Via U.S. Mail

February 9, 2015

Secretary Arne Duncan
U.S. Department of Education
Lyndon Baines Johnson DOE Building
400 Maryland Avenue, SW
Washington, D.C. 20202

CC: Acting Assistant Secretary for Postsecondary Education Dr. Ericka Miller, Deputy Assistant Secretary for International and Foreign Language Education Mohamed Abdel-Kader

RE: Concerns about government interference with Middle East area studies programs

Dear Secretary Duncan:

We, the undersigned civil rights organizations, write to express our strong objection to recent proposals by the Amcha Initiative and the Brandeis Center for statutory and regulatory changes that would condition federal funding for Middle East studies programs on viewpoint-based regulation of academic activity about U.S. foreign policy and the Israeli-Palestinian conflict. The lobbying effort relies on narrow partisan considerations to characterize academic centers as "biased," "anti-American," and "anti-Israel," and calls upon the U.S. Department of Education (the "Department") to pressure university departments to adopt programming sympathetic to Israeli government policies and practices. For the following reasons, we believe these proposals, if implemented, would violate academic freedom, contravene the purpose of Title VI of the Higher Education Act (HEA), and raise serious First Amendment concerns.

1. **Amcha and Brandeis's campaign against Middle East area studies is based on faulty factual and legal premises.**

The Amcha Initiative and the Brandeis Center for Human Rights have published reports purporting to document "anti-Israel bias" at Middle East Studies centers funded under Title VI of the Higher Education Act.[1] The groups are calling upon the Department to combat the purported

[1] See Brandeis Center, *The Morass of Middle East Studies: Title VI of the Higher Education Act and Federally Funded Area Studies,* available at http://brandeiscenter.com/publications/research_articles/morass_of_middle_east; AMCHA Initiative,

bias through a series of controversial measures that would entangle the Department in endless debates about the content of hundreds of academic events organized at universities every year. Before demonstrating why the proposed measures would make for harmful policy and raise serious legal concerns, it is worth noting that the groups' reports—which single out the University of California Los Angeles (UCLA) Center for Near East Studies as a case study—are methodologically unsound and riddled with inaccuracies. The following resources, which are attached for your review, demonstrate how the reports fail to provide an accurate account of UCLA's outreach programs, proceed with overbroad and unreasonable definitions of "anti-Israel" and "anti-Semitic,"[2] and misrepresent the views of speakers at UCLA's events:

- An empirical account by UCLA's Center for Near East Studies of its programming: *Setting the Record Straight: Programming of the G.E. von Grunebaum Center for Near Eastern Studies, 2010-2014.*[3]

- A legal analysis published by the Middle East Research and Information Project (MERIP), *Title VI and Middle East Studies: What You Should Know.*[4]

- *Letter from the Middle East Scholars Association (MESA) to the Brandeis Center*, emphasizing that the Brandeis Center's report is "replete with false or misleading assertions," and that its apparent intent is to stifle academic engagement with the Israeli-Palestinian issue.[5]

The Department would be proceeding on shaky ground if it extrapolated conclusions about all Middle East Studies programs in the country and undertook major policy changes based on these two reports, whose account of just one program at UCLA is unreliable and controversial.

Antisemitic Activity and Anti-Israel Bias at the Center for Near East Studies, University of California at Los Angeles, 2010-2013, available at http://www.AMCHAinitiative.org/wp-content/uploads/2014/09/CNES-Report.pdf.

[2] Amcha's report lists examples of anti-Semitism in Appendix F. *See supra* 1 at 21. The examples are statements that do not, in and of themselves, demonstrate racial or religious animus. For example, Amcha claims it is anti-Semitic that "A speaker claimed that Zionism views Palestinians as 'subhuman, undesirable, a population that should not exist,' and accused Israel of 'denying the absolute basic inalienable human rights of Palestinians,'" and that, "A speaker stated that Israel was created through colonialism, and that 'colonialism and settler colonialism are both inherently unequal and unjust systems.' Another speaker asserted that 'Colonialism and colonization is not a civilizing mission, it's a violent mission of ethnic cleansing.'" These are views within the broad scope of reasonable debate, not examples of bigotry.

