Trial Court Case No. 11CM01351

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Lead Case No. 30-2011-518649 (consolidated appeals)

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF ORANGE

APPELLATE DIVISION

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ALI SAYEED et al.,

Defendants and Appellants.

ON APPEAL FROM THE ORANGE COUNTY SUPERIOR COURT
(Hon. Peter J. Wilson, Judge)

AMICI CURIAE BRIEF OF THE CENTER FOR CONSTITUTIONAL RIGHTS AND JEWISH VOICE FOR PEACE IN SUPPORT OF DEFENDANTS AND APPELLANTS

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INTRODUCTION

Appellants—ten Muslim-American former University of California students of conscience—rose to register calm, substantive protest of a political speech given by the Israeli Ambassador to the United States, based on their deeply-held objection to Israeli and United States government policy. Their remarks, though measured and short, invited jeering and cheering by opposing and supporting audience members—a reaction the First Amendment protects as an attribute of self-government and as a spark for the possibility of social change. Their protest, occurring as it did in a cauldron of democracy—a college campus—was part of a long, admirable tradition of student activism on equally pressing issues, such as civil rights, war, and South African apartheid. Indeed, in recent years, numerous, similar campus protests have occurred without the arrest or criminal punishment imposed on these Appellants.

The facts of Appellants' case and the political context in which it occurred raises the troubling inference that their prosecution was based on the State's or the jury's objection to the content of their unpopular message, critical of Israeli government policy, and even their Arab and Muslim identity. Penal Law Section 403, the statute under which Appellants were convicted, is fraught with the type of vagueness that would permit such discriminatory enforcement. First, it is unclear whether section 403's exemption for "political" meetings should apply to a meeting such as this, given its manifestly political nature; reasonable individuals such as Appellants did not have adequate notice, as due process requires, about whether their conduct in this meeting would be covered by the statute. Second, the trial court should have more scrupulously heeded limiting

construction imposed onto Section 403 by the California Supreme Court in *In re Kay* (hereinafter "*Kay*") (1970) 1 Cal. 3d 930, 943, to ensure that the statute's prohibition on "disturbance" of a meeting does not inhibit constitutionally protected speech such as Appellants'. That construction required the trial court to ensure that the disturbance violated the "implicit customs and usages" or "explicit rules" governing the meeting; given the tradition of tolerance of speech on campus, and the questionable validity of any applicable "rules," the strict adherence to such standard demanded by *Kay*, should have resulted in acquittals, not convictions.

The risk that the arrest, prosecution and conviction of Appellants was a product of viewpoint based discrimination, left insufficiently checked by the trial court, merits reversal of these convictions and reaffirmation of basic First Amendment principles tolerant of speech that challenges the status quo, no matter how emotionally or politically offensive that speech may be to the majority.

STATEMENT OF FACTS[1]

Students at the University of California at Irvine ("UC Irvine"), like university students across the country, have regularly protested speakers and public officials without punishment, much less arrest. (4:RT [Reporter's Transcript]:737, 759, 791-80, 7:RT:737, 759, 791-800, 847-856; 8:RT:866-71.) That is, until February 8, 2010, when the Israeli Ambassador to the United States, Michael Oren, gave an address at UC Irvine about "U.S. Israeli Relations from a Political and Personal Perspective." (4:RT:243-244;

[1] Rather than provide a comprehensive recitation of the factual record in this case, Amicus merely highlights facts it believes central to the legal questions it addresses.

Exhibit 4.) The Ambassador's "Political Perspective" on U.S.-Israeli relations is well known to be a controversial one to individuals who believe that the Israeli government engages in human rights violations of Palestinians with the acquiescence or support of the United States. Accordingly, the Defendants/Appellants ("Appellants") believed they had a "duty" to "ensure that [their] voices [would] be heard," and that "Michael Oren and any other Israeli politician knows" they cannot come to "make excuses for what they are doing to the Palestinians." (Exhibit 10, 1; Exhibit 29; 6:RT:631-33.)

The event was co-sponsored by the University's Department of Political Science, the College Republicans, and the Consulate General of Israel, among others. (Exhibit 4.) The event started over thirty minutes late, (4:RT:248-51, 338) and began with welcomes and introductions by Political Science Professor Mark Petracca, the president of the student group "Anteaters For Israel," and another student who introduced Oren. (4:RT:259, 338; Exhibit 2, 1-5.) After Oren began his remarks, each Appellant stood up and read a short statement from index cards prepared prior to the event, addressing Israel's human rights violations and Oren's role in their perpetration, and then walked out of the room. (*See, e.g.,* 4:RT:267-268, 270-277, 287-289, 292-293, 301-302, 304-305, 307-308, 315-316.) In an event that ultimately lasted one hour, the totality of Appellants' speech lasted no more than five minutes. (10:RT:1180.) During Oren's speech, Professor Petracca and Chancellor Michael Drake admonished the protestors for several minutes, and Oren himself was absent from the stage for approximately 15 minutes. (4:RT:259, 270, 274, 277-280, 305, 317; 7:RT:778; Exhibit 2, 7-10, 15.) Professor

Petracca said the topic was "one of the most important issues facing this planet." (Exhibit 2, 6-7.)

