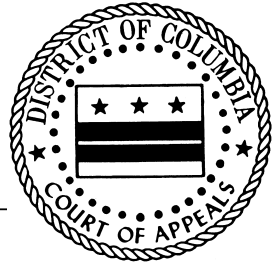


No. 19-CV-1222



Clerk of the Court  
Received 07/15/2020 02:59 PM

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IN THE DISTRICT OF COLUMBIA  
COURT OF APPEALS

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THE AMERICAN STUDIES  
ASSOCIATION, et al.,

*Defendants-Appellants,*

v.

SIMON BRONNER, et al.,

*Plaintiffs-Appellees.*

On Appeal from the Superior Court of the District of Columbia  
Case No. 2019 CA 001712 B

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BRIEF OF *AMICUS CURIAE* PALESTINE LEGAL  
IN SUPPORT OF DEFENDANTS-APPELLANTS

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Radhika Sainath  
Palestine Legal  
55 Exchange Pl. Suite 402  
New York NY 10005  
312-212-0448

*Counsel for Amicus Curiae*

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## **RULE 28(a)(2)(B) DISCLOSURE STATEMENT**

*Amicus* is a nonprofit organization, which certifies it has no parent corporation and has not issued any shares of stock to any publicly held corporation.

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## **INTEREST OF *AMICUS CURIAE***

Palestine Legal is a non-profit legal and advocacy organization dedicated to protecting the civil and constitutional rights of people in the U.S. who speak out for Palestinian freedom. Palestine Legal tracks incidents of censorship and efforts to suppress expression supporting Palestinian rights, including strategic lawsuits and legal threats intended to limit advocacy of the kind at issue in this case.

Palestine Legal writes to situate this lawsuit in the context of a broader, coordinated effort to stifle viewpoints that support Palestinian rights, including attempts by the Louis D. Brandeis Center for Human Rights (“Brandeis Center”) to chill criticism of Israel in academia and amongst students. Palestine Legal urges this Court to fulfill its role of ensuring that meritless litigation is not deployed to silence advocacy on the critical issue of Israel and Palestine.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

In recent years, an increasing number of individuals and groups have been protesting Israel’s violations of Palestinian rights. Many have heeded the call for “Boycott, Divestment and Sanctions” (BDS) that was issued by Palestinian civil society in 2005 as a way to protest Israeli human rights abuses.<sup>1</sup> Individuals and groups like Defendant-Appellants engage in boycotts of Israeli academic institutions

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<sup>1</sup> *Palestinian Civil Society Call for BDS*, BDSMOVEMENT.NET (July 9, 2005), <https://bdsmovement.net/call>.

on the conviction that these institutions play a central role in Israel's denial of Palestinian rights, and in a manner that mirrors boycotts challenging discrimination throughout history, from the anti-segregation bus boycotts in the U.S. South to the South African anti-apartheid boycotts.

Like the boycott of white-owned stores in the 1950s and 60s—which the Supreme Court held was unambiguously protected by the First Amendment in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)—boycotts challenging Israeli state practices are a form of political protest arising from a movement demanding freedom, justice and equality.

This growing movement for Palestinian rights, and especially the call for boycotts, has in turn been met aggressively by its target, the Israeli government, which, along with aligned private groups, has devoted significant financial and strategic resources to undermining it. Since 2016, the Israeli government has allotted over \$100 million to fight BDS.<sup>2</sup> This includes more than \$860,000 to establish a

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<sup>2</sup> Thrall, Nathan, *How the Battle of Israel and Anti-Semitism is Fracturing American Politics*, N.Y. TIMES MAGAZINE (Mar. 29, 2019), <https://www.nytimes.com/2019/03/28/magazine/battle-over-bds-israel-palestinians-antisemitism.html>.

legal network to stop the rise of the boycott movement.<sup>3</sup> Israel’s spy agency, the Mossad, has even been deployed to combat boycott activities.<sup>4</sup>

It is in this climate that the Brandeis Center—whose mission it is to stop what it believes to be anti-Israel activity on U.S. college campuses—brought this lawsuit.<sup>5</sup> Contrary to the claims of Plaintiffs, lawsuits such as this one have nothing to do with concerns over the intricacies of nonprofit management. This lawsuit is about chilling expression critical of Israel’s treatment of Palestinians by making it incredibly burdensome and expensive to engage in it. In the words of Brandeis Center’s

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<sup>3</sup> Maayan Jaffe-Hoffman, *Strategic Affairs Ministry to Form Anti-BDS Legal Network*, THE JERUSALEM POST (Dec. 20, 2018), <https://www.jpost.com/Arab-Israeli-Conflict/Ministry-of-Strategic-Affairs-to-create-international-anti-BDS-legal-team-574946>.

<sup>4</sup>A January 2019 freedom of information request of Israel’s Minister of Strategic Affairs’ schedule revealed a record of cooperation between the Ministry of Strategic Affairs and Israel’s spy agency, the Mossad to combat boycott activities in the U.S. One 2018 entry revealed a meeting between the Minister and Mossad chief Yossi Cohen, to discuss “the struggle against the boycott.” Noa Landau, *Mossad Involved in Anti-Boycott Activity, Israeli Minister’s Datebooks Reveal*, HAARETZ (June 12, 2019), <https://www.haaretz.com/israel-news/.premium-mossad-involved-in-anti-boycott-activity-israeli-minister-s-diaries-reveal-1.7360253>; Linah Alsaafin, *From Spying to Lobbying, Israel’s Fight Against BDS Intensifies*, AL-JAZEERA (June 20, 2019), <https://www.aljazeera.com/news/2019/06/spying-lobbying-israel-fight-bds-intensifies-190620170711122.html>; Asa Winstanley, *Mossad Role in Israel’s War Against BDS Confirmed*, ELECTRONIC INTIFADA (June 14, 2019), <https://electronicintifada.net/blogs/asa-winstanley/mossad-role-israels-war-against-bds-confirmed>.

