



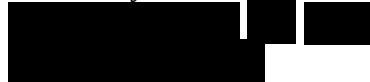
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CeCe Heil
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Admitted in CA, TN, VA & MO

November 24, 2014

VIA FEDERAL EXPRESS OVERNIGHT DELIVERY

Janet Napolitano
Office of the President
University of California



Dear President Napolitano:

As you may be aware, the membership of the University of California's student workers union, United Automobile Workers (UAW) 2865, comprised of over 12,000 student employees, will be voting in early December to decide whether to join the Palestinian Boycott, Divestment, and Sanctions (BDS) movement. The consequences of any boycott would be grave for Israelis working and studying alongside UAW members, subjecting them to scrutiny, reprisals, and retaliation merely because of their national origin or the national origin of their sponsors or affiliates. Among other things, the BDS movement calls for academic institutions and individual scholars to boycott activities and programs sponsored by Israeli universities. A leading BDS activist has explained that "[t]he real aim of BDS is to bring down the state of Israel . . . Justice and freedom for Palestinians are incompatible with the existence of the state of Israel."¹

The upcoming vote of UAW 2865, which calls for the University of California System and its individual student employees to engage in invidious discrimination based on the national origin and/or religion of the targeted persons, and marks a significant infringement of academic freedom rights, is of serious concern to the American Center for Law & Justice (ACLJ). Likewise, as more fully discussed herein, this vote should be of equally serious concern to the University of California (UC). Because the implementation of the BDS movement contemplated by the UAW 2865 ballot would result in violation of numerous UC policies, as well as state and federal nondiscrimination laws, UC administrators have not only a vital interest in this issue but also an obligation to ensure that UC employees, including student employees serving in such roles as tutors, researchers, and teaching assistants, do not take part in such discriminatory conduct in the course of their official duties.

¹ As'ad AbuKhalil, *A Critique of Norman Finkelstein on BDS*, AL-AKHBAR ENGLISH (February 17, 2012), <http://english.al-akhbar.com/node/4289>.

By way of introduction, the ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech.² As a part of the organization's commitment to the freedom of speech, ACLJ attorneys regularly handle cases specifically involving the protection of academic freedom.³

UAW 2865's BDS Ballot Initiative

The Joint Council of UAW 2865, comprised of members of the Executive Board of the Local Union as well as representatives from each of the nine (9) UC campuses, voted at its October meeting in favor of submitting to the vote of the entire union membership, on December 4, 2014, the issue of whether to support the BDS movement.⁴ According to information on the union's website, the ballot will have the following two components:

1. It asks members to vote on the UAW 2865 joining the BDS movement by: a) calling on the University of California System to divest from companies complicit in Israeli occupation of Palestine and its apartheid policies, b) asking the UAW International to do the same, and c) calling on the US government to end aid to Israel until it complies with international law.
2. Additionally, it asks members to join the BDS movement as individuals by refusing to take part in any research, conferences, events, exchange programs, or other activities that are sponsored by Israeli universities complicit in the oppression of the Palestinian people.⁵

In its statement of support for the BDS movement, the UAW 2865 Joint Council also encouraged its members "as educators to both learn about *and teach* the social issues of our time, including pressing global struggles such as the struggle of the Palestinian people for liberation from settler-colonialism and apartheid."⁶

² See, e.g., *Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors have First Amendment rights); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment).

³ E.g., *Adams v. Trustees of the Univ. of North Carolina-Wilmington, et al.*, No. 7:07-cv-00064-H (E.D.N.C. Apr. 10, 2007); *Enstrom v. Rice, et al.*, No. 2:12-cv-5168-JGB-SSx (C.D. Cal. June 13, 2012); *Jenkins v. Kurtinitis, et al.*, No. 1:14-cv-1346-ELH (D. Md. Apr. 21, 2014); *Buxton v. Kurtinitis, et al.*, No. 1:14-cv-2836-ELH (D. Md. Sep. 8, 2014).

⁴ UC STUDENT-WORKERS UNION LOCAL 2865, <http://www.uaw2865.org/> (last visited November 11, 2014).

⁵ FAQ regarding the UAW 2865 Ballot Initiative to join the Boycott, Divestment, and Sanctions Movement, available at <https://drive.google.com/file/d/0B4qLGWPPC3fla3paY25jckItQIE/edit> (last visited November 11, 2014).

⁶ *Student Workers at the University of California Support Palestine: UAW 2865 Joint Council Prepares for Membership Vote on BDS*, UC STUDENT-WORKERS UNION LOCAL 2865 (July 29, 2014), <http://www.uaw2865.org/?p=12137> (emphasis added).

The BDS movement and call to boycott stifles academic freedom and intellectual engagement. Over 250 universities and colleges have condemned the academic boycott,⁷ and the American Association of Universities (AAU) has urged scholars around the world who believe in academic freedom to oppose the boycott.⁸ Similarly, the American Federation of Teachers recently opposed the boycott stating that it “not only fl[ies] in the face of the principles of academic freedom that protect and enhance the integrity of scholarly work, but also stifle[s] the intellectual and democratic engagements through which the solutions to our world’s most difficult problems spring.”⁹ The undeniably pernicious nature of the BDS boycott is evidenced by the fact that a similar Israel boycott served as the direct impetus for the California Legislature’s passage of the Unruh Civil Rights Act.¹⁰

While UAW 2865 insists that the boycott “targets institutions based on their political ties,” not on national origin,¹¹ the BDS call for academic boycotts makes clear that it attributes Palestinian oppression to Israeli *individuals* not merely institutions. The BDS movement asserts that “the vast majority of Israeli intellectuals and academics have either contributed directly to the Israeli occupation and apartheid or at the very least have been complicit through their silence.”¹²

State and Federal Law

California law bars state funded programs from engaging in various forms of discrimination, including discrimination on the basis of race, national origin, and religion. California Government Code § 11135(a) states in relevant part:

- (a) No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.¹³

⁷ See *List of Universities rejecting academic boycott of Israel*, LEGAL INSURRECTION (December 22, 2013), <http://legalinsurrection.com/2013/12/list-of-universities-rejecting-academic-boycott-of-israel/>.