After the last statement by an Appellant, 70 to 80 people left the event, chanting on their way out. (4:RT:317-319; Exhibit 2, 18.) Members supporting Oren loudly jeered the statements of the protestors and heckled the protestors as they left the room. (4:RT:319.) Though Chief Paul Henisey observed antagonism between those who supported the student protestors and those who did not, none of the audience members who loudly jeered at the departing students were arrested. (4:RT:319-320.) Oren concluded his speech, and there was no question-and-answer period. (4:RT:322-323; 5:RT:424.)

ARGUMENT

The First Amendment rests on the assumption that the "widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." (*Associated Press v. United States* (1945) 326 U.S. 1, 20 [65 S.Ct. 1416, 1425].) In light of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," the First Amendment accommodates speech that "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (*New York Times v. Sullivan* (1964) 376 U.S. 254, 270 [84 S. Ct. 710, 721]; *see also Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 956 [the "[p]reservation of free expression is of particular urgency in the political arena"](citation omitted).)

First Amendment values and university mission reach their highest convergence when controversial speech on political affairs occurs in the cauldron of campus debate. The university "is peculiarly the 'marketplace of ideas," *Keyishian v. Board of Regents of Univ. of N.Y.* (1967) 385 U.S. 589, 603 [87 S. Ct. 675, 683] (hereafter *Keyishian*); it encourages critical thought and questioning of social and political orthodoxy, *see id.*, and is charged with producing future leaders acculturated in the norms of a pluralistic, democratic country. (*Grutter v. Bollinger* (2003) 539 U.S. 306, 324-325 [123 S. Ct. 2325, 2336-2337].) The First Amendment likewise seeks to promote those values. (*See generally* Alexander Meiklejohn, Free Speech and its Relation to Self-Government (1948); John Hart Ely, Democracy and Distrust (1980).) Accordingly, courts must ensure that University students retain "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'" (*Keyishian, supra,* 385 U.S. at p. 603 (internal citation omitted).)

Indeed, it was at the University of California that the student free speech movement, and the power of robust student activism, was born. (*See, e.g.*, Robert Cohen, Reginald E. Zelnik, eds. The Free Speech Movement: Reflections on Berkeley in the 1960s (2002).) Student agitation raised awareness of injustices surrounding the Vietnam War and South African Apartheid, among others, and contributed to changes of government policy in these and other areas. (Carol Zeiner, *Zoned Out! Examining Campus Speech Zones* (2005) 66 La. L. Rev. 1, 12 [citing Robert D. Bickel & Peter F. Lake, The Rights and Responsibilities of the Modern University (1999) pp. 7-8, 35-42].)

Appellants in this case, by challenging authority and calling out what they perceived were unjust government practices, are simply another recent manifestation of this most important constitutional tradition. Unlike prior protestors, however, government officials successfully silenced this message, through the sanction of a vague and discretionary criminal law.

I. PENAL LAW 403's REFERENCE TO "POLITICAL" MEETINGS IS UNCONSTITUTIONALY VAGUE ON ITS FACE.

The due process principles embedded in the vagueness doctrine demand written, advance notice sufficient to provide persons "of ordinary intelligence a reasonable opportunity to know what is prohibited." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108 [92 S. Ct. 2294, 2298-2299].). The doctrine exists both to avoid ensnaring conscientious individuals such as Appellants with criminal sanction and to prevent chilling of permissible speech – "causing people to steer a wider course than necessary in order to avoid the strictures of the law." (*Ewing v. City of Carmel-By-the-Sea* (1991) 234 Cal. App.3d 1579, 1594; *see also, People v. Mirmirani* (1981) 30 Cal.3d 375, 383 [observing that, because "the free dissemination of ideas may be the loser," courts scrutinize vague statutes potentially inhibiting speech more aggressively] (quoting *Smith v. California* (1959) 361 U.S. 147, 151 [80 S. Ct. 215]).)

Penal Law 403 is unconstitutionally vague on its face. The statute's title – which constitutes "part of the substance of the enactment, and [is] accorded the same effect as though written into the body of the law," (*Farraher v. Superior Court* (1919) 45 Cal.

App. 4, 5[2]) – enacts prohibitions on "Disturbance of assembly or meeting other than religious or *political*." (Deering's Cal. Codes Annotated [emphasis added].) The text of Section 403 does nothing to clarify the statute's scope: it excludes meetings referenced in California Elections Code § 18340, and thus excludes "public meetings for the consideration of public questions." (Elec. Code, § 18430.)

Many reasonable people would have considered the convening at which Plaintiffs were arrested to be a "political" meeting about a "public question" and thus excluded from the reach of Section 403 (either by its title or its incorporation of Section 18340). The event featured a speech by Israeli Ambassador to the United States Michael Oren about "U.S. Israeli Relations from a *Political* and Personal Perspective." (Exhibit 4 [emphasis added].) The event was co-sponsored by the University's Department of Political Science, the College Republicans, and the Consulate General of Israel among others. (Exhibit 4.) One would have to be unreasonably naïve to imagine that the convening would not raise political questions – from a contested perspective – on matters of public concern or, as Professor Petracca put it, on "one of the most important issues facing this planet." (Exhibit 2, 6-7.) Appellants too may have reasonably believed that Penal Law 403's criminal sanction did not apply to their speech activity at this political event.

