COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT
CIVIL DIVISION
DOCKET NO. 1984 CV 013908-H

JOHN DOE 1, et al.

v.

ROBERT J. MANNING, et al.

EMERGENCY MOTION TO INTERVENE AND MEMORANDUM OF LAW

Jewish Voice for Peace Western Mass, one of the sponsors of a panel that the plaintiffs would have this court shut down in an act of prior restraint on speech, brings this emergency motion to intervene in this matter to assert its rights and claims. In addition, event panelists Linda Sarsour, Marc Lamont Hill, Roger Waters, Dave Zirin, moderator Vijay Prashad, event organizer Sut Jhally and the Media Education Foundation, and co-sponsor Students for Justice in Palestine at University of Massachusetts at Amherst join in this motion to intervene to assert their rights and claims. The event's speakers and sponsors are necessary parties to this case, and should have been named as defendants.

PARTIES SEEKING INTERVENTION

1. Jewish Voice for Peace Western Mass ("JVP") is the Western Massachusetts chapter of Jewish Voice for Peace, "a national, grassroots organization inspired by Jewish tradition to work for a just and lasting peace according to principles of human rights, equality, and

international law for all the people of Israel and Palestine."[1] The Western Massachusetts chapter operates in Hampshire, Hampden, Franklin, Berkshire, and Worcester counties.

2. Event panelists include:
    a. Linda Sarsour, founder of grass-roots social justice organization MPower Change and organizer of the Women's March in Washington, DC.;
    b. Marc Lamont Hill, professor, journalist and former correspondent at CNN;
    c. Roger Waters, internationally renowned musician;
    d. Dave Zirin, journalist and author;
    e. Vijay Prashad, journalist, author, and historical commentator.
3. Event organizers include:
    a. Media Education Foundation, an organization based out of Northampton, MA, which "produces and distributes documentary films and other educational resources to inspire critical thinking about the social, political, and cultural impact of American mass media;"[2]
    b. Sut Jhally, founder of the Media Education Foundation and professor at the University of Massachusetts at Amherst.
4. Students for Justice in Palestine, a student group at the University of Massachusetts at Amherst, is an event co-sponsor.

FACTUAL BACKGROUND

On May 4, 2019, a panel discussion is scheduled to take place on the grounds of the University of Massachusetts at Amherst ("UMass") entitled, "Not Backing Down: Israel, Free

[1] https://jewishvoiceforpeace.org/, last visited April 28, 2019
[2] https://www.mediaed.org/about-mef/what-we-believe/, last visited on April 28, 2019.

Speech, and the Battle for Palestinian Rights." The host of the event is the Media Education Foundation, a documentary film company, founded by UMass professor Sut Jhally. The event is described as "a panel discussion on the accelerating backlash against pro-Palestinian voices," during which panelists "will address recent attacks on Rep. Ilhan Omar and other progressives who have spoken out against Israel's 50-year military occupation of Palestinian land and pushed back against the claim that criticizing Israeli government policies is 'anti-Semitic.'"[3] The event will feature panelists including activist Linda Sarsour, musician Roger Waters, journalists Marc Lamont Hill and David Zirin, and moderator Vijay Prashad. Numerous organizations are co-sponsoring the event, including the Western Massachusetts chapter of Jewish Voice for Peace and the UMass chapter of Students for Justice in Palestine.

On April 25, 2019, Attorney Karen Hurvitz filed an Emergency Motion and Memorandum in Support Thereof for Preliminary Injunction ("Motion for Preliminary Injunction"), as well as a Verified Complaint for Declaratory and Injunctive Relief ("Verified Complaint")[4] in the Suffolk County Superior Court in Boston, MA. The plaintiffs are described as John Does 1, 2 and 3, "concerned Jewish students" who attend UMass. Complaint at ¶3. The defendants are members of the board of trustees at UMass, as well as the President and Chancellor of UMass. The gist of the plaintiffs' filings is that the event will endanger the safety of Jewish students on campus because the panelists, in espousing views that are critical of the Israeli government, are anti-semitic, and that allowing the event to proceed on the grounds of UMass is in violation of various campus policies. Parties petitioning herein to intervene claim

[3] https://www.umass.edu/resistancestudies/events/not-backing-down-israel-free-speech-and-battle-palestinian-right, last visited on April 28, 2019.