<sup>5</sup>*Mission and Values*, BRANDEIS CTR. (Jan. 13, 2013), <https://web.archive.org/web/20130114221218/http://brandeiscenter.com/index.php/about/mission>.

founder, former president and general counsel: “This [lawsuit] is not just about the American Studies Association,” but is meant to “send a signal” to other associations considering advocating for boycott resolutions.<sup>6</sup>

The District of Columbia’s Anti-SLAPP Act of 2010 (“Anti-SLAPP Act”) was enacted to weed out precisely this type of misuse of the legal process. Yet absent a dismissal and attorneys’ fees, anti-Palestinian groups like the Brandeis Center will continue to misuse the legal process to punish and chill one side of this critical debate.

Palestine Legal accordingly urges this Court to dismiss this case pursuant to the Anti-SLAPP Act.

## **ARGUMENT**

### **I. A BOYCOTT OF ISRAELI ACADEMIC INSTITUTIONS IS EXPRESSIVE ACTIVITY THAT FALLS WITHIN THE PURVIEW OF THE ANTI-SLAPP ACT**

Almost every major social movement has at some point used boycotts as a method to raise awareness about a persistent injustice. From the boycott of slave-produced sugar,<sup>7</sup> to anti-colonial actors in India who called for the boycott of British

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<sup>6</sup> Elizabeth Redden, *Israel Boycott Battle Heads to Court*, INSIDE HIGHER ED (Apr. 21, 2016), <https://www.insidehighered.com/news/2016/04/21/lawsuit-targets-american-studies-associations-stance-israel-academic-boycott>.

<sup>7</sup> Mike Kaye, *The Tools of the Abolitionists*, BBC.CO.UK, [http://www.bbc.co.uk/history/british/abolition/abolition\\_tools\\_gallery\\_07.shtml](http://www.bbc.co.uk/history/british/abolition/abolition_tools_gallery_07.shtml) (last updated Feb. 17, 2011).



goods,<sup>8</sup> to the Montgomery bus boycott,<sup>9</sup> the historical pedigree and legitimacy of boycotts as a tool to challenge injustice is unimpeachable. Indeed, it was a global boycott, divestment, and sanctions movement—which included academic boycotts—that helped dismantle apartheid in South Africa.<sup>10</sup>

In December 2013, after years of public grassroots organizing and after months of open debate, the ASA voted by a large margin to “honor the call of Palestinian civil society for a boycott of Israeli academic institutions.”<sup>11</sup> Anchored in human rights principles, the ASA resolution advocates for the academic freedom

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<sup>8</sup> CHARLES ANDREW ORR, *A STUDY OF INDIAN BOYCOTTS* (1940). The word “boycott” originates from 1880’s Ireland, when tenant workers, unhappy with the refusal of their English land agent—Charles Cunningham Boycott—to decrease rents when crops were poor, refused to sell him goods. Steven Greenhouse, *IDEAS & TRENDS: A Weapon for Consumers; The Boycott Returns*, N.Y. TIMES (Mar. 26, 2000),

<https://www.nytimes.com/2000/03/26/weekinreview/ideas-trends-a-weapon-for-consumers-the-boycott-returns.html>.

<sup>9</sup> See E.R. Shipp, *Rosa Parks, 92, Founding Symbol of Civil Rights Movement, Dies*, N. Y. TIMES (Oct. 25, 2005),

<https://www.nytimes.com/2005/10/25/us/25parks.html>.

<sup>10</sup> See William Finnegan, *Postscript: Nelson Mandela, 1918-2013*, NEW YORKER, (June 8, 2013), <https://www.newyorker.com/news/news-desk/postscript-nelson-mandela-1918-2013>. “The anti-apartheid movement gained traction globally. Economic sanctions and the divestment campaign, although opposed by conservative Western leaders, including Ronald Reagan and Margaret Thatcher, who continued to call the A.N.C. a ‘terrorist organization,’ began to take their toll.” *Id.* See also Håkan Thörn, *Solidarity Across Borders: The Transnational Anti-Apartheid Movement*, 17 *Voluntas: Int’l J. Voluntary & Nonprofit Orgs.* 285 (2006).

<sup>11</sup> *Boycott of Israel Academic Institutions*, AMERICAN STUDIES ASS’N, <https://www.theasa.net/about/advocacy/resolutions-actions/resolutions/boycott-israeli-academic-institutions-0> (Dec. 14, 2013).

of Palestinian students and scholars under Israeli military occupation.<sup>12</sup> It communicates a view that the United States plays a significant role in enabling the Israeli occupation and other violations of international law which have had a “devastating impact on the overall well-being, the exercise of political and human rights, the freedom of movement, and the educational opportunities of Palestinians.”<sup>13</sup> By pressuring Israel’s academic institutions to stop violating the academic freedom of Palestinians, the ASA resolution seeks to ensure that Palestinians have the freedom to engage in academic pursuits, including the study of American history and culture.<sup>14</sup>

Soon after their resolution was passed, the Mossad-linked Shurat HaDin Israeli Law Center threatened to sue the ASA unless the academic group “immediately take[s] all necessary steps to cancel the boycott of Israeli institutions and academics,” and claimed that the academic boycott resolution was illegal and discriminatory.<sup>15</sup> Other pro-Israel groups, including the Brandeis Center and pro-Israel blogger and law professor William Jacobson followed suit, threatening to

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Letter from Nitsana Darshan-Leitner, Shurat HaDin-Israel Law Ctr. to Elizabeth Duggan, President-Elect, American Studies Ass’n. (Jan. 9, 2014) (on file with Palestine Legal); Asa Winstanley, *Israeli Law Center Admits Mossad Ties*, ELECTRONIC INTIFADA (Nov. 16, 2017), <https://electronicintifada.net/blogs/asa-winstanley/israeli-law-center-shurat-hadin-admits-mossad-ties>.

challenge the ASA's tax-exempt status.<sup>16</sup> While the Brandeis Center never publicly followed through on its I.R.S. threat, Jacobson did and the complaint was never found to have merit.<sup>17</sup> The Brandeis Center instead sued in federal court and after that suit was dismissed, initiated the case on appeal here.<sup>18</sup>