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[2] (*See also People v. Superior Court* (2001) 25 Cal. 4th 703, 728; *People v. Hull* (1991) 1 Cal. 4th 266, 272.)

II. PENAL LAW 403's OTHER TERMS INVITE DISCRIMINATORY ENFORCEMENT AGAINST UNPOPULAR SPEECH.

Penal Law 403 subjects to criminal sanction a person who "willfully disturbs" an assembly or public meeting (Penal Code, § 403), as long as that meeting is not "political," *see supra*. The California Supreme Court recognized the vagueness of the term "disturbs," and sought to give it a sufficiently limiting construction in order to prevent its application to "[a]udience activities, such as heckling, interrupting, harsh questioning, and booing," as they "can nonetheless advance the goals of the First Amendment." (*Kay*, *supra,* 1 Cal. 3d at p. 939; *see also id*. at p. 940 ["The heckling and harassment of public officials and other speakers while making public speeches is as old as American and British politics"].) Thus, the Court imposed a limiting construction necessary to distinguish between lawful sanction and unconstitutional censure: the State must demonstrate that a defendant "substantially impaired" the conduct of a meeting, through conduct that she knows or should have known violates "implicit customs or usages" or "explicit rules for governance." (*Id*. at 943.)

Given that the terms "implicit customs or usages" and "explicit rules" are themselves susceptible to subjective interpretations, the California Supreme Court stressed that trial courts must scrupulously monitor application of this norm to the facts of a particular case to ensure it does not permit arrest or punishment based on the content of the speech. (*See Kay, supra,* 1 Cal. 3d. at p. 944 ["Not every violation of a general custom or of an explicit meeting rule becomes so grave as to warrant application of criminal sanction; nor does section 403 contemplate such extensive coverage"].) Trial

courts must insist on a "stringent reading of section 403" lest application of the statute produce a "chilling effect on the protected expression" of meeting participants and thus "raise serious constitutional questions concerning the provision's constitutionality." (*Id.* at p. 946.)

A. The Vagueness Doctrine is Designed to Prohibit Prosecutions that Might be Based on Arbitrary or Discriminatory Enforcement.

Recognizing that "behavior as a general rule is not mapped out in advance on the basis of statutory language," (*Smith v. Goguen* (1974) 415 U.S. 566, 574 [94 S. Ct. 1242, 1248]), the United States Supreme Court has emphasized that "perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." (*Id.)* Vague statutes are dangerous because they "delegate basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-09 [92 S. Ct. 2294, 2299].)

That discretion, in turn, if left unchecked by the court, chills more speech than can be legitimately proscribed by the vague statute. (*See Thornhill v. Ala.* (1940) 310 U.S. 88, 97-98 [60 S. Ct. 736, 741-742] [threat of vague statute is that it "readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, [and] results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its

purview."].) Unpopular speech is naturally the primary casualty of statutes that fail to precisely define prohibited conduct.

B. Vague Statutory Provisions Providing Law Enforcement Discretion Risk Discriminatory Enforcement of Unpopular, But Constitutionally Protected, Speech.

"[H]istory shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law." (*Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1051 [111 S. Ct. 2720, 2732].) For example, reviewing years of political efforts to root out Communist ideas from the public sphere, the United States Supreme Court recognized the political instinct to enforce laws discriminatorily against those with whom officials disagreed. "It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches that prosecutors too are human." (*Cramp v. Board of Public Instruction* (1961) 368 U.S. 278, 286-87 [82 S. Ct. 275, 280].)

Mindful of the risk of viewpoint based suppression, the Supreme Court repeatedly invalidated statutes that used vague terms such as "subversive organizations," (*Baggett v. Bullitt* (1964) 377 U.S. 360 [84 S. Ct. 1316]; *Dombrowski v. Pfister* (1965) 380 U.S. 479, 493-494 [85 S. Ct. 1116, 1124-1125]) and "opposition to organized government." (*Stromberg v. California* (1931) 283 U.S. 359, 361 [51 S. Ct. 532, 533].) In *Dombrowski*, defendants claimed that they the term "subversive" provided law enforcement a pretext to prosecute them in order to "discourage [their] civil rights activities." (*Id.* at p. 490.) Reversing the defendants' convictions, the Court recognized

that "unduly vague, uncertain and broad" statutes with create "a 'danger zone' within which protected expression may be inhibited." (*Dombrowski, supra,* 380 U.S. at p. 494.)

Vague statutes are particularly threatening in a democracy, given government officials' natural instincts to maintain the status quo. Officials thus view challenges to political orthodoxy with particular suspicion, which tends to stifle the possibility of social change the First Amendment aspires to promote. In the Civil Rights era, it was all-too-common, at least until the United States Supreme Court's intervention on First Amendment grounds, for government officials in segregationist states to enforce laws discriminatorily against civil rights activists demanding social change. (*See* Tammy W. Sun, *Equality by Other Means: The Substantive Foundations of the Vagueness Doctrine* (2011) 46 Harv. C.R.-C.L. L. Rev. 149, 157 ["First Amendment law experienced its own transformation during [the Civil Rights] era as the Court increasingly turned towards expressive liberty as the means for achieving and preserving racial equality"].) The Supreme Court struck down as vague those laws that could be enforced in ways that infringed on individuals' speech rights because of officers' and prosecutors' personal aversion to the message of those protesting segregation and discrimination. (*See, e.g.*, *Edwards v. South Carolina* (1963) 372 U.S. 229, 237 [83 S. Ct. 680, 684] [overturning "breach of peace" conviction of African-American protester at State Assembly because states are not permitted "to make criminal the peaceful expression of unpopular views" via vague laws]; *Cox v. Louisiana* (1965) 379 U.S. 536, 551-552 [85 S. Ct. 453, 462-463] [finding breach of peace statute unconstitutionally vague as to "permit the punishment of the fair use of this opportunity [for free political discussion]" and stating

