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cc: Dee Williams-Ridley, City Manager, manager@cityofberkeley.info

January 31, 2018

Re: **Baseless threats against Council Member Davila endanger free speech in Berkeley**

Dear Ms. Brown,

We write to assist you and Council Member Cheryl Davila in responding to baseless legal threats made against her and the city by the Zionist Organization of America (ZOA).

Palestine Legal is an independent organization dedicated to protecting the civil and constitutional rights of people in the U.S. who speak out for Palestinian freedom. Supporters of Palestinian rights are often threatened, harassed and legally bullied into silence and inaction. Our mission is to help people respond to these threats. The National Lawyers Guild is an organization of progressive lawyers in the San Francisco Bay Area.

In its letter, the ZOA claims that Council Member Davila's support for Palestinian rights violates public policy and that her actions violate a non-discrimination provision in the City Charter (which the ZOA mistakenly refers to as the Berkeley Municipal Code). Neither claim holds any water.

California Does Not Have a Public Policy Against Political Boycotts

The ZOA asserts that "California will not sanction or tolerate" Council Member Davila's support for boycotts for Palestinian rights. They are wrong. California does not—and cannot—have a public policy against political boycotts. Boycotts to bring about political, economic or social change, including boycotts for Palestinian rights, are protected by the First Amendment.¹

¹ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909–912 (1982); *Koontz v. Watson*, 2018 U.S. Dist. LEXIS 14260.

The state law referenced by the ZOA, California Assembly Bill (AB) 2844, which is enacted at Public Contract Code § 2010 (PCC § 2010), has no bearing on city commission appointments. The law requires entities seeking state agency contracts of \$100,000 or more to certify that they are in compliance with the Unruh Civil Rights Act (Unruh Act) and the California Fair Employment and Housing Act (FEHA) and that any policy they have against a sovereign nation or peoples is not used to discriminate in violation of those acts. For more information on the limited scope of this law, please see a “Frequently Asked Questions” memo prepared by the Center for Constitutional Rights and Palestine Legal.²

It is correct that the bill’s sponsor sought to suppress boycotts for Palestinian rights. But the views of a bill’s sponsor do not define public policy and were in fact rejected by the legislature. In early versions, AB 2844 was called the “California Combating Boycott, Divestment and Sanctions of Israel Act” and would have required the state to blacklist and impose a public-contract ban against any entity that supported boycotts of Israel.³ The bill was rewritten several times to avoid penalizing boycotts for Palestinian rights after the California State Assembly’s own legal experts concluded that it would have unconstitutionally punished political speech.⁴

In January 2018, a federal judge blocked a bill substantially similar to the original AB 2844, which passed in Kansas, because “the First Amendment protects the right to participate in a boycott like the one punished by the Kansas law.”⁵

Many Berkeley constituents embrace council member Davila’s support for boycott, divestment and sanctions (BDS) campaigns because they carry on decades of support for racial justice movements at home and across the globe. BDS campaigns hold Israel and corporate actors accountable under international law for violations of Palestinian rights. The strategy is based on universal principles of equality, justice and freedom for all.

Even if the City of Berkeley were to adopt a boycott or divestment initiative, AB 2844/ PCC § 2010 would have no bearing on the law because boycotts for Palestinian rights do not discriminate based on Jewish religion or Israeli national origin. Boycotts for Palestinian rights oppose Israeli *state policy* and they are based on the *conduct* of corporate actors who are complicit in human rights violations.

² Center for Constitutional Rights and Palestine Legal, “Frequently Asked Questions: California’s AB 2844 and the Right to Boycott”, <https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/58051a4aebbd1a8433764fdb/1476729419573/AB2844+FAQ+final.pdf>

³ See California Legislative Information, AB-2844 Public contracts: discrimination (2015-2016), https://leginfo.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201520160AB2844&cversion=20150AB284497AMD.

⁴ See Bill Analysis, Assembly Committee on Judiciary, April 19, 2016, http://www.leginfo.ca.gov/pub/15-16/bill_asm/ab_2801-2850/ab_2844_cfa_20160417_192827_asm_comm.html (“As noted in the analysis, the bill in print raises serious and perhaps insurmountable First Amendment concerns. Most notably, it offers a clear illustration of the ‘unconstitutional conditions’ doctrine, which holds that a government may not condition a government benefit on the recipient’s willingness to forgo a constitutional right, and its corollary, that government cannot deny a benefit to penalize a person for exercising a constitutional right.”).

