anti-Semitism. Zionism is a "movement for (originally) the re-establishment and (now) the development and protection of a Jewish nation in what is now Israel." The definition of Anti-Semitism includes "*the targeting of the state of*

Israel, conceived as a Jewish collectivity" and *denying the Jewish people their right to self-determination."* See OCR Definition of Anti-Semitism, in Motion and Memorandum, in Section B.

II. Making the Event Take Place off-Campus does not violate the First Amendment

Defendants cite *Rosenberger v. Rector and Visitors of Univ. of Va*., 515 U.S. 819 (1995), *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), and *Pleasant Grove City, Utah v Summum*, 555 U.S. 460 (2009) as authority for the proposition that public forums like universities may not discriminate against speech on the basis of viewpoint. As pointed out in Plaintiffs' Memorandum, cases involving registered student groups who want to sponsor events, like *Rosenberger* and *Christian Legal Society*, are inapposite, since it is the university itself here, through its faculty departments, that are sponsoring the event. *Pleasant Grove City, Utah* is also not authoritative because it deals with a religious organization asking to place a monument in a city park.

Defendants claim that disallowing the event will constitute a prior restraint, and warn that courts must tread cautiously in that area. They cite *Care and Protection of Edith*, 421 Mass. 703 (1996) but that case dealt with a probate court's ordering a parent not to speak with the media. They cit Sindi v El-Moslimany, 896 F.3d 1 (1st Cir. 2018), but that case involved an injunction in a defamation case. They also cite *Krebiozen Research Found. v. Beacon Press*, 334 Mass. 86 (1966), but that case ruled on the propriety of enjoining publication of a book.

In *Roth v. United States*, 354 U.S. 476, 483 (1957), the Supreme Court held that "in light of . . . history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance." Even the dissent stated that "Freedom of expression can be suppressed

if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it." Id., at 514. Thus, limitations on free speech, even prior restraints, have been upheld in limited circumstances. In *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961), the Court allowed a Chicago ordinance to stand which required the submission of all motion pictures for examination prior to their public exhibition. The Petitioner objected, stating that the content of the film he wanted to show was irrelevant - even if his film contained the basest type of pornography, or incitement to riot, or forceful overthrow of orderly government, his position was that it may nonetheless be shown without prior submission for examination. The challenge was to the censor's basic authority. The Court, reiterating what it has said in *Joseph Burstyn, Inc., v. Wilson*, 343 U.S. 495, at 502 (1952) said that the "capacity for evil . . . may be relevant in determining the permissible scope of community control." The holding fell into the category of cases permitting prior restraints with respect to pornography. In *Young v American Mini Theatres, Inc*., 427 U.S. 50 (1976), the Court upheld a zoning ordinance restricting adult theaters to a specific area of Detroit. The Court reasoned that these types of movie theaters are associated with serious risks to the public well-being, so the city should have some flexibility in determining an appropriate response, in that instance, confining the theatres to one neighborhood. The Court found that distributors and exhibitors of adult films would not be denied access to the market or, conversely, that the viewing public would be unable to satisfy its appetite for sexually explicit fare. "Viewed as an entity, the market for this commodity is essentially unrestrained." Id, at 62. Finally, in *New York v. Ferber*, 458 U.S. 747 (1982), the Court, recognizing that lewd and obscene speech "are of such slight social value as a step to truth that any benefit derived from them is clearly outweighed by the social interest in order and morality," at 754, bowed to the "legislative judgment, as well as the judgment found in the relevant literature, that the use of children as pornographic material is harmful to the physiological, emotional, and mental health of the child"

and upheld a state obscenity law. The premise of all of these cases, as stated in *Ferber*, at 763-4 is that

> The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech." *Young v. American Mini Theatres, Inc.,* 427 U. S. 50, 427 U. S. 66 (1976) … *See also FCC v. Pacifica Foundation,* 438 U. S. 726, 438 U.S,742 748 (1978) (opinion of STEVENS, J., joined by BURGER, C.J., and REHNQUIST, J.). "[I]t is the content of [an] utterance that determines whether it is a protected epithet or an unprotected *fighting comment.'" Young v. American Mini Theatres, Inc., supra, at 427 U.S. See Chaplinsky v. New Hampshire, 315 U. S. 568 (1942). Leaving aside the special considerations when public officials are the target, New York Times Co. v. Sullivan, 376 U. S. 254 (1964), a libelous publication is not protected by the Constitution. Beauharnais v. Illinois, 343 U. S. 250 (1952). Thus, it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.*

Evaluating the content of the speech, in limited circumstances, then, is not contrary to the First Amendment. In Massachusetts, the legislature has determined that discrimination on the basis of race is damaging, and has made it illegal. Moreover, Massachusetts is one of several states that have enacted laws against group libel. G.L. 272 § 98C makes it a crime to "publish any false written or printed material with intent to maliciously promote hatred of any group of persons in the commonwealth because of race…or religion." The Massachusetts legislature is aware that, as Kenneth Lasson put it, "When society permits destructive attacks on a group, individuals within that group inescapably suffer. Where Jews or blacks are defamed as a group, the speaker's target is each Jew or black. The same is true of other racial or ethnic denominations." "Racial Defamation as Free Speech: Abusing the First Amendment", Kenneth Lasson, 17 Colum. Hum. Rts. L. Rev. 11 (1985).

