



*Via email*

President Elliot Hirshman  
San Diego State University, Office of the President

Associated Students President Jamie Miller,  
San Diego State University Associated Students

Cc: Chimezie Ebriekewe, Associated Students President-Elect;  
Patty Masengale, Executive Vice President;  
Dylan Colliflower, Vice President of External Relations;  
Alex Shapiro, Vice President of Financial Affairs;  
Eric Rivera, Vice President of Student Affairs;  
Marcie Bober-Michel, University Senate Chair;  
Anne Donadey, Academic Senate Diversity, Equity, Outreach Committee Chair;  
Mark Freeman, Academic Senate Freedom of Expression Committee Chair;  
Chancellor Timothy White;  
Loren Blanchard, Executive Vice Chancellor;  
Christine Miller, Academic Senate Chair;  
Thomas Norman, Faculty Affairs Committee Chair;  
Framroze Virjee, General Counsel

April 24, 2017

**Re: Constitutional Concerns with “A Resolution to Condemn Anti-Semitism”, adopting the State Department Definition of Anti-Semitism**

Dear President Hirshman and President Miller,

As civil and human rights organizations committed to racial justice, we support your efforts to confront racism and discrimination, including through thoughtful conversations about combatting anti-Semitism and creating an environment that is welcoming for all students. However, we write on behalf of San Diego State Students for Justice in Palestine (SJP) to raise concerns with “A Resolution to Condemn Anti-Semitism”,<sup>1</sup> a resolution approved by the San Diego State University Associated Students (AS) on April 12, 2017. The resolution adopts a widely-discredited, overbroad, and vague definition of anti-Semitism that classifies virtually all political speech supportive of Palestinian rights as anti-Semitic.

This definition – often referred to as the “State Department definition”<sup>2</sup> – invites the university to restrict political speech in violation of the First Amendment of the U.S.

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<sup>1</sup> Legislation + Resolutions Spring 2017 - #UCB S17, “A Resolution to Condemn Anti-Semitism,” April 12, 2017,

<sup>2</sup> Defining Anti-Semitism, Fact Sheet, Special Envoy to Monitor and Combat Anti-Semitism, U.S. Department of State, <http://www.state.gov/j/drl/rls/fs/2010/122352.htm>. See also Palestine Legal, FAQ: What to know about efforts

Constitution. If AS, or any other agent of the university, implements the resolution to restrict or penalize speech supportive of Palestinian rights, you will violate the U.S. Constitution, in addition to California law, and California State University policy.

The State Department definition is particularly detrimental to universities, where academic freedom, unfettered debate, and critical inquiry are integral. Even the lead-author of the definition, Kenneth Stern, has repudiated its use in the university context.<sup>3</sup>

At a time when bias incidents and hate crimes, including those motivated by anti-Semitism and Islamophobia, are on the rise, this resolution provides no new legal protections for Jewish or other students. On the contrary, this resolution increases unwarranted scrutiny into the activities of Muslim and Arab students at San Diego State as well as all students – including many Jewish students – who advocate for Palestinian human rights. As a result, this resolution may actually encourage Islamophobia and anti-Semitism. Instead of offering constructive solutions to counter the disturbing rise in discrimination and bigotry that has been documented in recent months, this resolution compounds the problem while trampling on free speech rights.

### **I. Adopting the State Department definition of antisemitism invites the university to violate the First Amendment**

Much of the State Department definition of anti-Semitism is uncontroversial and aligns with a traditional understanding of the term.<sup>4</sup> But the definition radically departs from that understanding with its listing of examples of “Anti-Semitism Related to Israel,” known as the “three D’s”: “demonizing Israel,” “applying a double standard to Israel” and “delegitimizing Israel.”<sup>5</sup> This codifies the false conflation of anti-Semitism with political speech critical of Israeli policies. This approach is inappropriate especially for universities that value, and are obligated to protect, academic freedom and First Amendment-protected speech.

The State Department’s anti-Semitism definition is not binding law in the United States and is used for the limited purpose of “monitoring and combatting acts of anti-Semitism and anti-Semitic incitement *that occur in foreign countries.*”<sup>6</sup> It is not used domestically by any other U.S. government agency or entity. There is an important reason for this: applying the definition domestically on campuses or elsewhere in the U.S. would violate the First Amendment. Indeed, similar attempts to censor Palestine advocacy by adopting the State Department definition have failed due to Constitutional concerns in Congress,<sup>7</sup> Virginia,<sup>8</sup> and California.<sup>9</sup>

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to re-define anti-Semitism to silence criticism of Israel,

<https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/56e6ff0cf85082699ae245b1/1457979151629/FAQ+onDefinition+of+Anti-Semitism-3-9-15+newlogo.pdf>

<sup>3</sup> Kenneth Stern, Will Campus Criticism of Israel Violate Federal Law?, The New York Times, Dec. 12, 2016, <https://www.nytimes.com/2016/12/12/opinion/will-campus-criticism-of-israel-violate-federal-law.html>; see also Kenneth Stern, Should a major university system have a particular definition of anti-Semitism, Jewish Journal, June 22, 2015, [http://www.jewishjournal.com/opinion/article/should\\_a\\_major\\_university\\_system\\_have\\_a\\_particular\\_definition\\_of\\_anti\\_semit](http://www.jewishjournal.com/opinion/article/should_a_major_university_system_have_a_particular_definition_of_anti_semit);

<sup>4</sup> For example, the State Department’s definition begins: “Anti-Semitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of anti-Semitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.” Merriam-Webster defines anti-Semitism as, “Hostility toward or discrimination against Jews as a religious, ethnic or racial group.”