that "constitutional rights may not be denied simply because of hostility to their assertion or exercise"]; *Brown v. Louisiana* (1966) 383 U.S. 131 [86 S. Ct. 719] [finding sit-in at library protected First Amendment activity that could not be basis for breach of peace conviction]; *NAACP v. Button* (1963) 371 U.S. 415 [83 S. Ct. 328] [recognizing NAACP activities as First Amendment-protected, and finding that state may not ignore constitutional rights under the guise of enforcing professional rules].)

Likewise, anti-war activists in the 1960s were common targets of law enforcement activity pursuant to vague statutes, as have been other marginalized groups. (*See, e.g.*, *Goguen*, *supra,* 415 U.S. at p. 578 [statute prohibiting "contemptuous" public treatment of US flag unconstitutional because it "fails to draw reasonably clear lines defining criminal activity, and it sets forth the standards so indefinitely that police, court and jury are free to react to nothing more than their own preferences for treatment of the flag"]; *Papachristou v. City of Jacksonville* (1972) 405 U.S. 156, 170 [92 S. Ct. 839, 847] [vagrancy law struck down with an understanding that "[t]hose generally implicated by the imprecise terms of the ordinance-poor people, nonconformists, dissenters, idlers-may be required to comport themselves according to the life style deemed appropriate by the…police and the courts."].)

As in *Papachristou*, Penal Code 403 "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" (*Id.* [internal citations omitted]) The majority's disdain for Appellants' speech, and their Muslim and Arab identity, is akin to that the

majority held for communist, civil rights and anti-war activists that challenged the status quo.

C. Appellants' Criticism of Israeli Government Policy is Precisely the Type of Unpopular Speech Subject to Discriminatory Sanction by Vague Provisions of Penal Law 403.

This case, like those in the anti-Communist and Civil Rights eras, involves the expression of views that are disfavored by government officials, and calls for scrutiny from the courts to protect against discriminatory suppression of protected speech. Support for Palestinian human rights or, more specifically, criticism of Israel's policies toward Palestinians – and attendant U.S. support – is perceived as challenging a deeply held official perspective, and the status quo of U.S.-Israel relations.[3] As a result, speech activities that criticize Israel or advocate for Palestinian human rights have been the target of undue scrutiny by government officials and are being condemned,[4] sanctioned,

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[3] (*See* John J. Mearshimer and Stephen M. Walt, The Israel Lobby and US Foreign Policy 168-96 (Farrar Straus and Giroux: New York, 2008) [Addressing the orthodoxy of government officials' positions on Israel-Palestine, and how public criticism of Israel by government officials, academics and is attacked].)

[4] (*See, e.g.*, Glenn Greenwald, *NYC officials threaten funding of Brooklyn College over Israel event*, The Guardian (Feb. 4, 2013) <http://www.theguardian.com/commentisfree/2013/feb/04/brooklyn-college-bds-official-threats> [discussing opposition by New York City officials to a student-organized event on boycott, divestment and sanctions against Israel, calling it offensive and anti-Semitic and pressuring the University to cancel it]; Stephen Zunes, *California State Assembly Seeks to Stifle Debate on Israel* (Aug. 30, 2013) HuffingtonPost.com, The Blog <http://www.huffingtonpost.com/stephen-zunes/california-state-assembly_b_1842841.html> [discussing California legislature's resolution condemning anti-Semitism at public California universities, defining anti-Semitism to include common criticisms and activism against Israeli policies, and encouraging universities to enact policies restricting student speech rights].)

surveilled[5] and criminalized[6] on many levels—by state and federal prosecutors, government agencies, and at private as well as public universities.

At universities around the country, organizations that promote Israeli government policies are pressuring administrators to curtail, punish or prohibit activities critical of Israel, and even threatening and filing lawsuits and civil rights complaints to attempt to compel them to do so.[7] At UC Irvine in particular, prior to Appellants' arrest, there was pressure on the administration over several years to investigate and punish the Muslim

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[5] (*See, e.g.,* Alex Kane, *Documents expose Boston police working with FBI to track Palestine solidarity activists* (Oct. 18, 2012) Mondoweiss<http://mondoweiss.net/2012/10/documents-expose-boston-police-working-with-fbi-to-track-palestine-solidarity-activists.html>.)

[6] There have been a number of threatened and prosecuted "material support for terrorism" cases against Palestinians engaged in advocacy for Palestinian rights and for sending charity to Palestinians. (See, e.g., Eric Lichtblau, *From advocacy to terrorism, a line blurs*, New York Times (June 5, 2005) <http://www.nytimes.com/2005/06/05/national/nationalspecial3/05terror.html?pagewanted=all&_r=0> [regarding case against professor al-Arian for speech activities]; Peter Wallsten, *Activists cry foul over FBI probe*, Washington Post (June 13, 2011) <http://articles.washingtonpost.com/2011-06-13/politics/35235946_1_activists-cry-stephanie-weiner-targets> [regarding September, 2010 FBI raids of homes and organizations and Grand Jury subpoenas to anti-war and Palestine solidarity activists, investigating material support for terrorism charges for their advocacy work. After over two years, no indictments have come down].)