As described above, boycotts such as the ASA's are historically a central form of resistance and protest protected by the U.S. Constitution. In 1982, the Supreme Court recognized that the First Amendment protects politically motivated peaceful boycotts, reaffirming our "profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust and wide-open.'" *Claiborne Hardware*, 458 U.S. at 913 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). "It is fundamental that the First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes

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<sup>16</sup> See Peter Schmidt, *Backlash Against Israel Boycott Throws Academic Association on Defensive*, CHRONICLE OF HIGHER ED (June 1, 2014), <https://www.nytimes.com/2014/01/06/us/backlash-against-israel-boycott-throws-academic-association-on-defensive.html? r=0>; William A. Jacobson, *Anti-Israel Academic Boycott Group's Tax-Exempt Status Challenged*, LEGAL INSURRECTION (Jan. 6, 2014), <http://legalinsurrection.com/2014/01/anti-israel-academic-boycott-groups-tax-exempt-status-challenged/>.

<sup>17</sup> William A. Jacobson, *Judge: Lawsuit against American Studies Assoc over BDS can go forward*, LEGAL INSURRECTION (Apr. 3, 2017), <https://legalinsurrection.com/2017/04/judge-lawsuit-against-american-studies-assoc-over-bds-can-move-forward/> ("I have not heard anything about the status of the complaint, and there is no IRS procedure for me to check the status.").

<sup>18</sup> *Bronner v. Duggan*, \_\_\_ F.3d \_\_\_, 2020 WL 3393531 (D.C. Cir. June 19, 2020) (affirming the District Court's February 4, 2019 dismissal on the basis of subject matter jurisdiction).

desired by the people.” *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (internal quotations omitted).

Strategic lawsuits against public participation are actions filed by one side of a political debate “aimed to punish or prevent the expression of opposing points of view.” *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1226 (D.C. 2016), *as amended* (Dec. 13, 2018). Like the boycotts in *Claiborne Hardware*, Defendant-Appellants’ boycott has a clear set of demands for social justice and seeks to challenge a political system that has denied people basic rights of dignity and equality. 458 U.S. at 909, 918.

ASA’s academic boycott resolution is unquestionably expressive activity on an issue of public interest that falls within the purview of the Anti-SLAPP ACT.

## **II. THE BRANDEIS CENTER FILED THIS LAWSUIT TO CHILL EXPRESSION SUPPORTING PALESTINIAN RIGHTS**

The Brandeis Center and its former president and general counsel Kenneth Marcus have been explicit that the goal of this lawsuit is to scare off other professors and academic associations from advocating for the academic boycott of Israel.

Mincing no words about wanting to send a warning to other academic associations, Marcus declared, when announcing the Center’s suit against the ASA:

The Brandeis Center is concerned that other associations may have the perception that the **wrongdoers have been able to escape accountability** for their shenanigans . . . .

**Academic associations should think twice** before abusing their missions and betraying the lawful purposes for which they were established in favor of the personal political agendas of their noisiest and most politicized activist members.<sup>19</sup>

Marcus was similarly blunt when he told *Inside Higher Ed* that the Center's lawsuit against the ASA was all about deterring similar advocacy by other academic associations:

This is **not just about the American Studies Association** . . . It's about any association officer or director who is thinking about using their association as a tool to advance their own ideological agenda. This should **send a signal that if association activists are not concerned that BDS resolutions** are anti-Semitic and may be a violation of academic freedom they should certainly be concerned that they may violate corporations law.<sup>20</sup>

Indeed, when another academic association, the Modern Languages Association (MLA), was on the eve of voting on an academic boycott resolution, it received a letter from the Brandeis Center informing the group that its proposed resolution was “illegal under the law of Maryland.”<sup>21</sup> The letter ominously noted that “The

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<sup>19</sup> Lea Speyer, *Jewish Rights Advocate: BDS Making a Laughing Stock out of the American Studies Association*, ALGEMEINER (Apr. 22, 2016), <https://www.algemeiner.com/2016/04/22/jewish-rights-advocate-bds-making-a-laughing-stock-out-of-the-american-studies-association/> (emphasis added).

<sup>20</sup> Elizabeth Redden, *Israel Boycott Battle Heads to Court*, INSIDE HIGHER ED, (Apr. 21, 2016), <https://www.insidehighered.com/news/2016/04/21/lawsuit-targets-american-studies-associations-stance-israel-academic-boycott> (emphasis added).

<sup>21</sup> Letter from Kenneth L. Marcus, President and General Counsel, Louis D. Brandeis Human Rights Ctr., to Kwame Anthony Appiah, President, Modern Language Ass'n of America (Dec. 14, 2016), [https://brandeiscenter.com/wp-content/uploads/2017/10/release\\_122016.pdf](https://brandeiscenter.com/wp-content/uploads/2017/10/release_122016.pdf).

Brandeis Center represents members of the American Studies Association (ASA) in a lawsuit against the ASA challenging a resolution very similar to the one at issue here.”<sup>22</sup>

After warning the MLA not to pass a boycott resolution, the Brandeis Center blasted a press release to media organizations reiterating that:

**The MLA’s proposed resolution is very similar to a 2013 American Studies Association (ASA) resolution to boycott Israeli academic institutions. This past April, the Brandeis Center, along with prominent litigators at Marcus & Auerbach and Barnes & Thornburg, filed a lawsuit against the ASA on behalf of four distinguished American Studies professors, challenging this unlawful boycott of Israel.**<sup>23</sup>

After the MLA’s boycott resolution failed, the Brandeis Center took credit for chilling the association’s speech activity, declaring that it was the Center’s threat of litigation that had prevented the resolution—which was “initially expected to pass”—from succeeding.<sup>24</sup> In a statement on the Center’s website, Marcus warned other academic associations that, should they pass a resolution

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<sup>22</sup> *Id.*

<sup>23</sup> Press Release, Brandeis Ctr., LDB to MLA: Drop Ultra Vires Boycott Resolution (Dec. 20, 2016), <https://brandeiscenter.com/ldb-to-mla-drop-ultra-vires-boycott-resolution/> (emphasis added).