⁸ *AAU Statement on Boycott of Israeli Academic Institutions*, ASSOCIATION OF AMERICAN UNIVERSITIES (Dec. 20, 2013), <http://www.aau.edu/WorkArea/downloadAsset.aspx?id=14859>.

⁹ Press Release, *AFT’s Weingarten on American Studies Association’s Boycott Decision*, AMERICAN FEDERATION OF TEACHERS (December 13, 2013), <http://www.aft.org/press-release/afts-weingarten-american-studies-associations-boycott-decision#sthash.ySqGsu8g.dpuf>.

¹⁰ *Semler v. General Electric Capital Corp.*, 196 Cal. App. 4th 1380, 1404 (Cal. Ct. App. 2011).

¹¹ FAQ regarding the UAW 2865 Ballot Initiative to join the Boycott, Divestment, and Sanctions Movement, available at <https://drive.google.com/file/d/0B4qLGWPPC3fIa3paY25jckItQIE/edit> (last visited November 11, 2014).

¹² *Academic Boycott*, BDS MOVEMENT, <http://www.bdsmovement.net/activecamps/academic-boycott> (last visited November 14, 2014) (explaining that while the Palestinian Campaign for Academic and Cultural Boycott of Israel (PACBI)-inspired calls for boycott “consistently target institutions, not individuals,” the BDS Call is much “wider”).

¹³ CAL. GOV. CODE § 11135 (a).

Section 11135 further provides that, “race, national origin, ethnic group identification, religion . . . includes a perception that a person has any of those characteristics or that the person is associated with a person who as, or is perceived to have, any of those characteristics.”¹⁴ In its application both to Israeli academic *institutions* and to *individuals* associated with those institutions (e.g., in the refusal of individual student workers to participate in research activities with Israeli scholars based on sponsorship of a project by an Israeli institution), UAW 2865’s proposed BDS ballot initiative calls for action that would constitute blatant violation of this state law.

Applicable federal law similarly protects against this type of discriminatory conduct. The Equal Protection Clause of the Fourteenth Amendment to the Constitution provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹⁵ The Equal Protection Clause requires state officials to treat an individual in the same manner as others similarly situated. Pursuant to 42 U.S.C. § 1983, government officials may also be held personally liable for denying a person equal protection of the laws.¹⁶

In addition, Title VI of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000(d) provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.¹⁷

Likewise, Title IV of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, sex, religion or national origin by public elementary and secondary schools and public institutions of higher learning.¹⁸

UC has a legal obligation to prevent unlawful discrimination by its employees and staff.¹⁹ The upcoming vote of UAW 2865, which calls for the UC System and its individual student employees to engage in invidious discrimination, opens up UC to potential liability under the state and federal laws identified above.²⁰

¹⁴ CAL. GOV. CODE § 11135 (f).

¹⁵ U.S. CONST. amend. XIV, § 1.

¹⁶ *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009). See also *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (confirming that state government employees may be sued in their individual capacities pursuant to 42 U.S.C. § 1983 for action taken under color of state law that causes the deprivation of a federal right) (relying on *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)).

¹⁷ 42 U.S.C. § 2000(d).

¹⁸ 42 U.S.C. § 2000c, et seq.

¹⁹ See CAL. GOV CODE § 815.2(a) (providing for liability of a public entity “for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative”).

²⁰ CAL. GOV CODE § 11139 expressly provides for a private right of action for equitable relief for violations of Section 11135. See *Donovan v. Poway Unified School Dist.*, 167 Cal. App. 4th 567, 594 (Cal. App. 4th Dist. 2008) (explaining that the California legislature “amended Government Code section 11139 to expressly provide for a private right of action”).

University of California Policy

UAW 2865's proposed ballot initiative also flies in the face of the University of California's stated commitment to diversity in its education, services, administration, research and creative activity.²¹ As UC has recognized, "the State of California has a compelling interest in making sure that people from all backgrounds perceive that access to the University is possible", and that "diversity is integral to the University's achievement of excellence."²²

Contrary to these principles, the discriminatory and exclusionary actions proposed by UAW 2865's support of the BDS movement violates UC's policies prohibiting discrimination on the bases of national origin and religion.²³ While UAW 2865 insists that it will only target institutions based on their political ties, its proposed boycott clearly targets organizations for disparate and discriminatory treatment solely on the basis of their national origin, as well as specific individuals associated with those organizations in a representative capacity. Further, because most Israelis are Jewish, UAW 2865's exclusionary policy will have a disparate impact on Jewish Israelis – thereby discriminating on the bases of race and religion.

UAW 2865's support of the BDS movement would also undermine UC's stated commitment to "the highest ethical standards in furtherance of [UC's] mission of teaching, research and public service."²⁴ As outlined in UC's Statement of Ethical Values and Standards of Ethical Conduct,#

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The University is committed to the principle of treating each community member with respect and dignity. The University prohibits discrimination and harassment and provides equal opportunities for all community members and applicants regardless of race, color, national origin, religion, sex, gender identity, pregnancy, physical or mental disability, medical condition (cancer-related or genetic characteristics), ancestry, marital status, age, sexual orientation, citizenship, or status as a covered veteran.²⁵

These standards, according to the statement, "apply to all members of the University, including . . . academic personnel, staff, students, volunteers, agents and others associated with the University" and they apply organizationally to "campuses . . . campus organizations, foundations, alumni associations and support groups."²⁶

²¹ See Regents Policy 4400: University of California Diversity Statement (Adopted as Amended September 15, 2010), available at <http://regents.universityofcalifornia.edu/governance/policies/4400.html> (defining diversity as "the variety of personal experiences, values, and worldviews that arise from differences of culture and circumstances" – differences which include, among others, "race, ethnicity [and] religion").