[3] James Gelvin, *Setting the Record Straight: Programming of the G.E. von Grunebaum Center for Near Eastern Studies,* 2010-2014, http://international.ucla.edu/cnes/article/146247.

[4] Bekah Wolf, *Title VI and Middle East Studies: What You Should Know,* Middle East Research and Information Project, Nov. 14, 2014, http://www.merip.org/title-vi-middle-east-studies-what-you-should-know.

[5] Letter from Nathan Brown, President of Middle East Studies Association, to Kenneth L. Marcus, President of Brandeis Center, Oct. 23, 2014, available at http://www.mesa.arizona.edu/pdf/US20141023B.pdf ("Your report fails to demonstrate that all or even some of the Title-VI supported Middle East studies centers have failed to meet the mandates of that program. At the same time, your demand that Title VI be defunded, apparently in order to serve your political agenda of stifling open discussion of an issue critical to national concern, not only threatens the academic freedom rights of the scholars and teachers at those centers but also does a grave disservice to the United States.").

2. Government regulation of academic programming contradicts academic freedom and First Amendment principles when motivated by narrow partisan or political considerations.

Those calling on the Department to regulate academic programming about the Middle East have proposed a method of evaluating scholarship that is vulnerable to politicization, is constitutionally suspect, and would infringe academic freedom. The proposals would upend Congressional policy against "mandat[ing], direct[ing] or control[ing] an institution of higher education's specific instructional content, curriculum or program of instruction."[6]

To be clear from the outset, we embrace the notion that universities should endeavor to expose students to diverse points of view, particularly those to which they may not otherwise be exposed outside the university context. Students benefit from exposure to a variety of academic perspectives, including those that present viewpoints both sympathetic to and critical of Israeli state policies, American foreign policies, and so on. But the policy proposals from Amcha and the Brandeis Center go much further.

First, these calls are premised on the characterization of academic work and lectures as "anti-American" and "anti-Israel," which are subjective labels that oversimplify and disparage scholars who engage critically with the status quo. The very meaning of these terms is widely contested.[7] A standard based on such subjective terms will be very difficult, if not impossible, to apply fairly or objectively. Every attempt to do so will no doubt mire the Department in drawn-out disputes of a political character. Although Amcha and Brandeis are focused on Israel and Palestine, such a standard will apply to all area studies programs funded under Title VI of the HEA. Other area studies programs, like those focused on Russia, Latin America, and East Asia, are bound to generate contentious battles of their own as interest groups realize they can influence academic programming simply by lodging a complaint on grounds of "bias."

Second, if funding for higher education and area studies becomes contingent on such mercurial, politicized labels, the requirement and its inevitable chilling effects would contradict First Amendment values. As the Supreme Court has stated, "[i]f there is any fixed star in our

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[6] *See* 20 U.S.C. § 1132-2—Rule of Construction ("Nothing in this subchapter shall be construed to authorize the Secretary to mandate, direct or control an institution of higher education's specific instructional content, curriculum or program of instruction.").