[4] Proposed intervenors have not seen a signed and verified copy of the "Verified Complaint" and do not know if it is actually verified.

that their rights are bound up in these proceedings and their outcomes, and that the suit should not be permitted to move forward without their participation.

MEMORANDUM OF LAW

Intervenor Jewish Voice for Peace Western Mass ("JVP") is the cosponsor of "a panel on the backlash against pro-Palestinian voices." Exhibit A, Event poster. This is a political event in which individuals who have been targeted with political repression and threats of violence because of their outspoken pro-Palestine politics are coming together to discuss, educate and act to try to solve these problems.

The present complaint is part of the backlash that is the very subject of the panel. The purposes of the suit are to harass and publicly smear the speakers and sponsors, and to try to deny their rights to free speech and assembly. In the past several years, increasing advocacy in support of Palestinian rights has been met with aggressive efforts by legislators, academic institutions, and others to suppress such speech, often at the urging of the Israeli government and Israel-aligned private groups.[5] From 2014-2018, legal advocacy group Palestine Legal responded to nearly 1,250 incidents of censorship, punishment, and other burdening of advocacy for Palestinian rights.[6] This number understates the phenomenon, as many activists are unaware of their rights or do not report incidents of suppression. These incidents affect playwrights, school teachers, artists, chefs, musicians, professors, students, activists and authors.[7] These

[5] *See* Ctr. for Const. Rts. & Palestine Legal, The Palestine Exception to Free Speech: A Movement Under Attack in the US (2015), *available at* https://ccrjustice.org/the-palestine-exception.

[6] 2018 Year-In-Review: Censorship of Palestine Advocacy in the U.S. Intensifies, Palestine Legal, https://palestinelegal.org/2018-report (last visited Jan. 23, 2019).

[7] Id; The Palestine Exception to Free Speech, supra note 26. See also, e.g., Jennifer Schuessler, Jewish Center Faces Backlash After Canceling Play Criticized as Anti-Israel, N.Y. Times (Oct. 11, 2017), https://www.nytimes.com/2017/10/11/arts/jewish-center-faces-backlash-after-canceling-play-criticized-as-anti-israel.html; Ben Norton, Palestinian-American artist detained for sketches & Arabic writing falsely accused of terrorism by right-wing media, Salon.com (Dec. 22, 2015),

censorship campaigns and legal threats frequently conflate criticism of Israel's treatment of Palestinians with discrimination against Jewish people, as plaintiffs do in the instant case. Many of the challenges to advocates of Palestinian rights are occurring on college campuses, including through the filing of frivolous complaints against universities. Kenneth Marcus—Assistant Secretary for Civil Rights at the Department of Education—explained that, in the context of analogous Title VI complaints, these meritless complaints are designed to chill speech:

> Seeing all these cases rejected has been frustrating and disappointing, but we are, in fact, comforted by knowing that we are having the effect we had set out to achieve . . . . These cases—even when rejected—expose administrators to bad publicity. . . . No university wants to be accused of creating an abusive environment. . . . Israel-haters now publicly complain that these cases make it harder for them to recruit new adherents . . . . Needless to say, getting caught up in a civil rights complaint is not a good way to build a resume or impress a future employer.

Kenneth Marcus, "Standing Up for Jewish Students," Jerusalem Post (Sept. 9, 2013), https://www.jpost.com/Opinion/Op-Ed-Contributors/Standing-up-for-Jewish-students-325648.