²² *Id.*

²³ See, e.g., University of California Policy PPSM-12; University of California Policy PACOAS-10; University of California Policy PACAOS-Appendix C; University of California Policy PACAOS-20; University of California Policy PACAOS-30; University of California Policy PACAOS-40.

²⁴ *Statement of Ethical Values and Standard of Ethical Conduct* (May 2005), available at http://www.ucop.edu/ethics-compliance-audit-services/_files/stmt-stds-ethics.pdf.

²⁵ *Id.*

²⁶ *Id.*

To the extent that student employees take up the encouragement to not only learn about the BDS movement but also teach it to their students, the infraction of UC policy would be compounded, as Regents Policy 2301 expressly prohibits “[m]isuse of the classroom by, for example, allowing it to be used for political indoctrination”²⁷

It should serve as no consolation to UC that UAW 2865 considers its proposed support of the BDS movement and boycott to target institutions (and those associated with these institutions) solely on the basis of political ties, rather than national origin or religion. Even if UAW 2865 were correct that no targeting of a protected class (*i.e.*, national origin or religion) would occur, UC has made quite clear that “[a]s a State instrumentality, the University must remain neutral on religious and political matters” and thus, “[t]he University cannot sponsor or fund religious or political activities except when authorized for University purposes.”²⁸

In fact, use of UC’s name to boycott or support, endorse or advance any political movement is specifically prohibited. As California Education Code § 92000(a)(3) provides in relevant part,

(a) The name “University of California” is the property of the state. No person shall, without permission of the Regents of the University of California, use this name, or any abbreviation of it , or any name of which these words are a part, in any of the following ways:

(3) To display, advertise, or announce this name publicly at, or ***in connection with***, any meeting, assembly, or demonstration, or any propaganda, advertising, or promotional ***activity of any kind which has for its purpose or any part of its purpose the support, endorsement, advancement***, opposition, or defeat ***of any*** strike, lockout, or ***boycott or of any political***, religious, sociological, or economic ***movement***, activity, or program.²⁹

UC Regents-UAW Contract

The UAW 2865 statement of support for the BDS movement and its proposed ballot initiative also constitute breaches of the Agreement Between the Regents of the University of California and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO Academic Student Employees Unit (“UC-UAW Contract”), effective June 21, 2014-June 30, 2018. That agreement expressly provides that “[t]he UAW, on behalf of its officers, agents, and members agrees that there shall be no strikes, *stoppages or interruptions of work, or other concerted activities which interfere directly or indirectly with University operations* during the life of this agreement”³⁰ The UAW further “agrees that it shall not in any way authorize, assist, *encourage*, participate in, *sanction, ratify*,

²⁷ Regents Policy 2301: Policy on Course Content (September 22, 2005), available at <http://regents.universityofcalifornia.edu/governance/policies/2301.html>.

²⁸ Policies Applying to Campus Activities, Organizations and Students (PACAOS) 40.00, Policy On Use of University Properties (September 25, 2006), available at <http://policy.ucop.edu/doc/2710524/PACAOS-40>.

²⁹ CAL. ED. CODE § 92000(a)(3).

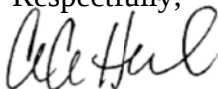
³⁰ UC-UAW Contract, Art. 19, Section A, available at <http://www.uaw2865.org/wp-content/uploads/Local-2865-UC-Contract-2014-18FINAL1.pdf> (emphasis added).

condone, or lend support to any activities in violation of this article.”³¹ In addition to imposing mandatory disciplinary action against employees who violate it,³² this article imposes the express obligation on the union to “take whatever affirmative action is necessary to prevent and bring about an end to any concerted activity in violation of this article.”³³

The BDS ballot initiative, including both its call for discriminatory action by UC and its encouragement that members participate in a boycott of professional activities sponsored by Israeli institutions, operates in direct contravention of UAW 2865’s contractual obligation to avoid encouraging, condoning, or lending support to any activities that would interfere with University operations. In other words, the mere act of putting these issues to a membership vote would constitute a legally actionable breach of contract by UAW 2865. Indeed, the union may already be in breach as a result of the Joint Council’s July 29, 2014, statement of support for the BDS movement, which includes the specific request that members “vote ‘yes’ in the coming membership vote for joining the BDS movement.”³⁴ A return to a position of contractual compliance for UAW 2865 would require immediate rescission of its July 29 statement and a cessation of its efforts in support of the BDS movement, including the upcoming December 4 membership vote.

In light of the foregoing, we urge the administration of the University of California System to take all necessary steps to protect itself against legal liability, including for the official conduct of its student employees, that would flow from the adoption and implementation of UAW 2865’s proposed activities in support of the BDS movement. Further, we are resolved to take all appropriate legal action in the event that any UC employee discriminates against Israelis, individually or institutionally.

Respectfully,



Cecilia N. Heil
Senior Counsel

Jay Alan Sekulow
Chief Counsel

David A. French
Senior Counsel

AMERICAN CENTER FOR LAW & JUSTICE

cc: Charles F. Robinson, UC General Counsel

³¹ *Id.* (emphases added).

³² *Id.*, Section B.

³³ *Id.*, Section C.

³⁴ *Student Workers at the University of California Support Palestine: UAW 2865 Joint Council Prepares for Membership Vote on BDS*, UC STUDENT-WORKERS UNION LOCAL 2865 (July 29, 2014), <http://www.uaw2865.org/?p=12137>.