<sup>5</sup> Defining Anti-Semitism, supra note 1.

<sup>6</sup> See 22 U.S.C. § 2731(b) (emphasis added).

<sup>7</sup> See Palestine Legal, Bill aimed at censoring Palestine advocacy on campuses fails to pass U.S. House, Dec. 12, 2016, <http://palestinelegal.org/news/2016/12/12/bill-aimed-at-censoring-palestine-advocacy-on-campus-fails-to-pass-us-house>.

The definition puts the university in the position of violating First Amendment rights because AS and other university bodies will likely be called upon to restrict funding allocations or oppose programming that includes speech and advocacy supportive of Palestinian rights, citing your resolution. It will violate the law if the university discriminates against students in their ability to access university resources, under the mistaken illusion that it is appropriate to penalize speech and advocacy critical of Israel.<sup>10</sup> Unlawful discrimination against advocates for Palestinian rights has occurred on other campuses in California and it is your obligation to avoid inviting such discrimination.<sup>11</sup>

The resolution's language claiming it is not "intended to create restrictions on anyone's right to free speech, academic freedom, or participation in social activism," has no credibility. The core of the resolution undermines its cursory reference to free speech by adopting a definition which encompasses common forms of criticism of Israel policy, and thus directly targets both social activism and protected First Amendment expression.

Further, adoption of the definition has a chilling effect on constitutionally-protected speech and academic inquiry supportive of Palestinian human rights. Students will inevitably act in ways to avoid review of their activities and avoid the specter of being officially labeled as anti-Semitic. This is especially likely given the definition's vagueness. What is a "double standard" with regards to criticism of Israel and how will it be judged? How many additional countries are students and professors required to criticize when they criticize Israel, and what degree or depth of criticism are they required to make in order to avoid applying a "double standard" to Israel? How would AS define "delegitimizing" or "demonization" of Israel? To enter such a morass of viewpoint-based distinctions is an invitation to restrict and chill protected speech.

Perhaps most chilling is the final resolved clause promising to share the resolution with various university organizations, including the President's Office, Student Affairs, Students for Justice in Palestine (SJP) and Hillel, as if to threaten those who would dare engage in criticism of Israeli policy and stop them before they begin. We understand that the reference to SJP has since been removed, but the warning signal to SJP cannot be undone by merely deleting their name. This carries a McCarthyist tone that reinforces the worst suspicions about the intent of the resolution to chill campus debate.

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<sup>8</sup> See Palestine Legal, Victory! Unconstitutional bill defeated in Virginia, Jan. 30, 2017, <http://palestinelegal.org/news/2017/1/30/virginia-lawmakers-considering-unconstitutional-bill-aimed-at-censoring-palestine-advocacy-1>.

<sup>9</sup> See Palestine Legal, UC Drops Consideration of State Department Anti-Semitism Definition, July 22, 2015, <http://palestinelegal.org/news/2015/7/22/uc-drops-consideration-of-state-department-anti-semitism-definition>.

<sup>10</sup> *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 836 (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."). 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.").

<sup>11</sup> In 2016, for example, University of California (UC) Los Angeles found that the then-president of the Graduate Student Association violated university policies prohibiting discrimination on the basis of political viewpoint when he restricted funding for student groups with a connection to "Divest from Israel or any equivalent movement/organization." See Palestine Legal, "Setting the Facts Straight re UCLA GSA President," Sept. 7, 2016, <http://palestinelegal.org/news/2016/9/7/setting-the-facts-straight-re-ucla-gsa-president>. UC Berkeley blatantly violated free speech and academic freedom protections when it suspended a course on Palestine in September, 2016, in response to complaints from Israel advocacy organizations. The university reinstated the course after an outcry from legal and campus organizations. See ACLU Northern California, "UC Berkeley Just Reinstated a Course on Palestine. It Should Have Protected Free Speech From the Start," September 20, 2016, <https://www.aclunc.org/blog/uc-berkeley-just-reinstated-course-palestine-it-should-have-protected-free-speech-start>.

## II. The State Department definition is not appropriate for universities that value unfettered speech

Adopting a definition of anti-Semitism that encompasses even the most routine criticism of a nation-state is particularly inappropriate for educational institutions because of the essential role that academic freedom and unfettered debate play in the university setting. The United States Supreme Court has recognized the importance of this role, stating that “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”<sup>12</sup> The State Department definition silences legitimate opinions and perspectives, and imposes a standard that undermines the university’s commitments to academic freedom and inquiry.