This Court should not allow this collateral attack on the rights of the speakers and sponsoring organizations, for several reasons. While this case implicates certain obligations of UMass, as a governmental body, educational institution, and provider of a public forum for expression, the intervenors have fundamental constitutional rights which fall outside of the purview of UMass' interests. In addition, the complaint violates the requirement in Rule 19 of the Massachusetts Rules of Civil Procedure ("Mass. R. Civ. P.") to name all parties with an interest in the subject matter of the complaint whose absence would have a negative impact on

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https://www.salon.com/2015/12/22/palestinian_american_artist_detained_for_sketching_in_arabic_falsely_accused_of_terrorism_by_right_wing_media/; Leena Trivedi-Grenier, The Tenacity of Chef Reem Assil, Vice.com (May 11, 2018), https://munchies.vice.com/en_us/article/mbkqvv/the-tenacity-of-chef-reem-assil; Sam Sodomsky & Amy Phillips, Lawmaker Calls for Lorde Florida Concert Cancellations Over Israel, Pitchfork.com (Feb. 14, 2018), https://pitchfork.com/news/lawmaker-calls-for-lorde-florida-concert-cancellations-over-israel/; Alice Yin, Evanston Public Library reinstates canceled book talk after accusations of censorship, Daily Northwestern (Aug. 4, 2014), https://dailynorthwestern.com/2014/08/04/city/evanston-public-library-reinstates-canceled-book-talk-after-accusations-of-censorship/.

their rights to defend their interests. Finally, the failure to add the intervenor also violates the necessary parties provision in the declaratory judgment statute, G.L. c. 231A, s. 8.

Allowing the plaintiffs' stratagem would invite the enemies of the First Amendment to adopt similar tactics to improve their efforts at censorship and repression: wait until close to an event, then file an action in an inconvenient venue naming the forum as a defendant, but not those whose constitutional rights are at stake. This court should reject these tactics and permit JVP and the organizers, co-sponsors, and panelists of the event to intervene as defendants in this matter, postpone hearing on the motion for preliminary injunction to permit the intervenors to prepare a defense, and set a schedule for the intervenor to answer the complaint and/or bring a motion to dismiss.

I. THE PROPOSED INTERVENORS HAVE INTERESTS IN THIS MATTER THAT WILL NOT BE ADEQUATELY ADDRESSED WITHOUT THEIR INTERVENTION.

Under Massachusetts rules of civil procedure, parties can move for intervention in two different ways: through intervention as of right and through permissive intervention. Whether a party may intervene in an action is a threshold inquiry; therefore, a party seeking intervention need only claim an interest related to the issue at suit, even if the claim ultimately fails on the merits. Beacon Residential Management L.P. v. R.P., 477 Mass. 749, 754-55 (2017) ("the prospective intervener should not be required to demonstrate the merits of his or her claim at an evidentiary hearing. Instead, the claim of intervention should be evaluated based on the allegations of the claim itself, and related documents; its merits are to be decided with all other claims."). "The issue to be determined in deciding a motion to intervene is simply whether the

prospective intervener has alleged plausible facts that claim an interest, not whether she would ultimately prevail in the underlying action" Id. at 755.

A. JVP and the event organizers and panelists qualify for intervention as of right.

Intervenors Jewish Voice for Peace and event speakers and co-sponsors should be permitted to intervene as of right in the present action. Mass. R. Civ. P. 24(a)(2) defines intervention as right where: "(1) the applicant claims an interest in the subject of the action, and (2) he is situated so that his ability to protect this interest may be impaired as a practical matter by the disposition of the action, and (3) his interest is not adequately represented by the existing parties. Mass.R.Civ.P. 24(a)(2), 365 Mass. 769 (1974)." The designation of an "interest" in a case is more lenient towards applicants for intervention in cases implicating public interest. Bridgeman v. Dist. Attorney for Suffolk Dist., 471 Mass. 465, 485 (2015) (permitting intervention of public defender agency in suit of criminal defendants whose convictions had been based on tainted drug certifications against district attorney's office).

Regarding the third prong of this test, it is an applicant's burden to demonstrate the inadequacy of the representation of already-named parties, which is evaluated on a case-by-case basis. "The question whether the prospective intervener is adequately represented necessarily turns to a comparison of the interests asserted by the applicant and the existing party." Mayflower Dev. Corp. v. Dennis, 11 Mass.App.Ct. 630, 636 (1981). "If the prospective intervener's interest 'is similar to, but not identical with that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, but [the applicant] ordinarily should be allowed to intervene unless it is clear that the [existing] party will

provide adequate representation for the [applicant].'" Bridgeman, 471 Mass. at 485 (citations omitted).