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CeCe Heil
Senior Counsel

Admitted in CA, TN, VA & MO

November 24, 2014

VIA FED EX OVERNIGHT DELIVERY

UC-Student Workers Union
UAW Local 2865
c/o President Michelle Glowa
[REDACTED]

Dear Ms. Glowa and Joint Council Members:

The American Center for Law and Justice (ACLJ) is aware that the University of California's student workers union, United Automobile Workers (UAW) 2865, comprised of over 12,000 student employees, will be voting in early December to decide whether to join the Palestinian Boycott, Divestment, and Sanctions (BDS) movement. The upcoming vote of UAW 2865, which calls for invidiously discriminatory conduct and marks a significant infringement of academic freedom rights, is of serious concern to the American Center for Law & Justice (ACLJ). The consequences of any boycott would be grave for Israelis working and studying alongside UAW members, subjecting them to scrutiny, reprisals, and retaliation merely because of their national origin or the national origin of their sponsors or affiliates.

By way of introduction, the ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech.¹ As a part of the organization's commitment to the freedom of speech, ACLJ attorneys regularly handle cases specifically involving the protection of academic freedom.²

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www.aclj.org

The Joint Council of UAW 2865, comprised of members of the Executive Board of the Local Union as well as representatives from each of the nine (9) UC campuses, voted at its October meeting in favor of submitting to the vote of the entire union membership, on December 4, 2014, the issue of whether to support the BDS movement.³ According to information on the union's website, the ballot will have the following two components:

1. It asks members to vote on the UAW 2865 joining the BDS movement by: a) calling on the University of California System to divest from companies complicit in Israeli occupation of Palestine and its apartheid policies, b) asking the UAW International to do the same, and c) calling on the US government to end aid to Israel until it complies with international law.
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The BDS movement calls for academic institutions and individual scholars to boycott activities and programs sponsored by Israeli universities. A leading BDS activist has explained that "[t]he real aim of BDS is to bring down the state of Israel . . . Justice and freedom for Palestinians are incompatible with the existence of the state of Israel."⁶

The academic BDS movement stifles academic freedom and intellectual engagement. Over 250 universities and colleges have condemned the academic boycott,⁷ and the American Association of Universities (AAU) has urged scholars around the world who believe in academic freedom to oppose the boycott.⁸ Similarly, the American Federation of Teachers recently opposed the boycott stating that it "not only fl[ies] in the face of the principles of academic freedom that protect and enhance the integrity of scholarly work, but also stifl[e] the intellectual and democratic engagements through which the solutions to our world's most difficult problems

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⁴ *FAQ regarding the UAW 2865 Ballot Initiative to join the Boycott, Divestment, and Sanctions Movement*, available at <https://drive.google.com/file/d/0B4qLGWPPC3fla3paY25jckItQIE/edit> (last visited November 11, 2014).

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⁶ As'ad AbuKhalil, *A Critique of Norman Finkelstein on BDS*, AL-AKHBAR ENGLISH (February 17, 2012), <http://english.al-akhbar.com/node/4289>.

⁷ *See List of Universities rejecting academic boycott of Israel*, LEGAL INSURRECTION (December 22, 2013), <http://legalinsurrection.com/2013/12/list-of-universities-rejecting-academic-boycott-of-israel/>.

⁸ *AAU Statement on Boycott of Israeli Academic Institutions*, ASSOCIATION OF AMERICAN UNIVERSITIES (Dec. 20, 2013), <http://www.aau.edu/WorkArea/downloadAsset.aspx?id=14859>.

spring.”⁹ The undeniably pernicious nature of the BDS boycott is evidenced by the fact that a similar Israel boycott served as the direct impetus for the California Legislature’s passage of the Unruh Civil Rights Act.¹⁰

While UAW 2865 insists that the boycott will only target Israeli institutions based on their political ties, not on national origin,¹¹ the BDS call for academic boycotts makes clear that it attributes Palestinian oppression to Israeli *individuals* not merely institutions. The BDS movement asserts that “the vast majority of Israeli intellectuals and academics have either contributed directly to the Israeli occupation and apartheid or at the very least have been complicit through their silence.”¹²

The purpose of this letter is to put UAW 2865 and its members on notice that implementation of support for the BDS movement, as contemplated in the upcoming UAW 2865 vote, would result in violation of state and federal nondiscrimination laws (for which participating members may be held individually liable), as well as numerous UC policies and the union’s contract with the UC Regents. Additionally, UAW 2865’s efforts increase the risk of liability for UC because UC maintains an obligation to ensure that its employees, including student employees serving in such roles as tutors, researchers, and teaching assistants, do not take part in discriminatory conduct in the course of their official duties.

State and Federal Law

California Government Code § 11135(a) states in relevant part:

(a) No person in the State of California shall, on the basis of ***race, national origin, ethnic group identification, religion***, age, sex, sexual orientation, color, genetic information, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.¹³

Section 11135 further provides that, “race, national origin, ethnic group identification, religion . . . includes a perception that a person has any of those characteristics or that the person is associated with a person who as, or is perceived to have, any of those characteristics.”¹⁴ In its

⁹ Press Release, *AFT’s Weingarten on American Studies Association’s Boycott Decision*, AMERICAN FEDERATION OF TEACHERS (December 13, 2013), <http://www.aft.org/press-release/afts-weingarten-american-studies-associations-boycott-decision#sthash.ySqGsu8g.dpuf>.

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¹² *Academic Boycott*, BDS MOVEMENT, <http://www.bdsmovement.net/activecamps/academic-boycott> (last visited November 14, 2014) (explaining that while the Palestinian Campaign for Academic and Cultural Boycott of Israel (PACBI)-inspired calls for boycott “consistently target institutions, not individuals,” the BDS Call is much “wider”).