<sup>24</sup> Edward Kunz, *Modern Language Association Overwhelmingly Passes Anti-BDS Motion*, BRANDEIS CTR., <https://brandeiscenter.com/modern-language-association-overwhelmingly-passes-anti-bds-motion-2/> (last visited July 8, 2020).

supporting the rights of Palestinian professors and students, they too would face painful lawsuits.<sup>25</sup>

Indeed, from 2013-2015, eight other academic associations endorsed academic boycott resolutions.<sup>26</sup> Since the Brandeis Center first sued the ASA in April 2016, none, to our knowledge, have passed.

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<sup>25</sup> *Id.* (“...these resolutions are unlawful and may subject the organization to liability.”)

<sup>26</sup> *The ALA supports the Academic Boycott of Israeli Academic Institutions*, AFRICAN LITERATURE ASS’N, <http://africanlit.org/about-the-ala/ala-resolutions-and-executive-letters/> (Apr. 2014); *Proposal to Boycott Israeli Academic Institutions*, ASS’N FOR ASIAN AMERICAN STUDIES, [https://aaastudies.org/wp-content/uploads/2020/01/aaas-4\\_20\\_13-conference-resolution-to-support-the-boycott-of-israeli-academic-institutions-revised.pdf](https://aaastudies.org/wp-content/uploads/2020/01/aaas-4_20_13-conference-resolution-to-support-the-boycott-of-israeli-academic-institutions-revised.pdf) (Apr. 20, 2013); *Support The Academic And Cultural Boycott Of Israel*, ASS’N FOR HUMANIST SOCIOLOGY, <https://www.humanist-sociology.org/bds.html> (Oct. 2013); *Academic Boycott of Israeli Academic Institutions*, CRITICAL ETHNIC STUDIES ASS’N, <https://criticalethnicstudies.org/content/bds> (July 18, 2014,); *Resolution to Support the Boycott of Israeli Academic Institutions*, NATIONAL ASS’N OF CHICANA AND CHICANO STUDIES, <https://www.facebook.com/notes/10153439796812481/> (Apr. 19, 2015); *NWSA Statement in Solidarity*, NATIONAL WOMEN'S STUDIES ASS’N, <https://www.nwsa.org/news/news.asp?id=483386&hhSearchTerms=%22bds%22> (Jan. 19, 2015); *Declaration in Support of the Boycott of Israeli Academic Institutions*, NATIVE AMERICAN AND INDIGENOUS STUDIES ASS’N, <https://www.naisa.org/about/documents-archive/previous-council-statements/#palestine> (Dec. 13, 2013); *PJSA endorses BDS Campaign*, PEACE AND JUSTICE STUDIES ASS’N, <https://www.peacejusticestudies.org/pjsa-endorses-bds-campaign/> (Nov. 5, 2014).

The Anti-SLAPP Act was created to weed out meritless litigation wielded to prevent opposing points of view on issues of public interest—which is precisely what Plaintiffs and their counsel, the Brandeis Center, have attempted to do by filing this case.

### **III. THE BRANDEIS CENTER HAS REPEATEDLY WEAPONIZED LEGAL CLAIMS TO SHIELD ISRAEL FROM CRITICISM**

The Brandeis Center was founded in 2012 with a mission to stop what it calls “anti-Israelism” on U.S. campuses.<sup>27</sup> It has promoted a strategy of filing baseless discrimination complaints targeting speech supporting Palestinian rights on college campuses.<sup>28</sup> It has called for government intervention into academic programs, including leading an effort to cut off funding for Middle East studies programs it believes are not sufficiently pro-Israel.<sup>29</sup> It has pushed for universities and federal, state, and local governments to pass laws portraying criticism of Israel as a form of antisemitic discrimination.<sup>30</sup> And it has lobbied for harsh punishments

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<sup>27</sup> *Mission and Values*, *supra* note 5.

<sup>28</sup> Letters from Pelchat, Dep’t of Educ., *infra* notes 33-35.

<sup>29</sup> See *The LDB urges Congress to end or mend Middle East Studies*, *infra* note 39.

<sup>30</sup> See Erica L. Green, *An Advocate for Israel Draws Fire as He Nears Confirmation to Civil Rights Post*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/us/politics/kenneth-marcus-civil-rights-israel-bds.html>; *Victory in Bal Harbor: LDB Testifies in Support of Anti-Semitism Definition Act, Unanimously Passes First Reading*, BRANDEIS CTR., <https://brandeiscenter.com/victory-bal-harbour-ldb-testifies-support-anti-semitism-definition-act-unanimously-passes-first-reading/> (last visited July, 9, 2020); Lee Sutherland, *UC Stakeholders: Sign Petition to Board of Regents On State Department’s Definition*, BRANDEIS CTR., <https://brandeiscenter.com/uc->



for student activists supporting Palestinian rights, often focusing on students of color.<sup>31</sup>

Ultimately, the core mission of the Brandeis Center is to stop criticism of Israel's policies by throwing whatever legal obstacles it can at students, universities, and professors, no matter what sticks. The goal, in the then-president of the Brandeis Center's own words, is not to win the underlying legal claim, but to

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[stakeholders-sign-petition-to-board-of-regents-on-state-departments-definition-2/](#) (last visited July, 9, 2020).

<sup>31</sup> In 2017, the Brandeis Center wrote the University of Wisconsin asking the university to take action against a Black student, who supports Palestinian rights, for saying "Fuck White Supremacy" at a student government meeting, and for writing in an open letter to the university that "all white people are racist." The Brandeis Center urged the university to take disciplinary action in response to the statement, which was based on the racism the student had experienced as a Black woman on campus, calling the statement "especially damaging." See *University of Wisconsin-Madison Students of Color Targeted for Organizing Against White Supremacy and Zionism*, PALESTINE LEGAL (Nov. 6, 2017), <https://palestinelegal.org/news/2017/11/6/wisconsin-students-of-color-targeted>; Letter from Kenneth L. Marcus, President and General Counsel, Louis D. Brandeis Human Rights Ctr, to Rebecca M. Blank, Chancellor, Univ. of Wis. (June. 21, 2017), <http://brandeiscenter.com/ldb-urges-further-action-from-uw-madison>.