[7] For example, several complaints to the Department of Education (DOE) under Title VI of the Civil Rights Act resulted in years-long investigations into allegations that Palestinian rights advocacy on campus creates a hostile anti-Semitic environment for Jewish students. The DOE recently dismissed three of these cases against UC schools, including UC Irvine, affirming that the activities complained of (including protests, film screenings, dramatic renderings of checkpoints preventing Palestinian freedom of movement in the West Bank, etc.) "constituted expression on matters of public concern," and that "even when personally offensive and hurtful" to some, it is not harassment. (*See* CCR Press Release, In Victory for Free speech, Department of Education Dismisses Complaints (Aug. 28, 2013) < http://ccrjustice.org/newsroom/press-releases/victory-student-free-speech,-department-of-education-dismisses-complaints>.)

Student Union (MSU), the student group to which Appellants belonged, for a fundraiser and other events they organized.[8] The intensive nationwide local and federal government surveillance of Muslim communities and Muslim student activists engaging in constitutionally protected speech and association activities is more evidence of the pressure students activists are under.[9]

In this case, students decided to protest the political position of one of the most powerful public figures in Israeli politics and US-Israeli relations[10] – an official they considered responsible for human rights violations and war crimes – and to challenge a

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[8] In addition to a Title VI complaint against UC Irvine, the Zionist Organization of America (ZOA) wanted MSU punished for its speech activities, and rejoiced when the University suspended MSU for the Oren protest. (*See* Morton A. Klein, *After Long ZOA Campaign, UC Irvine Earns ZOA's Praise for Suspending Muslim Student Union* (June 14, 2010) < http://zoa.org/2010/06/102675-after-long-zoa-campaign-uc-irvine-earns-zoas-praise-for-suspending-muslim-student-union/> [detailing ZOA's multi-year campaign against MSU, efforts to encourage criminal investigations into an MSU fundraiser, and its civil rights complaint to the DOE].)

[9] (*See*, *e.g.*, Matt Apuzzo and Eileen Sullivan, *FBI Muslim scandal: Documents show San Francisco FBI office illegally collected information on local Muslims* (March 27, 2012) Huffington Post- San Francisco, <http://www.huffingtonpost.com/2012/03/28/fbi-muslim-scandal_n_1386482.html>; Matt Apuzzo and Adam Goldman, *NYPD moves covertly in Muslim areas* (Aug. 23, 2011) Associated Press, <http://www.ap.org/Content/AP-In-The-News/2011/With-CIA-help-NYPD-moves-covertly-in-Muslim-areas>; Chris Hawley and Matt Apuzzo, *NYPD infiltration of colleges raises privacy fears* (Oct. 11, 2011)Associated Press, <http://www.ap.org/Content/AP-In-The-News/2011/NYPD-infiltration-of-colleges-raises-privacy-fears>.)

[10] Ambassador Oren has no shortage of opportunities to express Israel's viewpoint. (*See*, *e.g.,* The Embassy of Israel to the United States, *Dr. Michael B. Oren* <http://www.israelemb.org/washington/NewsAndEvents/media_appearances/Pages/media.aspx?WPID=WPQ3&PN=1> [listing Oren's recent media appearances, public statements, published op-eds, etc.].)

dominant view in the U.S.[11] (*See, e.g.,* Exhibits 10, 29]; *see also, e.g.,* RT: 266-267.) This was exactly the kind of expression that "lies at the heart of the First Amendment," that *Kay* sought to protect from the overbreadth of 403: "free expression articulated through 'disturbances' that are no more than announced differences in ideology or beliefs." (*Kay, supra,* 1 Cal. 3d at p. 941-942.) And the prosecution of Appellants for their speech is the kind of threat that *Kay* aimed to curtail by limiting 403's scope: that a "jury… might convict persons whose expressive conduct "[disturbed]" a meeting only because the content of the expression conflicted with the views espoused by the meeting's organizers or official speakers." (*Id.* at p. 941.)

III. PENAL LAW 403'S VAGUE PROVISIONS MAY HAVE CONTRIBUTED TO DISCRIMINATORY ENFORCEMENT OF APPELLANTS' UNPOPULAR SPEECH IN THIS CASE.

The arrest, prosecution and conviction of Appellants surfaces the risk of viewpoint-based suppression that inheres in statutes that give law enforcement and juries broad discretion. First, the disturbance in this case was far from "substantial" as *Kay* requires in order to cure the provision's vagueness, in light of the duration of the meeting and limited nature of the protest. Moreover, given the long-observed tradition of student protest on campus and the questionable validity of the alleged "rules" of the meeting, "implicit customs and usages" and "explicit rules," properly interpreted, would permit, not prohibit Appellants' speech activity. Appellants could not have reasonably known

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[11] (See, e.g., *Poll: American sympathy for Israel at record high, Jerusalem Post* (Mar. 15, 2013)<http://www.jpost.com/Diplomacy-and-Politics/Poll-Americans-sympathies-for-Israel-match-all-time-high>; Melani McAlister, Epic encounters: Culture, Media, and US Interests in the Middle East Since 1945, 155-197 (University California Press: 2005) [describing extent to which US public and media favor Israel].)

otherwise. These factors, combined with the State's unusually aggressive criminal prosecution of speech activity, raise the deeply problematic inference that Appellants' sanction followed from the controversial content of their speech, rather than any legitimate state interest in preventing substantial disruptions to non-political meetings.