[7] Perhaps nothing demonstrates the vagueness and unreliability of such terms as the example of J Street, an organization in Washington D.C. that promotes itself as "pro-Israel, pro-Peace." Yet many J Street University chapters have been banned from some Jewish communal institutions on the grounds they are "anti-Israel." *See, e.g.,* Solomon Tarlin, *Hillel student board votes to reject J Street U at Boston University,* Times of Israel, Apr. 30, 2014, http://blogs.timesofisrael.com/hillel-student-board-votes-to-reject-j-street-u-at-boston-university/#ixzz30OIAZBzi. Recently, the Conference of Presidents of Major Jewish Organizations voted against admitting J Street because it "has been accused of being anti-Israel." *See* Maya Shwayder, *Conference of Presidents votes against J Street inclusion,* JERUSALEM POST, May 1, 2014, http://www.jpost.com/Jewish-World/Jewish-Features/Conference-Of-Presidents-votes-against-J-Street-inclusion-350972. As the New York Times reported, J Street was accused of "trying to change what pro-Israel means" at a time "when Jewish institutions have been struggling over how much debate over Israel they are willing to tolerate." Michael Paulson, *Jewish Groups Consider Including J Street,* NEW YORK TIMES, Apr. 29, 2014, http://www.nytimes.com/2014/04/30/us/jewish-groups-consider-including-j-street.html. In response to incidents like these, a new movement of Jewish students called Open Hillel is asking for greater "pluralism" on "the subject of Israel," arguing that "no Jewish group should be excluded from the community for its political views." *See* Open Hillel, About Us, http://openhillel.org/about.php.

constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion."[8] Federal courts have consistently prohibited government interference with academic programming in educational institutions when such interference is motivated by narrow partisan or political considerations, or official disagreement with certain ideas.[9] The government may set aside federal funding with viewpoint-neutral conditions, like requiring funding to be used to promote the study of the Middle East; but it may not require recipients to promote or forbid a particular set of opinions on the issue.[10] Brandeis's proposals would put the Department in the position of determining the scope of legitimate academic viewpoints, a form of government interference that not only intrudes on a sphere traditionally left to academic experts, but also approaches a prescription of orthodoxy.

Third, to require such measures under the guise of "balance" or "diverse perspectives," as Amcha and Brandeis do, misses the point.[11] Though universities should—and do—expose students to a robust variety of viewpoints, that variety should reflect scholarly judgments that are based on pedagogical and curricular value, not political considerations.[12] Brandeis's recommendations would

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[8] *W. Va. State Bd. of Educ. v. Barnett*, 319 U.S. 624, 642 (1943).

[9] *See*, *e.g.*, *Bd. Of Educ., Island Trees Union Free School Dist. No. 26 v. Pico,* 457 U.S. 853, 872 (1982) ("[S]chool boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.") (quotation and citation omitted); *id.* at 870 (government discretion over pedagogical matters "may not be exercised in a narrowly partisan or political manner"). *See, also, Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 601 (1967) (striking down law requiring investigation and removal of teachers who advocated "treasonous" or "seditious" ideas, in part because it would "stifle that free play of the spirit which all teachers ought especially to cultivate and practice" and "[i]t would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate [enforcement] machinery") (citation and quotation omitted).

[10] Such a condition would improperly require universities to endow particular viewpoints with academic legitimacy irrespective of academic merit. *Cf. Agency for Intl. Development v. Alliance for Open Society Intl., Inc.,* 133 S.Ct. 2321, 2331 (2013) (holding that federal grants to combat HIV worldwide could not be conditioned on requiring recipients to adopt policies opposing prostitution and or to refrain from advocating for the legalization of prostitution because federal funding cannot be conditioned on a "recipient espous[ing] a specific belief as its own"). *See, also, Epperson v. State of Ark.*, 393 U.S. 97, 107 (1968) (striking down Arkansas law banning the teaching of evolution in public schools because "Arkansas did not seek to excise from the curricula of its schools and universities *all* discussion of the origin of man," but rather, "to blot out a particular theory because of its supposed conflict with the Biblical account, literally read") (emphasis added).