The University of California and other universities have already been subjected to pressure to adopt the anti-Semitism definition endorsed by this resolution, and have ultimately rejected it due to free speech concerns.<sup>13</sup> Israel advocacy organizations pushed for its adoption in March 2015, causing outcry from free speech advocates<sup>14</sup> across the political spectrum, media,<sup>15</sup> students,<sup>16</sup> graduate student instructors,<sup>17</sup> and Jewish<sup>18</sup> and other civil rights organizations.<sup>19</sup> Jewish commentators,<sup>20</sup> including (as noted above) the State Department definition’s original author Kenneth Stern, repudiated its use on college campuses.<sup>21</sup>

It is inappropriate for a student government to adopt a definition of anti-Semitism that encompasses criticism of Israel, particularly at a time when Palestine activists increasingly face false accusations that their political criticisms of Israel are tantamount to anti-Semitism and/or support for terrorism. Such a definition silences legitimate opinions and perspectives, and lends credence to a national political climate that is overtly hostile to Muslims, Arabs, and Palestinians.

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<sup>12</sup> *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

<sup>13</sup> See UC Drops Consideration of State Department Anti-Semitism Definition, Palestine Legal, July 22, 2015, <http://palestinelegal.org/news/2015/7/22/uc-drops-consideration-of-state-department-anti-semitism-definition>.

<sup>14</sup> See Will Creely, State Department’s Anti-Semitism Definition Would Likely Violate First Amendment on Public Campuses, Foundation for Individual Rights in Education, May 22, 2015, <https://www.thefire.org/state-departments-anti-semitism-definition-would-likely-violate-first-amendment-on-public-campuses/>.

<sup>15</sup> Editorial, How far should UC go with an anti-Semitism policy, Los Angeles Times, July 16, 2015, <http://www.latimes.com/opinion/editorials/la-ed-anti-semitism-20150716-story.html>.

<sup>16</sup> Letter, Students ask Janet Napolitano not to endorse conflation of anti-Semitism with critique of Israel, SJP West, June 29, 2015, <http://sjpwest.org/2015/06/29/students-ask-janet-napolitano-not-to-endorse-conflation-of-antisemitism-with-critique-of-israel>.

<sup>17</sup> UAW Letter to Janet Napolitano, UC Student Workers Union – UAW Local 2865, July 6, 2015, <http://www.uaw2865.org/uaw-letter-to-president-napolitano>.

<sup>18</sup> Action alert, Tell UC President Napolitano and the UC Regents: criticizing Israel is not anti-Semitic, Jewish Voice for Peace, [http://org.salsalabs.com/o/301/p/dia/action3/common/public/?action\\_KEY=18000](http://org.salsalabs.com/o/301/p/dia/action3/common/public/?action_KEY=18000).

<sup>19</sup> Palestine Legal, Jewish Voice for Peace, National Lawyers Guild, and the Center for Constitutional Rights sent a letter to Janet Napolitano and the UC Regents outlining First Amendment concerns with the State Department’s redefinition of anti-Semitism. The letter is available at <http://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/558abe8ae4b050f36b381190/1435156106563/UCOPLetterAntiSemitismFinal.pdf>.

<sup>20</sup> See, e.g., Jay Michaelson, Why U. of California Should Dump “Three D” Definition of Anti-Semitism, The Forward, July 22, 2015, <http://forward.com/opinion/312358/why-u-of-california-should-dump-three-d-definition-ofanti-semitism>.

<sup>21</sup> Kenneth Stern, *supra* note 2.

### **III. Advocacy for Palestinian rights must not be falsely conflated with anti-Jewish bias.**

Definitions of anti-Semitism that treat criticism of Israeli policy as inherently anti-Semitic are inaccurate and harmful. The majority of Jews are not Israeli, and not all citizens of Israel are Jewish. Israel is a state; Zionism is a political ideology; Judaism and Jewish identity encompass a diversity of religious and secular expressions and a robust, varied set of traditions, cultures, and lived experiences. Most importantly, Zionism is deeply contested, and people worldwide, including Jewish people, have widely diverging views towards it. Palestinian rights activists criticize Israel not based on anti-Jewish bias, but based on the nation-state's policies and practices.

### **IV. Conclusion**

We embrace the importance of addressing allegations of anti-Semitism on campus. Like you, we are alarmed by the growing power of anti-Semitic, racist white nationalists, and increased incidents of swastika graffiti, bomb threats to Jewish Community Centers, and desecration of Jewish cemeteries. But when bias incidents and hate crimes, including those motivated by anti-Semitism and Islamophobia, are on the rise, it is especially important to be clear about the differences between anti-Jewish hatred and criticism of Israel.

And just as the university and the Associated Students has an obligation to respond seriously to allegations of anti-Semitism, so too must it protect students' constitutional rights to speak openly and freely on matters of public concern.

We urge the Associated Students to retract the resolution and reject any other attempt to chill campus debate by conflating anti-Semitism with criticism of Israel. We expect you will uphold free speech protections, and refrain from engaging in unconstitutional viewpoint discrimination.

Sincerely,

Liz Jackson  
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Center for Constitutional Rights, Cooperating Counsel

Tallie Ben Daniel, PhD  
Jewish Voice for Peace, Academic Advisory Council