In this case, the applicants for intervention (1) claim interests in this case; (2) would not be able to protest their interests without intervention; and (3) would not be adequately represented by counsel for UMass. First, co-sponsor JVP, members of whom include faculty and students at UMass, claims that, at a minimum, its constitutional rights and interests to assemble and hear the speech of the panelists are directly affected by this action. Co-sponsor Students for Justice in Palestine claims that, at a minimum, its constitutional rights and interests to assemble and hear the speech of the panelists on their college campus, where they came to participate in the exchange of ideas promised by UMass' vibrant intellectual culture, are directly affected by this action. The panelists and the event organizers claim, at a minimum, their constitutional rights and interests to assemble and express their speech, as well as their contractual rights, are directly affected by this action. Because these claims implicate important public interests including First Amendment protections on college campuses, the Court's interpretation of the applicants' interests should be broad.

Second, the proposed intervenors would not be able to protect their interests if they are not added as parties to this action.

Finally, the proposed intervenors do not share the identical interests or ultimate objectives in the present ligation as defendant UMass. While the intervenors and the currently-named defendants both seek the denial of the plaintiffs' requests for injunctive and declaratory relief, intervenors have interests and rights that are likely to remain outside of the purview of UMass' legal defenses. For example, JVP, the speakers, and the organizers vigorously protest the gross mischaracterizations contained in the plaintiffs' filings, including false statements

regarding the panelists, the nature of the event, and the principles underlying the current debates regarding the movements in support of Palestinian human rights. They would challenge the plaintiffs' unfounded assertions that the panelists are anti-semitic, that criticism of Israeli governmental policies is anti-semitic and dangerous for Jews, and that the event (and others espousing similar viewpoints) will inspire anti-semitic animus on the campus of UMass. Proposed intervenors further seek to challenge plaintiffs' central use of a definition of anti-semitism that, even according to its author, was "never intended as a vehicle to monitor or suppress speech on campus." Exhibit B, ACLU Letter Re: Anti-Semitism Awareness Act, at 2 (June 4, 2018). While UMass is well situated to defend itself on content-neutral grounds related to its status as an academic environment and public forum, the applicants' interests will not be adequately protected without an opportunity to address the flagrant accusations leveled against them in this action. Furthermore, intervenors also have standing to pursue additional claims and remedies, possibly including sanctions under the anti-SLAPP statute, G.L. c. 231 §59H, abuse of process, and interference with contract. In addition, UMass cannot adequately protect the intervenors' interests in preventing harassment and intimidation directed against the speakers, sponsors, and organizers. Because intervenors have interests at stake which they cannot protect without intervention and which will not be adequately represented by presently named defendants, this Court should recognize their right to intervene and allow the present emergency motion.

B. In the alternative, this Court should use its discretion to permit petitioners to intervene.

In addition to intervention as of right, parties can petition courts to exercise their discretion to permit their intervention pursuant to Mass. R. Civ. P. 24(b). Under that rule a court may permit intervention "when an applicant's claim or defense and the main action have a

question of law or fact in common." Mass.R.Civ.P. 24(b)(2)." For all of the reasons stated above, proposed intervenors would move the Court to exercise its discretion to permit those people and organizations specifically attacked in the plaintiffs' filings and threatened with being silenced to intervene.

II. THE INTERVENORS OPPOSE THE ISSUANCE OF A PRELIMINARY INJUNCTION

The proposed intervenors, co-sponsors of the May 4 forum and scheduled speakers, also wish to be heard in opposition to the plaintiffs' emergency motion for a preliminary injunction - an injunction that would constitute a prior restraint on speech and prevent their forum from taking place at UMass. The intervenors request additional time to review the plaintiffs' motion and to respond to it. In the event the court will not delay consideration of the motion, the intervenors briefly set forth their opposition based on the plaintiffs' failure to meet the standards for a preliminary injunction.

In order for a preliminary injunction to issue, the moving party must show:

> (1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the [moving party's] likelihood of success on the merits, the risk of irreparable harm to the [moving party] outweighs the potential harm to the [nonmoving party] in granting the injunction. When a party seeks to enjoin governmental action, a judge is also required to determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public.