¹³ CAL. GOV. CODE § 11135 (emphases added).

¹⁴ CAL. GOV. CODE § 11135 (f).

application both to Israeli academic *institutions* and to *individuals* associated with those institutions (*e.g.*, in the refusal of individual student workers to participate in research activities with Israeli scholars based on sponsorship of a project by an Israeli institution), UAW 2865's proposed BDS ballot initiative calls for action that would constitute blatant violation of this state law.

Applicable federal law similarly protects against this type of discriminatory conduct. The Equal Protection Clause of the Fourteenth Amendment to the Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹⁵ The Equal Protection Clause requires state officials to treat an individual in the same manner as others similarly situated. Pursuant to 42 U.S.C. § 1983, government officials may also be held personally liable for denying a person equal protection of the laws.¹⁶

In addition, Title VI of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000(d) provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.¹⁷

Likewise, Title IV of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, sex, religion or national origin by public elementary and secondary schools and public institutions of higher learning.¹⁸

In light of the numerous state educational activities, including many such UC activities, that receive federal funding, implementation of UAW 2865's proposed BDS measures would result in violations of these federal laws as well.

University of California Policy

In addition to the laws cited above, UAW's proposed ballot initiative defies UC's stated commitment to diversity in its education, services, administration, research and creative activity.¹⁹ As UC has recognized, "the State of California has a compelling interest in making sure that people from all backgrounds perceive that access to the University is possible," and that "diversity is integral to the University's achievement of excellence."²⁰

¹⁵ U.S. CONST. amend. XIV, § 1.

¹⁶ *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009). *See also Hafer v. Melo*, 502 U.S. 21, 25 (1991) (confirming that state government employees may be sued in their individual capacities pursuant to 42 U.S.C. § 1983 for action taken under color of state law that causes the deprivation of a federal right) (relying on *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)).

¹⁷ 42 U.S.C. § 2000d.

¹⁸ 42 U.S.C. § 2000c, et seq.

¹⁹ *See* Regents Policy 4400: University of California Diversity Statement (Adopted as Amended September 15, 2010), available at <http://regents.universityofcalifornia.edu/governance/policies/4400.html> (defining diversity as "the variety of personal experiences, values, and worldviews that arise from differences of culture and circumstances" – differences which include, among others, "race, ethnicity [and] religion").

²⁰ *Id.*

Contrary to these principles, the discriminatory and exclusionary actions proposed by UAW 2865's support of the BDS movement violate numerous UC policies and standards prohibiting discrimination on the basis of national origin and religion.²¹ The boycott proposed by UAW 2865 clearly targets organizations for disparate and discriminatory treatment solely on the basis of their national origin, as well as specific individuals associated with those organizations in a representative capacity. Moreover, because most Israelis are Jewish, UAW 2865's exclusionary policy will also have a disparate impact on Jewish Israelis – thereby discriminating on the bases of race and religion as well.

UAW 2865's support of the BDS movement would also undermine UC's stated commitment to "the highest ethical standards in furtherance of [UC's] mission of teaching, research and public service."²² As is outlined in UC's Statement of Ethical Values and Standards of Ethical Conduct,

The University is committed to the principle of treating each community member with respect and dignity. The University prohibits discrimination and harassment and provides equal opportunities for all community members and applicants regardless of **race**, color, **national origin**, **religion**, sex, gender identity, pregnancy, physical or mental disability, medical condition (cancer-related or genetic characteristics), ancestry, marital status, age, sexual orientation, citizenship, or status as a covered veteran.²³

These ethical standards "apply to all members of the University, including . . . academic personnel, staff, students, volunteers, agents and others associated with the University" as well as organizationally to "campuses . . . campus organizations, foundations, alumni associations and support groups."²⁴

To the extent that union members took up the encouragement to not only learn about the BDS movement but also teach it to their students, the infraction of UC policy would be compounded, as Regents Policy 2301 expressly prohibits "[m]isuse of the classroom by, for example, allowing it to be used for political indoctrination"²⁵

It will serve as little consolation to UC that UAW 2865 considers its proposed support of the BDS movement and boycott to target Israeli institutions (and consequently, individuals associated with these institutions) solely upon the basis of political ties, rather than national origin or religion. Even if UAW 2865 were correct that no targeting of a protected class (*i.e.*, race, national origin, or religion) would occur, UC has made quite clear that "[a]s a State

²¹ See, *e.g.*, University of California Policy PPSM-12; University of California Policy PACOAS-10; University of California Policy PACAOS-Appendix C; University of California Policy PACAOS-20; University of California Policy PACAOS-30; University of California Policy PACAOS-40.

²² *Statement of Ethical Values and Standard of Ethical Conduct*, (May 2005), available at http://www.ucop.edu/ethics-compliance-audit-services/_files/stmt-stds-ethics.pdf.

²³ *Id.* (emphases added).