A. The "Disruption" Caused by Appellants Themselves Was Not "Substantial."

As Appellants demonstrate, the statements made during Oren's speech do not rise to the level of a "substantial disruption" that *Kay* contemplated to save the statute from constitutional infirmity. All told, the students' statements of dissent—prepared in advance and delivered concisely in protest of the speaker's message—lasted approximately 5 minutes—during an event that was over one hour long. (*Compare Kay*, *supra*, 1 Cal. 3d at p. 936 ["between 25 and 250 persons, engaged in rhythmical clapping and some shouting for about five or ten minutes" was not substantial disruption].) The event continued after the protest, permitting Oren to finish his remarks. (*Compare id.* at p. 944 [speaker "was able to complete his speech."].)

As described below, even in other cases where meetings were so disrupted that they had to be discontinued, no criminal punishment occurred. It is true that other students in the audience cheered or jeered—but that is to be expected; indeed, it is the point of constitutionally protected speech. (*See Kay*, *supra*, 1 Cal. 3d at p. 939 ["The very possibility of adverse audience reaction may aid in the correction of evils which would otherwise escape opposition."]; *Feiner v. New York* (1951) 340 U.S. 315, 326 [71 S. Ct. 303, 309] (Black, J., dissenting) ["it is rare where controversial subjects are

discussed," that a crowd does not "mutter, mill about, push, shove or disagree, even violently, with the speaker"]; *Landry v. Daley*(Ill. 1968) 280 F. Supp. 968, 971 ["New ideas more often than not create disturbances, yet the very purpose of the First Amendment is to stimulate the creation and dissemination of new concepts."].)

B. Because Similarly "Disruptive" Student Speech on Campus Has Not Been Prosecuted, the Departure from "Implicit Customs and Usages" in This Case Suggests Discriminatory Enforcement against Appellants' Speech.

Were one to seriously consider the "implicit customs and usages" that govern events featuring controversial figures and hotly debated subjects, it would become evident that these types of protests are in fact very common, expected, and tolerated; if any action against such protestors is taken, the most severe form is mere removal from the event. These unspoken "customs" are evident at UC Irvine, throughout the UC system, and across the country. Even President Obama recognized when confronting boisterous protest of his speech that such protests are "part of the American tradition we are proud of."[12] In another speech by the President, an individual repeatedly and loudly interjected her opposition to his administration's counterterrorism policies before she was eventually removed. She was never, however, arrested, and President Obama stated, "the voice of that woman is worth paying attention to."[13]

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[12] (*See* Chris Welch, *Protesters Disrupt Obama* (Jan. 7, 2008) CNN.com Blog <http://politicalticker.blogs.cnn.com/2008/01/07/protestors-disrupt-obama-rally/comment-page-2/>.)

[13] (*See Medea Benjamin v. President Obama: CodePink founder disrupts speech, criticizing drone, Gitmo policy* (May 24, 2013) Democracy Now <http://www.democracynow.org/2013/5/24/medea_benjamin_v_president_obama_codepink>)

A brief survey shows the widespread use of protests similar to that of Appellants' at similar events in the very same context—at institutions of higher learning—as well as in other fora. Appellants produced witnesses who testified at trial about how common protests against speakers were, and about protests they witnessed or were involved in, and there are many more. (*See, e.g.*, 7:RT:759, 792-800, 845-850; 8:RT:865-871.) This is critical, as *Kay* requires, consistent with notice principles embedded in the vagueness doctrine, proof that defendants engaged in conduct "*with knowledge*, or under circumstances in which they should have known," they were violating implicit customs or usages. (*Kay*, supra, 1 Cal.3d at p. 945 [emphasis added].)

The effort to suppress Appellants' pro-Palestinian speech in the face of the long and prized history of free speech action in California raises the very real risk of discriminatory enforcement of this vague statutory norm by police and prosecutors—a risk *Kay* instructed trial courts to avoid in order to save section 403 from constitutional infirmity. (*See Kay*, *supra* 1 Cal.3d at p. 941 [cautioning that interpretation of section 403 must avoid the possibility that a "jury…might convict persons whose expressive conduct '[disturbed]' a meeting only because the content of the expression conflicted with the views espoused by the meeting's organizers or official speakers"].)