In 2016 and 2017, the Brandeis Center called for criminal prosecutions of students at the University of California Irvine who peacefully protested an event featuring Israeli soldiers. See Gabriel San Roman, *Pro-Palestine Student Group Sanctioned by UCI for "Disrupting" Israeli Soldier Panel*, OC WEEKLY (Sept. 1, 2017), <http://www.ocweekly.com/news/uci-students-for-justice-in-palestine-sanctioned-again-8389976>; Letter from Kenneth L. Marcus, President and General Counsel, Louis D. Brandeis Human Rights Ctr., to Howard Gillman, Chancellor, Univ. Cal. Irvine (May 24, 2016), <https://brandeiscenter.com/ldb-urges-uc-irvine-chancellor-to-take-stronger-stance-against-disruptive-protest/>. The Brandeis Center called a diverse group of students, most of whom were Black, Latinx, and Native American, an "angry mob." *Id.*

make advocating for Palestinian rights so onerous and time-consuming, people will think twice before doing so.<sup>32</sup>

**a. The Brandeis Center has promoted baseless discrimination complaints aimed at chilling speech critical of Israeli policies**

One prominent example of the Brandeis Center's strategy to misuse the legal process to chill speech supporting Palestinian human rights is its promotion of complaints against universities with the U.S. Department of Education's (DOE) Office for Civil Rights (OCR) that allege that by tolerating campus events that criticize Israeli policies, universities violate Title VI of the Civil Rights Act, which prohibits discrimination by programs receiving federal funds.

From 2009-2013, Kenneth Marcus, the Brandeis Center and affiliated attorneys have threatened, promoted or filed complaints against the University of

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<sup>32</sup> Kenneth L. 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>.

California (UC) Berkeley,<sup>33</sup> UC Santa Cruz<sup>34</sup> and City University of New York-Brooklyn College<sup>35</sup> targeting speech like a film and panel discussion on Palestine, a

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<sup>33</sup> In 2012, two Brandeis Center board members filed a Title VI complaint with OCR against UC Berkeley. It alleged that campus speech activities like advocacy for resolutions to divest from companies complicit in Israel’s human rights abuses and mock checkpoints aimed at demonstrating one aspect of Palestinian life under Israeli occupation portrayed Jews as barbarians. This complaint was filed after a federal lawsuit the same board members filed against UC Berkeley was dismissed because the alleged incidents were political speech and expressive conduct “regarding matters of public concern” and protected by the First Amendment. *Felber v. Yudof*, 851 F. Supp. 2d 1182, 1188 (E.D. Cal. 2011) After investigating the incidents, OCR similarly dismissed the complaint, noting that the allegations amounted to “robust and discordant expression” that regularly takes place on college campuses, and constituted protected speech. See letter from Zachary Pelchat, Team Leader, U.S. Dep’t of Educ., to Robert J. Birgeneau, Chancellor, Univ. Cal. Berkeley (Aug. 19, 2013), available at [https://news.berkeley.edu/wp-content/uploads/2013/08/DOE.OCR .pdf](https://news.berkeley.edu/wp-content/uploads/2013/08/DOE.OCR.pdf).

<sup>34</sup> In 2009, Marcus promoted a Title VI complaint submitted to OCR by the pro-Israel group AMCHA Initiative, against UC Santa Cruz alleging institutional discrimination against Jewish students in violation of Title VI of the Civil Rights Act. See Peter Schmidt, *Education Dept. Investigates Complaint of Anti-Semitism at UC-Santa Cruz*, Chronicle of Higher Ed. (Mar. 15, 2011), <http://www.chronicle.com/article/Education-Dept-Investigates/126742>. The complaint alleged that UC Santa Cruz violated Title VI by allowing what it described as “anti-Israel” and “anti-Jewish” events to take place on campus. The events included a screening of the documentary *Occupation 101* and a talk by a former IDF soldier and a Holocaust survivor critical of Israeli policy. In March 2011, OCR opened an investigation in response to the 2009 complaint. After a two-year factual investigation, OCR dismissed the complaint in August 2013, emphasizing that speech critical of Israel falls within the “robust and discordant expression” that regularly takes place on college campuses. Letter from Zachary Pelchat, Team Leader, U.S. Dep’t of Educ., to Carole E. Rossi, Chief Campus Counsel, Univ. Cal. Santa Cruz (Aug. 19, 2013), available at [https://news.ucsc.edu/2013/08/images/OCR\\_letter-of-findings.pdf](https://news.ucsc.edu/2013/08/images/OCR_letter-of-findings.pdf).

teach-in on Gaza, a program on the costs of war on Israeli society, street theatre depicting Palestinians navigating Israeli army checkpoints, T-shirts encouraging students to support Palestine, debates concerning university divestment from companies that support Israel's human rights abuses, and a talk on BDS.

Not a single complaint was sustained or found to have legal merit. In dismissing such complaints as meritless, OCR found they were based on First Amendment-protected political expression and did not amount to discrimination or harassment against Jewish students who disagreed with viewpoints in favor of Palestinian rights.<sup>36</sup>

Despite these losses, the Brandeis Center revealed that the ultimate aim of these complaints—chilling advocacy for Palestinian rights—had been achieved. In

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<sup>35</sup> In 2013, Brooklyn College students who organized a panel discussion on BDS were investigated after Israel advocacy organizations and lawmakers falsely accused the students of antisemitism. The City University of New York's general counsel led a two-month investigation into the discrimination claims, interviewing more than forty individuals. The investigation found no evidence that the organizers discriminated against anyone on the account of their religion. See Press Release, Ctr. for Constitutional Rights, Brooklyn College Students for Justice in Palestine Vindicated After 2-Month CUNY Investigation into BDS event (April 15, 2013), <https://ccrjustice.org/home/press-center/press-releases/brooklyn-college-students-justice-palestine-vindicated-after-2>. The Brandeis Center, under Marcus, issued a statement echoing the earlier unfounded claims. See *Brandeis Center Welcomes Brooklyn College Administration's Apology for its Handling of 2013 Anti-Israel Event*, BRANDEIS CTR., <http://brandeiscenter.com/brandeis-center-welcomes-brooklyn-college-administrations-apology-for-its-handling-of-2013-anti-israel-event-jewish-pro-israel-students-vindicated-by-apology-further-action-to-protect-civil>.