²⁴ *Id.*

²⁵ Regents Policy 2301: Policy on Course Content (September 22, 2005), available at <http://regents.universityofcalifornia.edu/governance/policies/2301.html>.

instrumentality, the University must remain neutral on religious and political matters” and thus, “[t]he University cannot sponsor or fund religious or political activities except when authorized for University purposes.”²⁶

In fact, use of UC’s name to boycott or support, endorse or advance any political movement is specifically prohibited by California Education Code § 92000(a)(3), which provides in relevant part,

(a) The name “University of California” is the property of the state. No person shall, without permission of the Regents of the University of California, use this name, or any abbreviation of it, or any name of which these words are a part, in any of the following ways:

(3) To display, advertise, or announce this name publicly at, or ***in connection with***, any meeting, assembly, or demonstration, or any propaganda, advertising, or promotional ***activity of any kind which has for its purpose or any part of its purpose the support, endorsement, advancement***, opposition, or defeat ***of any*** strike, lockout, or ***boycott or of any political***, religious, sociological, or economic ***movement***, activity, or program.²⁷

UC Regents-UAW Contract

If the UAW 2865 leadership is undaunted by the potential ramifications to others (*i.e.*, its members and UC) for engaging in unlawful activity, surely it will be less dismissive of the prospect of legal action directly against the union itself. The Agreement Between the Regents of the University of California and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO Academic Student Employees Unit (“UC-UAW Contract”), effective June 21, 2014-June 30, 2018, expressly provides that “[t]he UAW, on behalf of its officers, agents, and members agrees that there shall be no strikes, stoppages or interruptions of work, or other concerted activities which interfere directly or indirectly with University operations during the life of this agreement”²⁸ The UAW further “agrees that it shall not in any way authorize, assist, *encourage*, participate in, *sanction*, *ratify*, *condone*, or *lend support* to any activities in violation of this article.”²⁹ In addition to imposing mandatory disciplinary action against employees who violate it,³⁰ this article imposes the express obligation on the union to “take whatever affirmative action is necessary to prevent and bring about an end to any concerted activity in violation of this article.”³¹

The BDS ballot initiative, including both its call for discriminatory action by UC and its encouragement that members participate in a boycott of professional activities sponsored by

²⁶ Policies Applying to Campus Activities, Organizations and Students (PACAOS) 40.00, Policy On Use of University Properties (September 25, 2006), available at <http://policy.ucop.edu/doc/2710524/PACAOS-40>.

²⁷ CAL. ED. CODE § 92000(a)(3) (emphases added).

²⁸ UC-UAW Contract, Art. 19, Section A, available at <http://www.uaw2865.org/wp-content/uploads/Local-2865-UC-Contract-2014-18FINAL1.pdf> (emphasis added).

²⁹ *Id.* (emphases added).

³⁰ *Id.*, Section B.

³¹ *Id.*, Section C.

Israeli institutions, operates in direct contravention of UAW 2865's contractual obligation to avoid encouraging, condoning, or lending support to any activities that would interfere with University operations. In other words, the mere act of putting these issues to a membership vote would constitute a legally actionable breach of contract by UAW 2865. Indeed, the union may already be in breach as a result of the Joint Council's July 29, 2014, statement of support for the BDS movement, which includes the specific request that members "vote 'yes' in the coming membership vote for joining the BDS movement."³² To return to a position of contractual compliance, the UAW 2865 leadership must immediately rescind its July 29 statement and cease its efforts in support of the BDS movement, including the upcoming December 4 membership vote.

It is clear that UAW 2865's proposed involvement in the BDS movement would place the University of California System, the union's members, and the union itself in direct violation of numerous provisions of state and federal nondiscrimination law, as well as related UC policies, and the UC-UAW Contract. As such, we urge the UAW 2865 leadership to act in the best interest of itself and its members, rescind its decision to put the BDS issue to a vote, and cease its supportive efforts toward the discriminatory BDS movement. If UAW 2865 and its members do choose to engage in discriminatory actions in violations of governing law and UC's Statement of Ethical Values, then they are hereby on notice that, in addition to the legal consequences to the union itself, each member of the union who engages in unlawful activity will be subject to individual liability.

Respectfully,



Cecilia N. Heil
Senior Counsel

Jay Alan Sekulow
Chief Counsel

David A. French
Senior Counsel

AMERICAN CENTER FOR LAW & JUSTICE

cc: Dennis Williams, UAW President
UAW 2865 Joint Council Members

³² *Student Workers at the University of California Support Palestine: UAW 2865 Joint Council Prepares for Membership Vote on BDS*, UC STUDENT-WORKERS UNION LOCAL 2865 (July 29, 2014), <http://www.uaw2865.org/?p=12137>.



★
CeCe Heil
Senior Counsel

Admitted in CA, TN, VA & MO

November 24, 2014

VIA FED EX OVERNIGHT DELIVERY

United Automobile Workers
Executive Board
c/o President Dennis Williams
[REDACTED]

Dear Mr. Williams and Executive Board Members:

The American Center for Law and Justice (ACLJ) is aware that the University of California's student workers union, United Automobile Workers (UAW) 2865, comprised of over 12,000 student employees, will be voting in early December to decide whether to join the Palestinian Boycott, Divestment, and Sanctions (BDS) movement. The upcoming vote of UAW 2865, which calls for invidiously discriminatory conduct and marks a significant infringement of academic freedom rights, is of serious concern to the American Center for Law & Justice (ACLJ), and should be of equal concern to UAW due to the potential legal liability it may face for the unlawful acts of its local units. The consequences of any boycott would be grave for Israelis working and studying alongside UAW members, subjecting them to scrutiny, reprisals, and retaliation merely because of their national origin or the national origin of their sponsors or affiliates.

By way of introduction, the ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedom of speech.¹ As a part of the organization's commitment to the freedom of speech, ACLJ attorneys regularly handle cases specifically involving the protection of academic freedom.²

¹ See, e.g., *Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors have First Amendment rights); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment).