There are numerous examples of persistent, loud, and repeated disruptions of speaking events on the UC Irvine campus, both before and after the prosecution of this case. In November 2001 at UC Irvine, a Muslim speaker was entirely shut down by protesters with the College Republicans who, seconds after he began speaking, came with pre-made signs, surrounded the speaker, chanted, and prevented the event from

continuing for 10-15 minutes.[14] There were no arrests, and certainly no prosecutions. (8:RT:866-881.) Similarly, in February 2005, John Yoo, a controversial figure in the Bush administration who authored legal memos authorizing torture, spoke at two events at UC Irvine that individuals protested by repeatedly shouting and chanting while he spoke.[15] Individuals were escorted out, but no arrests were made. (*See* 3:CT:638.) In April 2006, an economist gave a lecture sponsored by UC Irvine on neo-liberal globalization policies in India, which students protested by chanting loudly and holding banners during his speech for 5-10 minutes. (7:RT:791-797.) None of the protesters were reprimanded or arrested. A lecture at UC Irvine in January 2007 by conservative commentator Daniel Pipes was interrupted by a large crowd chanting loudly and walking out in opposition to his speech, with no adverse consequences befalling the protesters. (7:RT:799-800, 845-850.)[16]

Similar incidents had happened at other California universities and around the country where highly charged issues were being discussed, or unpopular or controversial figures were speaking, prior to Appellants' arrest. In February 2008, individuals attending a lecture by provocative scholar Norman Finkelstein at California State University, Northridge, repeatedly interrupted the presentation by shouting out insults,

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[14] See video of event (Tajwied, *Event Disruption,* YOUTUBE (Feb. 15, 2010) <http://www.youtube.com/watch?v=8GlPF7Jfl8Y>.)

[15] (See Christine Tsai, *Challengers Face Off With Yoo*, New University (Feb. 14, 2005) <http://www.newuniversity.org/2005/02/news/challengers_face_off_with105/>.)

[16] See video of event (DemoCast, *Militant Muslims Disrupt Dr. Daniel Pipes' Appearance at UC Irvine* YOUTUBE (Sep. 8, 2012) <http://www.youtube.com/watch?v=4pclXiyK2fo>.)

jeering and hissing.[17] The individuals were talked to separately by a school official but no arrests or prosecutions resulted. In October 2008, student advocates supporting Israeli government policies loudly protested another Finkelstein event at UC Berkeley, chanting, yelling slogans and setting off an alarm as they walked out, with no consequences.[18] In 2009, a panel with political commentator Max Blumenthal at UC Riverside was disrupted for 20-30 minutes by protesters holding signs blocking the stage, and yelling and shouting insults continuously, which resulted in the event ending early. No arrests or official admonishments were made. (7:RT:810-817.)

There are innumerable other examples of vigorous, repeated, loud and disruptive expressions of dissent where controversial speakers are featured. Those examples occurring before Appellants' arrest are what they "knew or should have known" to be the "customs and usages" for the type of event they were protesting. (*See Kay*, *supra,* 1 Cal.3d at p. 945.)

There are also telling examples of disruptive protests after Appellants' arrest and prosecution. In November 2010, soon after the protest here, there was a similar protest at a speech by Israeli Prime Minister Benjamin Netanyahu in New Orleans at the Jewish Federation General Assembly. Individuals with *amicus* Jewish Voice for Peace stood up in succession and yelled statements dissenting from Netanyahu's speech. As in this case,

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[17] (David Klein, *Why is Norman Finkelstein not allowed to teach*? 51/52 Works and Days, 26& 27, p. 308 (2008-2009) *available at* http://www.worksanddays.net/2008-9/File14.Klein_011309_FINAL.pdf. [describing the lecture and the persistent heckling that took place].)

[18] *See* video of event. (calsjp, *ASUC Senators and Tikvah Students Disrupt Berkeley Event* YOUTUBE (Oct. 15, 2008) http://www.youtube.com/watch?v=fNkFwb4MS6Q.)

the crowd's jeering and cheering every time a protester was escorted out was much longer and louder than the protests themselves.[19] None of the protesters were arrested. In July 2012, students "dressed as zombies interrupted" a UC Regents meeting voting on tuition hikes "and even broke out singing and dancing to Michael Jackson's 1982 hit 'Thriller.'"[20] Recently, students disrupted another UC Regents meeting swearing in Janet Napolitano as the new UC President, yelling and chanting in protest of her immigration policies as Department of Homeland Security Secretary until they were forcibly removed, but they were not arrested.[21]

So the question remains: Why was this case worthy of criminal prosecution while the others were not? Jewish peace activists posit that similar prosecutions are not pursued against Jewish protestors, whether they are protesting Israeli officials or speakers critical of Israel, and that the large-scale prosecution here was attributable to bias against the religious background of Appellants combined with their controversial message.[22] The highly anomalous prosecution of these Muslim Appellants, expressing unpopular speech,

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[19] See video of event. (Jewish Voice for Peace, *Israel/Palestine: Young Jews Protest Netanyahu at Jewish GA* YOUTUBE (Nov. 9, 2010) < http://www.youtube.com/watch?v=xjLm6d2Mzgg>.)

[20] (*UC Tuition Freeze Hinges on Brown's California Tax Initiative* (July 18, 2012) CBS San Francisco, <http://sanfrancisco.cbslocal.com/2012/07/18/uc-tuition-hike-hinges-on-browns-california-tax-initiative/>.)

[21] (*Napolitano's confirmation as UC president marked with angry protests* (July 19, 2013) RT.com, < http://rt.com/usa/napolitano-confirmation-california-protest-338/>.)