<sup>36</sup> Letters from Pelchat, Dep't of Educ., *supra* notes 33-34.

an 2013 op-ed in the *Jerusalem Post*, then-president of the Brandeis Center, Kenneth Marcus, explained that even when rejected, these complaints have the effect they “set out to achieve,” of “expos[ing] administrators to bad publicity,” as well as making it harder for critics of Israel “to recruit new adherents,” or obtain future employment because no one wants to “get caught up in a civil rights complaint.”<sup>37</sup>

“The only way to win these cases is to file them, even when we see some or most rejected,” Marcus explained. “We are creating a very strong disincentive for outrageous behavior by students in particular.”<sup>38</sup>

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<sup>37</sup> See *Standing up for Jewish Students*, *supra* note 32.

<sup>38</sup> *Id.* Since Brandeis Center’s former head, Kenneth Marcus, was appointed as Assistant Secretary for Civil Rights at DOE in June 2018, Brandeis Center-affiliated attorneys have been renewing efforts to file meritless Title VI complaints. For example, in November 2018, attorneys on the Brandeis Center’s Legal Advisory board filed a complaint alleging that a UC Berkeley vigil organized by Jewish Voice for Peace and Students for Justice in Palestine to mourn the deaths of Palestinian children killed in Gaza and Jewish people killed in the Pittsburgh massacre aimed to portray “Israel as a barbarian and racist nation” and called for the students who organized the vigil to be expelled. Aaron Bandler, *Pro-Israel Students File Complaint to Department of Education About SJP Vigil at Berkeley*, JEWISH JOURNAL (Nov. 13, 2018), <http://jewishjournal.com/news/nation/241882/pro-israel-students-file-complaint-department-education-sjp-vigil-berkeley/>; *UC Berkeley Faces New Campus Anti-Semitism Charges*, BRANDEIS CTR., <https://brandeiscenter.com/uc-berkeley-faces-new-campus-anti-semitism-charges/> (last visited July 8, 2020). The same attorneys filed a Title VI complaint against New York University (NYU) in 2019 after the NYU Students for Justice in Palestine was honored with the President’s Service Award for having a positive impact at NYU, which the complainant called “entirely unfair.” Jenni Fink, *Civil Rights Office Investigating NYU Over Claim It Allowed Hostile Environment for Jewish Students*, NEWSWEEK (Nov. 15, 2019), <https://www.newsweek.com/civil-rights-office-investigating-nyu-over-claim-it-allowed-hostile-atmosphere-jewish-students-1472118>. On July 10, 2020, the

**b. The Brandeis Center has pushed to defund Middle East studies programs because of scholarly criticism of Israel**

The Brandeis Center has similarly abused legal mechanisms to make it difficult for scholars and academic departments to express views critical of Israel's treatment of Palestinians.<sup>39</sup>

Under a theory that Middle East studies centers must offer views defending Israeli state policies at events in order to comply with Title VI of the Higher Education Act (HEA), the Brandeis Center has attempted to chill programming sympathetic to Palestinian rights by pushing for intrusive federal oversight to ensure that viewpoints sufficiently sympathetic to Israeli government policies would predominate—or the defunding of centers entirely.<sup>40</sup>

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Brandeis Center announced that Marcus was leaving his post and returning to Center. Press Release, Kenneth Marcus to Return to the Louise D. Brandeis Center as Chairman of the Board (July 10, 2020), <https://brandeiscenter.com/kenneth-l-marcus-to-return-to-the-louis-d-brandeis-center/>.

<sup>39</sup> In September, the Brandeis Center celebrated a move by the federal government to control the curriculum of a joint Middle Eastern studies program between the University of North Carolina and Duke University, which was widely regarded in academic circles as government overreach. The Brandeis Center, (@brandeiscenter), TWITTER (Sept. 20, 2019, 12:35 PM), <https://twitter.com/brandeiscenter/status/1175086100496474113>; See also *Multiple Groups Call Out Department of Education's Intrusion at Duke-UNC*, AAUP (Sept. 30, 2019), <https://www.aaup.org/news/multiple-groups-call-out-department-education's-intrusion-duke-unc>.

<sup>40</sup> See Craig Rossett, *The LBD urges Congress to end or mend Middle East Studies funding*, BRANDEIS CTR. (Sept. 20, 2014), <http://brandeiscenter.com/the-ldb-urges-congress-to-end-or-mend-hea-title-vi-diverse-perspectives-requirement> (last visited July 10, 2020); *Title VI and Middle East Studies: What You Should Know*, PALESTINE LEGAL (Nov. 17, 2014),

Examples of speech activity the Brandeis Center criticized in a 2014 white paper lobbying Congress to defund UCLA’s Center for Near East Studies include: a 2009 conference titled “Gaza and Human Rights” where speakers “repeated the smear that Israel deliberately targets civilians” and used the term “war criminals” to describe the Israeli army; another 2009 conference on settler colonialism where a professor “compared Israel to apartheid South Africa,” and a 2013 book talk by a former Israeli army commando and platoon sergeant where the speaker “outlined various practices that undoubtedly some would deem objectionable, but that hardly constitute war crimes and in many cases, are simple realities of military life.”<sup>41</sup>

The Brandeis Center’s campaign suggested that Congress could implement measures to exert control over academic programming, such as an “accountability system,” “formal compliance process” and monitoring—in essence advocating for a system in which the federal government would either define the scope of acceptable scholarly debate or defund programs entirely.<sup>42</sup>

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<https://palestinelegal.org/news/2014/11/17/title-vi-and-middle-east-studies-what-you-should-know>; See BRANDEIS CTR., THE MORASS OF MIDDLE EAST STUDIES: TITLE VI OF THE HIGHER EDUCATION ACT AND FEDERALLY FUNDED AREA STUDIES (2014) (“Brandeis White Paper”), [https://brandeiscenter.com/wp-content/uploads/2017/10/antisemitism\\_whitepaper.pdf](https://brandeiscenter.com/wp-content/uploads/2017/10/antisemitism_whitepaper.pdf).