² E.g., *Adams v. Trustees of the Univ. of North Carolina-Wilmington, et al.*, No. 7:07-cv-00064-H (E.D.N.C. Apr. 10, 2007); *Enstrom v. Rice, et al.*, No. 2:12-cv-5168-JGB-SSx (C.D. Cal. June 13, 2012); *Jenkins v. Kurtinitis, et al.*,



The Joint Council of UAW 2865, comprised of members of the Executive Board of the Local Union as well as representatives from each of the nine (9) UC campuses, voted at its October meeting in favor of submitting to the vote of the entire union membership, on December 4, 2014, the issue of whether to support the BDS movement.³ According to information on the union's website, the ballot will have the following two components:

1. It asks members to vote on the UAW 2865 joining the BDS movement by: a) calling on the University of California System to divest from companies complicit in Israeli occupation of Palestine and its apartheid policies, b) asking the UAW International to do the same, and c) calling on the US government to end aid to Israel until it complies with international law.
2. Additionally, it asks members to join the BDS movement as individuals by refusing to take part in any research, conferences, events, exchange programs, or other activities that are sponsored by Israeli universities complicit in the oppression of the Palestinian people.⁴

In its statement of support for the BDS movement, the UAW 2865 Joint Council also encouraged its members "as educators to both learn about *and teach* the social issues of our time, including pressing global struggles such as the struggle of the Palestinian people for liberation from settler-colonialism and apartheid."⁵

The BDS movement calls for academic institutions and individual scholars to boycott activities and programs sponsored by Israeli universities. A leading BDS activist has explained that "[t]he real aim of BDS is to bring down the state of Israel . . . Justice and freedom for Palestinians are incompatible with the existence of the state of Israel."⁶

The academic BDS movement stifles academic freedom and intellectual engagement. Over 250 universities and colleges have condemned the academic boycott,⁷ and the American Association of Universities (AAU) has urged scholars around the world who believe in academic freedom to oppose the boycott.⁸ Similarly, the American Federation of Teachers recently opposed the boycott stating that it "not only fl[ies] in the face of the principles of academic freedom that protect and enhance the integrity of scholarly work, but also stifle[s] the intellectual and democratic engagements through which the solutions to our world's most difficult problems

No. 1:14-cv-1346-ELH (D. Md. Apr. 21, 2014); *Buxton v. Kurtinitis, et al.*, No. 1:14-cv-2836-ELH (D. Md. Sep. 8, 2014).

³ UC STUDENT-WORKERS UNION LOCAL 2865, <http://www.uaw2865.org/> (last visited November 11, 2014).

⁴ *FAQ regarding the UAW 2865 Ballot Initiative to join the Boycott, Divestment, and Sanctions Movement*, available at <https://drive.google.com/file/d/0B4qLGWPPC3fla3paY25jckItQIE/edit> (last visited November 11, 2014).

⁵ *Student Workers at the University of California Support Palestine: UAW 2865 Joint Council Prepares for Membership Vote on BDS*, UC STUDENT-WORKERS UNION LOCAL 2865 (July 29, 2014), <http://www.uaw2865.org/?p=12137> (emphasis added).

⁶ As'ad AbuKhalil, *A Critique of Norman Finkelstein on BDS*, AL-AKHBAR ENGLISH (February 17, 2012), <http://english.al-akhbar.com/node/4289>.

⁷ See *List of Universities rejecting academic boycott of Israel*, LEGAL INSURRECTION (December 22, 2013), <http://legalinsurrection.com/2013/12/list-of-universities-rejecting-academic-boycott-of-israel/>.

⁸ *AAU Statement on Boycott of Israeli Academic Institutions*, ASSOCIATION OF AMERICAN UNIVERSITIES (Dec. 20, 2013), <http://www.aau.edu/WorkArea/downloadAsset.aspx?id=14859>.

spring.”⁹ The undeniably pernicious nature of the BDS boycott is evidenced by the fact that a similar Israel boycott served as the direct impetus for the California Legislature’s passage of the Unruh Civil Rights Act.¹⁰

While UAW 2865 insists that the boycott will only target Israeli institutions based on their political ties, not on national origin,¹¹ the BDS call for academic boycotts makes clear that it attributes Palestinian oppression to Israeli *individuals* not merely institutions. The BDS movement asserts that “the vast majority of Israeli intellectuals and academics have either contributed directly to the Israeli occupation and apartheid or at the very least have been complicit through their silence.”¹²

The purpose of this letter is to put UAW and its leadership on notice that implementation of support for the BDS movement, as contemplated in the upcoming UAW 2865 vote, would result in violation of state and federal nondiscrimination laws (as well as numerous UC policies and the union’s contract with the UC Regents). Faced with such notice, failure on the part of the parent union to launch an investigation and take the necessary actions to prevent these violations could be seen as tacit ratification of the local unit’s discriminatory conduct such that UAW may be liable for its local chapter’s violations of these laws.¹³

State and Federal Law

California Government Code § 11135(a) states in relevant part:

(a) No person in the State of California shall, on the basis of ***race, national origin, ethnic group identification, religion***, age, sex, sexual orientation, color, genetic information, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.¹⁴

Section 11135 further provides that, “race, national origin, ethnic group identification, religion . . . includes a perception that a person has any of those characteristics or that the person is associated with a person who as, or is perceived to have, any of those characteristics.”¹⁵ In its application both to Israeli academic *institutions* and to *individuals* associated with those

⁹ Press Release, *AFT’s Weingarten on American Studies Association’s Boycott Decision*, AMERICAN FEDERATION OF TEACHERS (December 13, 2013), <http://www.aft.org/press-release/afts-weingarten-american-studies-associations-boycott-decision#sthash.ySqGsu8g.dpuf>.

¹⁰ *Semler v. General Electric Capital Corp.*, 196 Cal. App. 4th 1380, 1404 (Cal. Ct. App. 2011).

¹¹ UC STUDENT-WORKERS UNION LOCAL 2865, *FAQ regarding the UAW 2865 Ballot Initiative to join the Boycott, Divestment, and Sanctions Movement*, <https://drive.google.com/file/d/0B4qLGWPPC3fla3paY25jckItQIE/edit> (last visited November 11, 2014).