⁵ American Civil Liberties Union, “In First, Judge Blocks Kansas Law Aimed at Boycotts Of Israel,” January 30, 2018, <https://www.aclu.org/news/first-judge-blocks-kansas-law-aimed-boycotts-israel>; *Koontz v. Watson*, 2018 U.S. Dist. LEXIS 14260.

Council Members Can Take Political Opinion Into Account When Making Political Appointments

Council members, have the right under city and state law to appoint commissioners who are aligned with the political values they are elected to represent.

The ZOA similarly misconstrues Section 37 of the City Charter, which the ZOA repeatedly refers to as the Berkeley Municipal Code. Section 37 of the City Charter is part of an article titled “Executive and Administrative Departments” and it does not apply to commissioners. This article governs officers and employees who serve under the City Manager. Except for the inclusion of additional protected classes, Section 37 has remained largely unchanged since the charter was adopted in 1909.⁶ At the time, the city did not have commissions as we know them today, and the only commissioners referenced in the charter were members of the city council designated as heads of departments.⁷

The non-application of Section 37 to commissioners is confirmed by the fact that another section of the charter, Section 36, which covers conflicts of interest, was amended to extend its application to certain members of boards and commissions.⁸ This suggests that if Section 37 was meant to include commissioners it would have been similarly amended. The conflict of interest provision and its implementing legislation in the municipal code are both included as appendices in the Commissioners’ Manual, but there is no reference to Section 37 in the manual.

Section 37 cannot apply to the selection of commissioners because they are political appointees. By contrast, city employees in executive and administrative departments carry out ministerial duties that should not be influenced by politics. Extending the application of Section 37 to policymakers and advisory bodies, such as the Transportation Commission, would defeat the purpose of Berkeley's 1975 Fair Representation Ordinance, which shifted the authority to appoint commissioners from the City Council majority to individual council members.⁹ This ordinance was designed to give all council members and the mayor an equal say in the makeup of commissions to provide better representation of the diverse interest of Berkeley residents. Prohibiting council members from considering political opinion in selecting their representatives on commissions would erase the benefits created by the Fair Representation Ordinance.

California state law already prohibits discrimination based on the protected classes listed in Section 37, but does not prohibit decisions based on political opinion.¹⁰

⁶ See Cal. Assembly Journal, 38 sess., 1909 at 641 (“No appointment to position under the city government shall be made or be withheld by reason of any religious or political opinions or affiliations or political services, and no appointment to or selection for or removal from any office or employment, and no transfer, promotion, reduction, reward or punishment shall be in any manner affected by such opinions, affiliations or services.”).

⁷ *Id.*

⁸ Compare *id.* with Charter of the City of Berkeley (Revised to November 8, 2016).

⁹ See Pierre Clavel, *The Progressive City: Planning and Participation, 1969-1984*, at 216 (1986) (describing more political nature of appointments under the Fair Representation Ordinance). As Clavel notes, “Appointees found they had the ear of the council members who had appointed them, while council members had the loyalty and advice of their appointees.”

¹⁰ Unruh Civil Rights Act (CA Civ. Code, §§ 51, 52).

The ZOA's Letter Distorts State and City Law to Chill Protected Political Speech

The baseless legal accusations launched against Davila and the City are part of a documented and concerted campaign to suppress criticism of Israeli policy in the U.S. As the movement for Palestinian rights continues to grow, the Israeli state and its proxy organizations in the U.S. are investing heavily in punitive measures to intimidate and chill the free speech of those who wish to express criticism of Israeli policies.¹¹

Palestine Legal responded to **308 incidents of suppression** of U.S.-based Palestine advocacy in 2017.¹² The incidents included baseless lawsuits, administrative disciplinary actions, violence, censorship, and false accusations of terrorism and antisemitism. In California, between January 1, 2014 and December 31, 2017 we responded to 291 incidents of suppression and legislative measures targeting advocacy for Palestinian rights.¹³

The ZOA has a demonstrated record of making false and legally baseless accusations to censor support for Palestinian rights. For example:

- The ZOA along with other Israel advocacy organizations pressured University of California (UC) Berkeley in 2016 to censor a student-led course called “Palestine: a Settler Colonial Inquiry.” In response, the administration suspended the class in the middle of the fall semester. The class was reinstated after an outcry from faculty, students and civil rights organizations who expressed shock at the blatant the First Amendment and academic freedom violations.¹⁴
- The ZOA made false allegations of antisemitism against the group Students for Justice Palestine (SJP) and called for the group to be banned from all City University of New York (CUNY) campuses.¹⁵ ZOA’s allegations against SJP were found to be unsubstantiated in a six-month investigation conducted by an independent task force, led by a former federal judge.¹⁶

¹¹ See, Chaim Levinson, “Israel Secretly Using U.S. Law Firm to Fight BDS Activists in Europe, North American,” *Haaretz*, October 26, 2017, <https://www.haaretz.com/israel-news/reveled-israel-s-top-secret-global-legal-operation-to-fight-bds-1.5460218>; Teresa Watanabe, “How a casino tycoon is trying to combat an exploding pro-Palestinian movement on campuses,” *LA Times*, August 21, 2016, <http://www.latimes.com/local/la-me-uc-israel-palestinian-adv-snap-story.html>; Itamar Eichner, “Government creates joint program for rapid BDS response,” *Ynet News*, December 20, 2017, <https://www.ynetnews.com/articles/0,7340,L-5063599,00.html>.

¹² Palestine Legal, “2017 Year in Review,” January 30, 2018, <https://palestinelegal.org/2017-report>.

¹³ *Id.*

¹⁴ Palestine Legal, “UC Berkeley Suspended Course on Palestine,” <https://palestinelegal.org/case-studies/2017/10/13/uc-berkeley-suspended-course-on-palestine>.

¹⁵ Palestine Legal, “ZOA Calls for SJP ban at 23 Schools,” February 25, 2016, <https://palestinelegal.org/news/2016/2/25/zoa-calls-on-sjp-ban-at-23-schools?rq=CUNY>.

¹⁶ Barbara Jones, Paul Schechtman, Bracewell LLP, “Report to Chancellor Milliken on Allegations of Anti-Semitism,” September 6, 2016, <http://www2.cuny.edu/wp-content/uploads/sites/4/page-assets/news/newswire/assets/CUNYReport.pdf>.

- ZOA filed baseless complaints with the Department of Education’s Office for Civil Rights (OCR) against UC Irvine and Rutgers University. The complaints alleged that advocacy for Palestinian rights caused a hostile environment for Jewish students. OCR dismissed both complaints in 2013 and 2014, noting that ZOA alleged facts which could not be corroborated, and concluding that the alleged discrimination involved disagreements “based on students’ political views,” not antisemitism.¹⁷

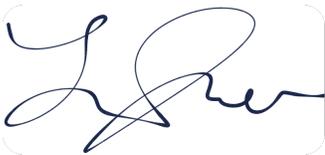
In addition to making consistent false assertions aiming to suppress speech critical of Israel, the ZOA has further undermined its credibility by aligning with prominent right-wing white supremacists. ZOA hosted Steve Bannon as a speaker at its fall 2017 dinner, and also invited Sebastian Gorka, a former Trump advisor with links to a far-right Hungarian nationalist group.

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We ask that you continue to shield the City of Berkeley from outside attack by right-wing forces with an agenda to suppress the human rights advocacy of Berkeley residents and public officials. To investigate ZOA’s baseless complaint would be to reinforce its agenda to chill political speech.

If you need any further assistance in evaluating the relevant legal issues or political context of suppression, please don’t hesitate to contact us.

Sincerely,



Liz Jackson
Staff Attorney, Palestine Legal, Oakland
Cooperating Counsel, Center for Constitutional Rights

Matt Ross
Retired Attorney, Berkeley
National Lawyers Guild San Francisco Bay Area

Dan Siegel,
Siegel, Yee & Brunner, Oakland
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¹⁷ Department of Education Office for Civil Rights, letter to Zionist Organization of America President Morton A. Klein, July 31, 2014, <https://www.documentcloud.org/documents/1300803-ocr-decision-on-title-vi-complaint-7-31-14.html>; Department of Education Office for Civil Rights, letter to UC Irvine Chancellor Drake, August 19, 2013, https://ccrjustice.org/sites/default/files/assets/files/OCR-UCIrvine_Letter_of_Findings_to_Recipient.pdf.