Boston Police Patrolmen's Assn. v. Boston Police Department, 446 Mass. 46, 49-50 (2006).

A. The plaintiffs do not have a likelihood of success on the merits.

1. UMass, as an arm of the Commonwealth of Massachusetts, is bound by the First Amendment.[8] Speech that criticizes the status quo in Israel and Palestine is protected First Amendment speech. By explicitly targeting a particular viewpoint being expressed—one advocating equality for all people and a "one state solution"—would strike at the heart of the First Amendment. 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."). The Supreme Court has emphasized that the ability to criticize government policy is "the central meaning of the First Amendment." New York Times v. Sullivan, 376, U.S. 254, 273 (1964). Moreover, "[d]iscrimination against speech because of its message is presumed to be unconstitutional." 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."). To engage in such discrimination 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." Rosenberger, 515 U.S. 819 at 835.

It is clear that supporters of Israel's policies, including numerous groups opposed to Palestinian freedom, disagree with the anticipated viewpoint of the panel's message. Nothing in the record shows that any of the panelists have targeted any individual or group on the basis of a

[8] 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.").

protected characteristic. Rather, the panelists have expressed viewpoints that all people should be free in the area currently controlled by Israel. Speech that advocates for freedom and equality of Palestinians is speech that criticizes the status quo treatment of Palestinians by the State of Israel—not by Jews or Israelis as a people. Advocating for Palestinian freedom does not become anti-Jewish or anti-Israeli simply because some interpret it as a personal attack or because they strongly identify with Israel as a Jewish state, as opposed to a state with equal rights for all its inhabitants. The personal offense of some campus members cannot change the fact that the panelists' statements may express viewpoints critical of a state's policies.

2. The requested preliminary injunction would effectively shut down intervenors' event which has been planned for months, and would therefore constitute prior restraint on the speech of the intervenors. There is no way to move an event of this size with all its speakers to another location on such short notice. "Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press Association v. Stuart, 427 U.S. 539, 559 (1976).

3. Even if this event could be held elsewhere, under the First Amendment, the existence of an alternative location does not justify denial of use of an appropriate location. Schneider v. State of New Jersey, 308 U.S. 147, 163 (1939). UMass, a public university subject to the First Amendment, has stated that its facilities are available to outside organizations as well as its faculty and students for events like the May 4 forum; it is a public forum for expression and the university may not impose viewpoint-based restrictions on speech there. "Promoting the

free exchange of ideas is one of the most important functions of the university." University Statement on May 4 event (April 25, 2019)[9].

4. Plaintiffs' false, vitriolic, and easily-hurled accusations of anti-semitism against the speakers do not justify cancellation of this event at UMass. The university could not restrict speech simply because there are those who find the views expressed to be abhorrent. Healy v. James, 408 U.S. 169, 187-88 (1972). Indeed, as the Healy Court stated at 181-82:

> "(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960). The college classroom with its surrounding environs is peculiarly the "marketplace of ideas," and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

B. The plaintiffs cannot demonstrate irreparable harm.

The intervenors have not had access to any sworn statements of the plaintiffs. The allegations of the Complaint, however, do not establish any legally cognizable irreparable harm to them. The plaintiffs assert that as Jewish students, they do not feel comfortable or protected on campus and are hesitant to express their views for "fear of hostility and retaliation by other students and by faculty." Complaint ¶ 3. These allegations do not constitute irreparable harm to justify a preliminary injunction against speech. The possibility of retaliation is speculative and, indeed, there are many remedies to address specific threats to their safety. In the context of a public university, these fears do not override the commands of the First Amendment. As the Supreme Court has announced,

> 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. Speech is often

[9] https://www.umass.edu/newsoffice/article/university-statement-may-4-event, last visited April 28, 2019.

> provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

C. Intervenors and the public interest would be harmed by the grant of an injunction.

Although the plaintiffs cannot demonstrate irreparable harm, the Intervenors surely will be harmed if the requested injunction is granted and they are silenced on campus. Delay in or denial of the exercise of First Amendment freedoms is considered irreparable harm. See Elrod v. Burns, 427 U.S. 347, 373 (1976). In addition, the public interest is harmed by the cancellation of a program on important issues of public debate. As argued above, there is a recognized First Amendment right to assemble and receive information as well as to speak. Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972). In addition, allowance of the plaintiffs' request will amount to judicial approval of their mischaracterizations of the panelists, their viewpoints, and similar viewpoints shared by co-sponsoring organizations, as well as their misuse of a definition of anti-semitism not intended to be applied to speech on college campuses. Judicial imprimatur on the plaintiffs' baseless and inflammatory claims will both harm the intervenors and serve to impermissibly chill public discourse on these important issues.

CONCLUSION

For the foregoing reasons, the Court should grant the motion to intervene and deny the request for a preliminary injunction.

CERTIFICATION OF NOTICE

Counsel for intervenors hereby certifies that she gave notice of her intent to file the present emergency motion for intervention to opposing counsel, Attorney Karen Hurvitz, via email on April 28, 2019. Attorney Hurvitz opposes this motion.

Respectfully submitted,

Attorney Rachel Weber
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On behalf of:
Jewish Voice for Peace Western Mass
Students for Justice in Palestine at UMass Amherst
Media Education Foundation
Sut Jhally
Marc Lamont Hill
Vijay Prashad
Linda Sarsour
Roger Waters
Dave Zirin

COMMONWEALTH OF MASSACHUSETTS

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AFFIDAVIT IN SUPPORT OF EMERGENCY MOTION TO INTERVENE AS DEFENDANTS IN THE PRESENT ACTION

Now comes counsel in the above-entitled matter and hereby states the following:

1. I am currently a member of the Massachusetts Bar in good standing.

2. I have reviewed the plaintiffs' filings as well as applicable law.

3. Based on that review, I believe that the intervenors named herein have numerous grounds to be added as defendants so that they may be heard regarding their interests in the disposition of this matter.

4. I submit that the statements made in the attached motion and memorandum of law are true to the best of my knowledge and belief.

Signed under pains and penalties of perjury on this 29th day of April, 2019.

_____
Rachel Weber

CERTIFICATE OF SERVICE

I, Rachel Weber, hereby certify that on this 29th day of April 2019, a copy of the above motion was delivered by hand and via email to counsel for all parties in this matter, including:

For plaintiffs:
Attorney Karen Hurvitz
34 Tanglewood Drive
Concord, MA 01742
HurvitzLaw@comcast.net

For defendants:
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EXHIBIT A

THE **MEDIA EDUCATION FOUNDATION** PRESENTS

NOT BACKING DOWN

ISRAEL, FREE SPEECH, & THE BATTLE FOR PALESTINIAN RIGHTS

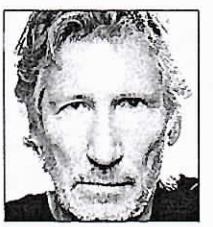
SATURDAY MAY 4, 2019 | 6:30 PM

FINE ARTS CENTER, UNIVERSITY OF MASSACHUSETTS

A Panel on the Backlash Against Pro-Palestinian Voices

Linda Sarsour
Co-founder,
MPower Change;
Co-Chair, The
Women's March

Dave Zirin
Sports Editor,
The Nation
magazine



Roger Waters
Co-founder,
Pink Floyd

Marc Lamont Hill
Temple University
and former CNN
commentator

Vijay Prashad
MODERATOR
Director,
Tricontinental
Institute

ADMISSION IS FREE BUT TICKETS ARE REQUIRED (LIMIT 4 PER PERSON)

Tickets call 413-545-2511 or 800-999-8627
or online at fineartscenter.com

For more information visit NotBackingDownUmass.com

Co-sponsored by: The Media Education Foundation; Department of Communication; Department of Women, Gender, Sexuality Studies; Resistance Studies Initiative UMASS; Jewish Voice for Peace Western Massachusetts; The Resistance Center; and Arise for Social Justice. With support from Students for Justice in Palestine, Black Student Union, Prison Abolition Coalition, and Graduate Students of Color.