<sup>41</sup> *Id.* at 18, 20, and 22. The Brandeis White Paper also argued that “Though the event included both Jewish and Israeli speakers, it was intellectually homogeneous,” complaining that “[UC San Diego Professor of Sociology] Gershon Shafir . . . offered a very weak defense of Israel.” *Id.* at 20.

<sup>42</sup> See Rossett, *supra* note 40.

As part of its lobbying campaign, Marcus published an op-ed in *The Hill*, a newspaper widely read by policy experts, claiming, outlandishly, that there is a law that prevents professors from criticizing Israel too much:

[T]here's a law that curbs [such criticism of Israel] as well: Title VI of the HEA, which was created to strengthen U.S. security by training security specialists and educating the public.

Fair-minded criticism of Israel is one thing, **but if a scholar is going to focus on Israel in such a one-sided way, that scholar is in fact committing professional malpractice.** You cannot understand Israel through such a lens.<sup>43</sup>

Brandeis Center's Middle East studies campaign, like this lawsuit, was an attempt to abuse legal mechanisms to burden and incapacitate scholars who expressed views with which the Brandeis Center disagreed.<sup>44</sup>

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<sup>43</sup> Kenneth Marcus, *Title VI and Campus Bias*, THE HILL (Sept. 19, 2014), <https://thehill.com/blogs/congress-blog/education/218110-title-vi-and-campus-bias>.

<sup>44</sup> The Brandeis Center has also targeted individual professors. For example, together another pro-Israel group, the Brandeis Center sent a letter in 2014 to California State Controller John Chiang demanding an audit of San Francisco State University (SFSU) professor Rabab Abdulhadi over her 2014 trip to Jordan and Palestine, arguing that the trip, which was made to attend a conference, conduct research, and meet with potential university partners towards a possible memorandum of understanding between SFSU and Palestinian universities, constituted a misuse of tax-payer funds. *See* Letter from AMCHA Initiative, Brandeis Ctr. *et al*, to John Chiang, Cal. State Controller, (June 24, 2014) <https://amchainitiative.org/letter-to-controller-chiang/>; Letter from Liz Jackson, Staff Attorney, Palestine Legal Support, to John Chiang, California State Controller (Aug. 1, 2014), <http://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/55357b08e4b0366c2fd525e9/55357b0ae4b0366c2fd5270f/1407195118000/Letter-to-Controller-Chiang-from-Civil-Rights-Orgs.8-4.pdf?format=original>.



#### IV. THIS LAWSUIT IS PART OF A BROADER EFFORT TO SUPPRESS GROWING ADVOCACY IN SUPPORT OF PALESTINIAN RIGHTS.

An increasing number of prominent individuals and institutions are protesting Israeli state practices that violate Palestinian rights, including by endorsing BDS as a tactic to effect change. Several major U.S.-based religious institutions have endorsed and participated in BDS initiatives, including the Evangelical Lutheran Church in America, the Presbyterian Church (USA), the Mennonite Church, and the United Methodist Church.<sup>45</sup> Acclaimed writers, artists, and professional athletes such as Natalie Portman, Lorde, Lana del Rey, Lauryn Hill, Cornell West, Michael Bennett, and others have endorsed or participated in a cultural boycott of Israel—or

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To our knowledge, the State Controller did not respond to this request for action. However, the letter prompted SFSU to conduct its own audit of the professor's travels and found the allegations "have no merit." *Allegations of improper faculty travel investigated; no merit found*, SF STATE NEWS (June 24, 2014), <https://news.sfsu.edu/allegations-improper-faculty-travel-investigated-no-merit-found> ("Faculty can and do communicate with others relevant to their research, communicating by various methods that can involve travel. Professor Abdulhadi's academic work in race and resistance studies requires examination of some of the world's most challenging and controversial issues. San Francisco State University will continue to respect academic freedom, and we will not censor our scholars nor condone censorship by others.")

<sup>45</sup> See Anna Baltzer, *Churches are Standing Up!*, U.S. CAMPAIGN FOR PALESTINIAN RIGHTS (Jul. 23, 2017), <https://uscpr.org/churches-are-standing-up/>; Annie Robbins, *In overwhelming vote, leading Lutheran branch calls on US to cut off aid to Israel*, MONDOWEISS (Aug. 12, 2016), <https://mondoweiss.net/2016/08/lutherans-say-cut-off-aid-toisrael/>.

refused to travel there—on account of its human rights violations.<sup>46</sup> United Electrical, Radio and Machine Workers of America (UE), a member-run union representing 30,000 workers, endorses BDS.<sup>47</sup> In 2015, a “Black Solidarity Statement with Palestine” signed by over 1000 individuals and nearly 40 Black-led organizations endorsed BDS.<sup>48</sup> Archbishop Emeritus and 1984 Nobel Peace Prize Winner Desmond Tutu has been a longtime vigorous supporter of BDS, recognizing that it falls within the social justice protest tradition of the South African anti-apartheid movement.<sup>49</sup>

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<sup>46</sup> Dana Kennedy, *Is Natalie Portman’s Israel Protest a Tipping Point?*, DAILY BEAST (Apr. 21, 2018), <https://www.thedailybeast.com/is-natalie-portmans-israel-protest-a-tipping-point>; Letter to the Editor, *Lorde’s artistic right to cancel gig in Tel Aviv*, THE GUARDIAN (Jan. 5, 2018), <https://www.theguardian.com/music/2018/jan/05/lordes-artistic-right-to-cancel-gig-in-tel-aviv>; *Natalie Portman: Israel’s Nation-state Law is ‘Racist’ and a ‘Mistake,’* HAARETZ (Dec. 20, 2018), <https://www.haaretz.com/us-news/natalie-portman-israel-s-nation-state-law-is-racist-and-a-mistake-1.6744158>; August Brown, *Lauryn Hill cancels Israel concert after bungled Nigeria date*, L.A. TIMES (May 5, 2015), <https://www.latimes.com/entertainment/music/posts/la-et-ms-lauryn-hill-cancels-israel-concert-20150505-story.html>; Steve Almasy, *Michael Bennet boycotts trip, says he won’t be used by Israel*, CNN (Feb. 12, 2017), <https://www.cnn.com/2017/02/12/middleeast/nfl-players-boycott-israel-trip/index.html>.