¹² *Academic Boycott*, BDS MOVEMENT, <http://www.bdsmovement.net/activecamps/academic-boycott> (last visited November 14, 2014) (explaining that while the Palestinian Campaign for Academic and Cultural Boycott of Israel (PACBI)-inspired calls for boycott “consistently target institutions, not individuals,” the BDS Call is much “wider”).

¹³ See *Laughon v. Int’l Alliance of Theatrical Stage Emps.*, 248 F.3d 931, 935-37 (9th Cir. 2001).

¹⁴ CAL. GOV. CODE § 11135 (emphases added).

¹⁵ CAL. GOV. CODE § 11135 (f).

institutions (*e.g.*, in the refusal of individual student workers to participate in research activities with Israeli scholars based on sponsorship of a project by an Israeli institution), UAW 2865's proposed BDS ballot initiative calls for action that would constitute blatant violation of this state law.

Applicable federal law similarly protects against this type of discriminatory conduct. The Equal Protection Clause of the Fourteenth Amendment to the Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹⁶ The Equal Protection Clause requires state officials to treat an individual in the same manner as others similarly situated. Pursuant to 42 U.S.C. § 1983, government officials may also be held personally liable for denying a person equal protection of the laws.¹⁷

In addition, Title VI of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000(d) provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.¹⁸

Likewise, Title IV of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, sex, religion or national origin by public elementary and secondary schools and public institutions of higher learning.¹⁹

In light of the numerous state educational activities, including many such UC activities, that receive federal funding, implementation of UAW 2865's proposed BDS measures would result in violations of these federal laws as well.

University of California Policy

In addition to the laws cited above, UAW's proposed ballot initiative defies UC's stated commitment to diversity in its education, services, administration, research and creative activity.²⁰ As UC has recognized, "the State of California has a compelling interest in making sure that people from all backgrounds perceive that access to the University is possible," and that "diversity is integral to the University's achievement of excellence."²¹

¹⁶ U.S. CONST. amend. XIV, § 1.

¹⁷ *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009). *See also Hafer v. Melo*, 502 U.S. 21, 25 (1991) (confirming that state government employees may be sued in their individual capacities pursuant to 42 U.S.C. § 1983 for action taken under color of state law that causes the deprivation of a federal right) (relying on *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)).

¹⁸ 42 U.S.C. § 2000(d).

¹⁹ 42 U.S.C. § 2000c, et seq.

²⁰ *See* Regents Policy 4400: University of California Diversity Statement (Adopted as Amended September 15, 2010), available at <http://regents.universityofcalifornia.edu/governance/policies/4400.html> (defining diversity as "the variety of personal experiences, values, and worldviews that arise from differences of culture and circumstances" – differences which include, among others, "race, ethnicity [and] religion").

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Contrary to these principles, the discriminatory and exclusionary actions proposed by UAW 2865's support of the BDS movement violate numerous UC policies and standards prohibiting discrimination on the basis of national origin and religion.²² The boycott proposed by UAW 2865 clearly targets organizations for disparate and discriminatory treatment solely on the basis of their national origin, as well as specific individuals associated with those organizations in a representative capacity. Moreover, because most Israelis are Jewish, UAW 2865's exclusionary policy will also have a disparate impact on Jewish Israelis – thereby discriminating on the bases of race and religion as well.

UAW 2865's support of the BDS movement would also undermine UC's stated commitment to "the highest ethical standards in furtherance of [UC's] mission of teaching, research and public service."²³ As is outlined in UC's Statement of Ethical Values and Standards of Ethical Conduct,

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The BDS ballot initiative, including both its call for discriminatory action by UC and its encouragement that members participate in a boycott of professional activities sponsored by Israeli institutions, operates in direct contravention of UAW 2865’s contractual obligation to

²⁷ Policies Applying to Campus Activities, Organizations and Students (PACAOS) 40.00, Policy On Use of University Properties (September 25, 2006), available at <http://policy.ucop.edu/doc/2710524/PACAOS-40>.

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²⁹ UC-UAW Contract, Art. 19, Section A, available at <http://www.uaw2865.org/wp-content/uploads/Local-2865-UC-Contract-2014-18FINAL1.pdf> (emphasis added).

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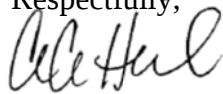
³¹ *Id.*, Section B.

³² *Id.*, Section C.

avoid encouraging, condoning, or lending support to any activities that would interfere with University operations. In other words, the mere act of putting these issues to a membership vote would constitute a legally actionable breach of contract by UAW 2865. Indeed, the union may already be in breach as a result of the Joint Council's July 29, 2014, statement of support for the BDS movement, which includes the specific request that members "vote 'yes' in the coming membership vote for joining the BDS movement."³³ To return to a position of contractual compliance, the UAW 2865 leadership must immediately rescind its July 29 statement and cease its efforts in support of the BDS movement, including the upcoming December 4 membership vote.

It is clear that UAW 2865's proposed involvement in the BDS movement would place the University of California System, the union's members, and the union itself in direct violation of numerous provisions of state and federal nondiscrimination law, as well as related UC policies, and the UC-UAW Contract. Absent immediate action to prevent the unlawful conduct of its local unit, UAW may find itself vicariously liable for that conduct. As such, we urge the UAW leadership to act in the best interest of itself and its members, contact its UAW 2865 local unit, and take all necessary action to put an end to UAW 2865's supportive efforts toward the discriminatory BDS movement.

Respectfully,



Cecilia N. Heil
Senior Counsel

Jay Alan Sekulow
Chief Counsel

David A. French
Senior Counsel

AMERICAN CENTER FOR LAW & JUSTICE

³³ *Student Workers at the University of California Support Palestine: UAW 2865 Joint Council Prepares for Membership Vote on BDS*, UC STUDENT-WORKERS UNION LOCAL 2865 (July 29, 2014), <http://www.uaw2865.org/?p=12137>.