EXHIBIT B

WASHINGTON
LEGISLATIVE OFFICE

ACLU

June 4, 2018

Re: Anti-Semitism Awareness Act, S. 2940, H.R. 5924

Dear Senator/Representative:

On behalf of the American Civil Liberties Union (ACLU) and our nearly two million members and supporters, we urge members of the Senate to oppose H.R. 5924/S. 2940, the "Anti-Semitism Awareness Act." Federal law already prohibits anti-Semitic discrimination and harassment by federally-funded entities. The proposed legislation is therefore unnecessary—and likely to chill free speech of students on college campuses by incorrectly equating criticism of the Israeli government with anti-Semitism.

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A previous version of this bill was introduced in 2016. Without hearing, committee consideration, committee or floor vote, or any meaningful floor debate, the Senate passed the bill just hours after it was introduced. Later the same day, a parallel bill was introduced in the House. The ACLU opposed the bill in the House along with other organizations, raising free speech concerns. Because of these concerns, this version never made it out of the House. Many of the same concerns remain in the current bill.

The proposed bill directs the Department of Education (Department) to take the State Department's definition of anti-Semitism "into consideration" when determining whether alleged harassment was motivated by anti-Semitic intent and violates Title VI of the Civil Rights Act of 1964. Title VI prohibits discrimination on the basis of race, color, or national origin in programs receiving federal financial assistance, including in higher education. It has been interpreted to prohibit harassment or discrimination against Jews, Hindus, Muslims, and Sikhs as well as others.[1] These existing protections are critically important, particularly in the current environment. According to the Federal Bureau of Investigation, hate crimes are on the rise and bias-motivated incidents against Jews are increasing.[2] Anti-Semitic harassment is a serious problem in the United States and it has no place in our government-funded institutions.

Unfortunately, the overbroad definition of anti-Semitism in this bill risks incorrectly equating constitutionally protected criticism of Israel with anti-Semitism, making it likely that free speech will be chilled on campuses. The examples incorporated into the bill's definition of anti-Semitism include actions and statements critical of Israel, including many constitutionally protected statements. For example, it includes applying a "double standard for Israel," "blaming Israel for all inter-religious or political tensions," or "denying the Jewish people their right to self-determination." The State Department's definition of anti-

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[1] Religious Discrimination, U.S. Department of Education (last modified Jan. 24, 2017) *available at* https://www2.ed.gov/about/offices/list/ocr/religion.html.
[2] Hate Crimes Statistics, Federal Bureau of Investigation, Department of Justice (2016) *available at* https://ucr.fbi.gov/hate-crime/2016/topic-pages/incidentsandoffenses.

Semitism was itself adapted from one used by the European Monitoring Centre to facilitate data collection about anti-Semitism in Europe. Kenneth Stern, the lead author of the original definition, has himself opposed application of this definition to campus speech. Stern noted the definition was "never intended as a vehicle to monitor or suppress speech on campus" and that it was not only unnecessary, but would also "hurt Jewish students and the academy"[3] by preventing conversations of the issues and isolating Jewish students. In his testimony before Congress last year, Stern also discussed the ways in which the definition has been used to curtail protected speech.[4]

The First Amendment squarely protects political speech, including criticism of Israel or any other government. Such speech cannot itself constitute harassment. Although this bill does not change the definition of harassment, it does direct the Department to consider such speech in determining whether any actionable harassment under Title VI, including allegations that the school is responsible for a "hostile environment," was motivated by anti-Semitism, which may ultimately lead to cuts to school funding. While the bill includes rules of construction to clarify that this does not change the standard by which the Department determines whether actionable harassment has in fact occurred, it will almost certainly result in the chilling of protected political speech.