<sup>47</sup> Press Release, UE Endorses BDS Movement for Peace and Justice in Israel and Palestine (Sept. 1, 2015), <https://www.ueunion.org/political-action/2015/BDS>.

<sup>48</sup> *2015 Black Solidarity Statement with Palestine*, BLACKFORPALESTINE.COM, <http://www.blackforpalestine.com/read-the-statement.html> (last visited July 10, 2020).

<sup>49</sup> See Desmond Tutu, *Tutu: Israel’s Humiliation of Palestinians ‘Familiar to Black South Africans’*, HAARETZ (Mar. 10, 2014), <http://www.haaretz.com/israel-news/1.578872>.

This increased 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.<sup>50</sup> Meritless litigation and legal claims such as this lawsuit are one of many tools intended to discourage and stop criticism of Israel's treatment of Palestinians as it increasingly filters into the mainstream. From 2014-2019, Palestine Legal responded to nearly 1494 incidents of censorship, punishment, and other burdening of advocacy for Palestinian rights.<sup>51</sup> 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, and authors.<sup>52</sup> These censorship campaigns and legal threats

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<sup>50</sup> 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>.

<sup>51</sup> *2019 Year-In-Review: Movement for Palestinian Rights Thrives Despite Censorship*, PALESTINE LEGAL, <https://palestinelegal.org/2019-report> (last visited June 25, 2020).

<sup>52</sup> *Id.*; *2018 Year-In-Review: Censorship of Palestine Advocacy in the U.S. Intensifies*, PALESTINE LEGAL, <https://palestinelegal.org/2018-report> (last visited July 9, 2020); THE PALESTINE EXCEPTION TO FREE SPEECH, *supra* note 50; 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), [https://www.salon.com/2015/12/22/palestinian\\_american\\_artist\\_detained\\_for\\_sketching\\_in\\_arabic\\_falsely\\_accused\\_of\\_terrorism\\_by\\_right\\_wing\\_media/](https://www.salon.com/2015/12/22/palestinian_american_artist_detained_for_sketching_in_arabic_falsely_accused_of_terrorism_by_right_wing_media/); Leena

frequently conflate criticism of Israel’s treatment of Palestinians with bias against Jewish people, as the Brandeis Center regularly does.

“The goal [of such lawsuits] is to make the enemy pay,” said the director of the Lawfare Project, a pro-Israel group that partners with the Brandeis Center, “and to send a message, a deterrent message, that similar actions such as those that they engage in will result in massive punishments.”<sup>53</sup>

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Trivedi-Grenier, *The Tenacity of Chef Reem Assil*, VICE.COM (May 11, 2018), [https://munchies.vice.com/en\\_us/article/mbkqv/the-tenacity-of-chef-reem-assil](https://munchies.vice.com/en_us/article/mbkqv/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/>.

<sup>53</sup> See Ali Abunimah, Israel lawfare group plans “Massive Punishments” for activists (June 25, 2016), <https://electronicintifada.net/blogs/ali-abunimah/israel-lawfare-group-plans-massive-punishments-activists>; The Brandeis Center has partnered with the Lawfare Project on several letters calling for the punishment of students supporting Palestinian rights. See *Lawfare Project and Brandeis Center Urge NYU to Discipline Students for Distributing Harassing Eviction Notices Into Private Dorm Rooms*, LAWFARE PROJECT (May 5, 2014), <https://www.thelawfareproject.org/releases/2018/4/3/lawfare-project-and-brandeis-center-urge-nyu-to-discipline-students-for-distributing-harassing-eviction-notices-into-private-dorm-rooms>; Aaron Bandler, *Pro-Israel Groups Urge U-Mich to Crack Down on Academic Boycotts*, JEWISH JOURNAL (Nov. 1, 2018), <https://jewishjournal.com/news/united-states/241311/pro-israel-groups-urge-u-mich-crack-academic-boycotts/>; Press Release, Lawfare Project, *Lawsuit Alleges Pervasive and Endemic Anti-Semitism at CUNY Campus* (Mar. 23, 2016), <https://www.thelawfareproject.org/releases/2018/4/3/lawsuit-alleges-pervasive-and-endemic-anti-semitism-at-cuny-campus>.

Like this broader suppression campaign, the Brandeis Center's ultimate purpose in this lawsuit is to prevent scholars from advocating for their ideals when those ideals conflict with the interests of the Israeli government. This is not a proper use of our courts.

### CONCLUSION

For the foregoing reasons, this Court should remand this case to the Superior Court with instructions to dismiss all counts of the Complaint and under the Anti-SLAPP Act.

Dated: July 15, 2020

Respectfully submitted,

/s/Radhika Sainath

Radhika Sainath (*Pro Hac Vice*)

Palestine Legal

55 Exchange Place, Suite 402

New York, New York 10005

Tel: (312) 212-0448

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/s/ Benjamin E. Douglas

Benjamin E. Douglas (Bar #1001439)

1629 Columbia Road NW, #231

Washington, DC 20009

(843) 303-6614

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 15, 2020, I caused the Brief of Amicus Curiae Palestine Legal in Support of Defendants-Appellants to be filed electronically with the Court of Appeals' e filing system, which system will notify counsel of record and the Judge's Chambers of the filing.

/s/ Benjamin E. Douglas  
Benjamin E. Douglas  
Bar #1001439