[22] (*See* A. Mizrahi et al., *Irvine 11 conviction reveals double standards and bias* (Oct. 11, 2011) Mondoweiss < http://mondoweiss.net/2011/10/irvine-11-conviction-reveals-double-standard-and-bias.html.>.)

underscores both that the "implicit customs and usages" of this type of event would have allowed such a disruption without threat of arrest or prosecution, and that the risks of discriminatory enforcement that a vague statute such as Penal 403 produces were very real in this case.

C. There Were No Legally Sufficient "Explicit Rules" in Place to Cure the Risk of Discriminatory Enforcement in this Case.

Just as "implicit customs or usages" would not support Appellants' prosecution, there were also no legally sufficient "explicit rules" that Kay requires to cabin prosecutorial or jury discretion in this case. As Appellants have argued (Appellants' Opening Brief: 58-62), some of the supposedly "explicit rules" relied upon by the prosecution—statements admonishing participants to be "civil," or to avoid "inappropriate" behavior and otherwise to show "hospitality" to the guest speaker, are, in the context of a public meeting on issues of public concern, unconstitutional on their face. (*See Kay, supra* 1 Cal.3d at p. 939 ["the Constitution does not require that the effective expression of ideas be restricted to rigid and predetermined patterns"]; *see also Gooding v. Wilson* (1972) 405 U.S. 518 [92 S. Ct. 1103] (striking down provision of breach of peace statute prohibiting use of "opprobrious words or abusive language" as facially overbroad); *Houston v. Hill* (1976) 482 U.S. 451 [107 S. Ct. 2502] [overturning conviction under statute that prohibits individual to "oppose, molest, abuse or interrupt" any policeman].)

Equally important, the trial court failed to instruct the jury on which of the allegedly "explicit rules" were constitutional, permitting the jury to vote for conviction

on any one of potentially unconstitutional "explicit rules." (*See, e.g., Stromberg v. California, supra*, 283 U.S. at pp. 367-368.) The court allowed the parties to address the question of whether the statements "were rules that could apply" to the event (9:RT:1058), although prohibited the parties from seeking a "legal determination on the issue" from the jury. (9:RT:1065.) Even as the trial court failed to cure this prejudicial defect, it acknowledged its significance, observing that "should this ever go to the Court of Appeal, I agree in particular the *In re Kay* case and the current jury instruction leave somewhat unresolved the issue of how to test the underlying validity of a rule." (9:RT:1058-59.) Because the "explicit rules" relied upon by the prosecution were not legally sufficient, they could not cure the vagueness of 403 or adequately limit the possibility that the prosecution and jury verdict were based on disapproval with the speaker's viewpoint.

D. The Prosecution's Conduct Further Suggests 403 Was Discriminatorily Enforced

Prosecutors in this case went to great lengths to prosecute Appellants' political expression on a hotly debated and sensitive political matter against a controversial speaker—despite First Amendment norms that would counsel hesitation in this context. The State originally claimed it was investigating a felony for this minor protest, and got search warrants to obtain tens of thousands of emails and documents. (3:CT:633.) It expended resources more commonly reserved for high-level felony cases on an obscure misdemeanor charge; assigned top prosecutors in the office to the case; convened a grand

jury and conducted a year-long investigation into a peaceful student protest. (3:RT:147-52, 164-65; 3:CT:623-33.)

There was also evidence that Appellants' Muslim identity influenced the prosecutors' actions. Despite the fact that the protest itself had nothing to do with Appellants' religion, the label of "The Muslim case" was placed on case files. (3:CT:641.) Respondent's brief also refers ominously and repeatedly to the fact that the student protesters planned to pray and in fact prayed together before the event, as if that somehow indicates their mal-intent. (Respondents' Brief at p. 4; 14-15.)[23]

This prosecution occurred in the context of societal prejudice against Muslims, widespread surveillance and suspicion of Muslim-American communities, and inflammatory accusations about Muslim students' activities—a context that "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." (*Papachristou*, *supra,* 405 U.S. at p. 170.)

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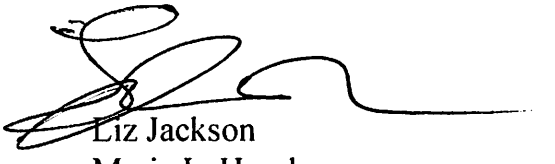
[23] It is worth noting that the Zionist Organization of America (ZOA) spent years pressuring UC Irvine officials about the activities of the Muslim Student Union at UCI, even making inflammatory and unfounded accusations that they were raising money for terrorist groups and urging the Justice Department to investigate. *See* n. 8 *supra*. Even though the University and the ZOA asked the FBI and the Justice Department to investigate, no charges were ever filed against the student organization. (*See* Jennifer Medina, *Charges Against Muslim students Prompt Debate Over Free Speech*, The New York Times (Feb. 9, 2011) <http://www.nytimes.com/2011/02/10/education/10irvine.html?pagewanted=all/>.)

CONCLUSION

Given the foregoing, Appellants' convictions should be reversed.

Dated: October 9, 2013

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH
CALIFORNIA RULE OF COURT 8.883(b)(1)

I, Maria C. LaHood, appellate counsel (*pro hac vice* application pending) for *amici curiae* the Center for Constitutional Rights and Jewish Voice for Peace, hereby certifies that the foregoing *amici curiae* brief complies with the requirements of California Rule of Court 8.883(b)(1) because according to the word count of the computer program used to prepare it, it contains 6,621 words, including footnotes.

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