If this bill becomes law, political speech critical of Israel will likely be censored in a number of ways. First, colleges and universities may suppress a wide variety of speech critical of Israel or in support of Palestinian rights in an effort to avoid investigations by the Department and the potential loss of funding, even where such speech is protected and does not qualify as harassment. Even in the absence of such a law, advocacy groups have filed or threatened to file numerous Title VI complaints and lawsuits, alleging that colleges have violated Title VI by condoning Palestinian rights groups, events, and advocacy.[5] To avoid Title VI complaints and investigations, schools have cancelled events, prevented student groups from forming, or penalized students or groups engaged in political activism.[6] Equating criticism of Israel with anti-Semitism by law under a threat of investigation will only create more fear in schools, prompting administrators to silence this speech regardless of whether it is protected. Kenneth Marcus, the current nominee for the Department of Education's Office of Civil Rights—the office that investigates Title VI complaints—has argued that these complaints are successful, *even when they are dismissed by the Department on the merits*, precisely because they pressure schools to suppress speech critical of Israel.[7]

Second, even where administrators do not take formal action, students and their organizations, faculty, and university staff may be deterred from speaking and organizing on these issues. Activists will be understandably hesitant to engage in political expression criticizing Israel or advocating for Palestinian rights if they have reason to believe the federal government will actively investigate such expression in connection with harassment complaints and investigations.

Finally, the bill will likely inspire an increasing numbers of complaints focused on constitutionally protected criticism of Israel. Thus far, the Department has rejected these complaints on the ground that such speech is protected under the First Amendment.[8] But the proposed bill will encourage

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[3] Kenneth S. Stern, *S.C. anti-Semitism bill isn't needed* (April 25, 2017) *available at* https://www.postandcourier.com/s-c-anti-semitism-bill-isn-t-needed/article_f17d607e-29e5-11e7-b4a7-a35035f3dc38.html.

[4] Testimony of Kenneth S. Stern, Hearing on Examining Anti-Semitism on College Campuses, U.S. House of Representatives, Committee on the Judiciary (Nov. 7, 2017) available at https://judiciary.house.gov/wp-content/uploads/2017/10/Stern-Testimony-11.07.17.pdf.

[5] Palestine Legal, Center for Constitutional Rights, *The Palestine Exception to Free Speech* (2015) *available at* https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/560b0bcee4b016db196d664b/1443564494090/Palestine+Exception+Report+Final.pdf.

[6] *Id.*

[7] Kenneth Marcus, *Standing Up for Jewish Students* (Sept. 9, 2013) *available at* https://www.jpost.com/Opinion/Op-Ed-Contributors/Standing-up-for-Jewish-students-325648.

[8] Palestine Legal, *FAQ: What to Know About Efforts to Re-define Antisemitism to Silence Criticism of Israel* (last updated April 18, 2018) *available at*

more such complaints and lawsuits.[9] In turn, these complaints will not only cause schools to limit speech out of fear, but will also force both the Department and covered universities to devote time and resources to addressing complaints about constitutionally protected speech, instead of meritorious harassment complaints.

Religious liberty and free speech are both fundamental rights under our Constitution and protecting them is at the core of the ACLU's values. Both can be protected without having to compromise one to allow for the other. In this case, protections against discrimination and harassment in schools for Jewish students already exist; the Department of Education has successfully investigated such cases.[10] Requiring the Department to investigate criticism of Israel will not meaningfully help it combat anti-Semitism, but it will§ chill constitutionally protected speech.

College campuses should be havens for free expression—not spaces that limit one viewpoint to elevate another—and students must be free to express their opinions and exercise their rights. We urge Members to oppose this dangerous bill that is likely to chill the speech and expression of students, faculty, and other members of university communities around the country.

If you have any questions, please feel free to contact Chris Anders (canders@aclu.org) or Manar Waheed (mwaheed@aclu.org).

Sincerely,

Christopher Anders
Deputy Director

Manar Waheed
Legislative and Advocacy Counsel

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https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/5ad7b16603ce646d1a0d59d9/1524085097669/FAQ+on+Definition+of+Antisemitism+4.18.18+.pdf (citing the Department's rejection of four complaints on campuses because criticism of Israel is protected speech).

[9] Numerous complaints were filed against universities such as Barnard College, Brooklyn College, UC Irvine, UC Santa Cruz, UC Berkeley, and Rutgers University, claiming that events or actions criticizing Israel or advocating for Palestinian rights violated Title VI. *See supra* note 5.

[10] *Id. See also supra* note 1.