The evils of anti-Semitism are certainly as great as the evils of child pornography or libel. In fact, they have proven far more destructive – witness the Holocaust. There is a deadly rising tide

of anti-Semitism in this country that as recently as 2 days ago caused the maiming and murder at a synagogue in San Diego, and 6 months earlier at a synagogue in Pittsburgh. Violence, maiming and murder are irreparable harm. With the Defendants' policies against BDS, which is anti-Semitism, and against hate, it is unthinkable that they would be sponsoring an anti-Semitic event. Unthinkable and enjoinable. The purveyors of BDS will not be denied access to their market nor will their supporters be denied their appetite for this type of expression if the event is moved to a different venue. Academic freedom does not embrace the freedom to discriminate. *Villanueva v Wellesley College*, 930 F.2d 124 (1991).

WHEREFORE, for all of the above reasons and for any further reasons that may arise at a hearing on this matter, Plaintiffs respectfully request that their Motion for Preliminary Injunction be granted.

Plaintiffs
By their attorney,

___/s/_____
Karen D. Hurvitz, BBO#245720
Law Offices of Karen D. Hurvitz
34 Tanglewood Drive
Concord MA 01742
HurvitzLaw@comcast.net

CERTIFICATE OF SERVICE

I hereby certify that I have emailed a copy of the foregoing Supplemental Memorandum to Defendants' counsel Denise Barton by email at dbarton@umass.edu and will also deliver a hard copy to her, this 29th day of April, 2019.

_____/s/_____
Karen D. Hurvitz

I, Rabbi Yaakov Menken, under oath to affirm the full truth, depose and say as follows:

1. I am an alumnus of Princeton University. I won elected office to a prominent, nonpartisan political student organization while clad in a skullcap. No one claimed, in the mid-1980s, that my traditional Jewish *kipah* meant I was a Zionist and should therefore be disqualified.

2. I am also a Rabbi, having attended several prominent religious seminaries after college. I have studied traditional literature on hatred of Jews in detail. Prior to my current position, I was a fellow of the Amud Aish Holocaust Museum in New York, where the educational program places the Holocaust into the context of a millenium of Jewish life in Europe punctuated by frequent Antisemitic acts.

3. I currently serve as Managing Director of the Coalition for Jewish Values, a 501(c)3 organization whose mission is to represent common rabbinic opinion in matters of public policy. This includes advocating for the security and safety of Jews in the United States and around the globe.

4. As part of my duties, it is my privilege to visit college campuses to speak about Antisemitism (which is itself a modern euphemism, barely a century old, for hatred of Jews and Judaism). I have spoken in Chicago, Toronto, Boston, New York, Philadelphia, Baltimore, and smaller communities such as at Lock Haven University in Lock Haven, PA, and Baylor University in Waco, TX.

5. I recently began offering students $100 if they can surprise me regarding someone honored by the Students for Justice in Palestine (SJP). While they search on their phones for an SJP honoree, we discuss what our honorees say about us: if a US Senator's office wall featured pictures of baseball players rather than political figures, all agree this would be inappropriate.

6. I then explain what would surprise me about a SJP honoree: that he or she not be a murderer, support murder through participation in a terrorist organization, or justify murder by claiming that Israel's "occupation" explains why terrorists kill (Jewish) women and children.

7. The students most commonly find honorees such as: Dalal Mughrabi, who killed 38 people, including 13 children, in the Coastal Road Massacre on an bus in 1978; George Habash, head of the Popular Front for the Liberation of Palestine (PFLP) terrorist organization; and Rasmea Odeh, a PFLP member who served 10 years for her involvement in the murder of two college students in 1969, and then lied about her conviction when applying for US citizenship (she was deported to Jordan in 2017).

8. Sometimes a student will find a name that I do not know, as happened at Baylor University. The room erupted with shocked laughter when the student then described the relevant biography of this honoree of the Students for Justice in Palestine: a stabbing attack which wounded eight victims.

9. In every case, the SJP honoree is found to be an advocate for the murder of Jews, and most likely an outright participant in acts of violence against them.

10. I still have my $100. "I am not telling you SJP is a murderous and barbaric organization," I conclude. "You proved it."

Subscribed and affirmed under the penalties of perjury this 29th day of April, 2019.

Rabbi Yaakov Menken