[11] AMCHA and Brandeis's campaign is reminiscent of the mid-2000s "Academic Bill of Rights" movement, which, under the guise of "intellectual diversity," sought to mandate the inclusion of "conservative" viewpoints in universities in response to perceived "liberal bias." The American Association of University Professors (AAUP) vigorously opposed such proposals in at least 28 state legislatures, explaining that "[t]he danger of such guidelines [enforcing 'intellectual diversity'] is that they invite diversity to be measured by political standards that diverge from the academic criteria of the scholarly profession" and that "they seek to enforce a kind of diversity that is instead determined by essentially political categories, like the number of Republicans or Democrats on a faculty, or the number of conservatives or liberals." To date, no such legislative effort has succeeded. AMCHA and Brandeis's recommendations threaten academic freedom in the same way by attempting to create a government apparatus to enforce "diverse perspectives" in federally-funded programs based on essentially political categories like "pro" or "anti-Israel." *See* American Association of University Professors, *Academic Bill of Rights,* available at http://www.aaup.org/AAUP/comm/rep/A/abor.htm (attached). *See, also,* AAUP, *The 'Academic Bill of Rights'-Coming to Your Campus*, available at http://www.aaup.org/our-work/government-relations/past-campaigns-academic-bill-rights/academic-bill-rights-coming-your.

[12] *See* Nancy Whitmore, *First Amendment showdown: Intellectual diversity mandates and the academic marketplace,* Communication Law and Policy, Vol. 13, No. 3 at 370-71 (Summer 2008), available at http://digitalcommons.butler.edu/cgi/viewcontent.cgi?article=1007&context=ccom_papers ("The content selected and ultimately disseminated through curricular offerings and scholarly pursuits represents a professional judgment by the

instead put Department officials in the position of evaluating programs under narrow partisan or political criteria. This violates "[a] fundamental premise of academic freedom […] that decisions concerning the quality of scholarship and teaching are to be made by reference to the standards of the academic profession, *as interpreted and applied by the community of scholars who are qualified by expertise and training to establish such standards.*"[13]

Fourth, Brandeis's version of balance looks at educational institutions in isolation, neglecting a key facet of academic life: intellectual diversity is achieved not solely within institutions but across them. Thus, particular institutions may often be associated with "schools of thought," allowing particular ideas or intellectual strands to be thoroughly developed in one place and then debated in the academic community more broadly. The Chicago School of Economics, for example, would not have thrived in the same way if the University of Chicago economics department had been mandated to include a Keynesian or Marxist on every academic panel or lecture it organized. The mechanical quotas suggested by Brandeis would undermine the ability of different centers to flourish and contribute distinct scholarship to the intellectual community.

Fifth, to suggest the HEA requires this kind of intrusion on a center's curricular judgment misreads the statute. By use of the term "diverse perspectives" in some sections of the Higher Education Act, Congress did not mean to require the narrow, politicized notion of "balance" put forth by Amcha and Brandeis. To the contrary, in 2008 Congress specifically amended the Higher Education Act to include a rule of construction that "[n]othing in this subchapter shall be construed to authorize the Secretary to mandate, direct or control an institution of higher education's specific instructional content, curriculum or program of instruction."[14] Further, though the statute requires applicants to explain how their programs facilitate "diverse perspectives,"[15] Congress refrained from making that a criterion for evaluating applications.[16]

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university's academicians on the value of the communication to the discipline it serves. Academicians, therefore, are not disseminators of government ideas or scripted professional speech. They function as instructors and scholars whose proper role may well include the evaluation of government administrations, policies and actions.").

[13] *See* AAUP Statement on Academic Bill of Rights, *supra* 10 (emphasis added). The incoherence of Brandeis's version of "balance" could be seen as analogous to potential complaints by oil companies that scientists at federally funded universities exhibit a "global warming" bias, and requests that the federal government require the promotion of more "diverse perspectives" by including voices that deny global warming. Such an ends-oriented notion of balance, which looks at final conclusions rather than academic merit or methodology, may be appropriate for a political talk-show, but not a university.

[14] *See* 20 U.S.C. § 1132-2—Rule of Construction.

[15] *See* 20 U.S.C. § 1122(e)(1) (applications must include "an explanation of how the activities funded by the grant will reflect diverse perspectives and a wide range of views and generate debate on world regions and international affairs").

[16] *See* 20 U.S.C. § 1127(b) (grant applications should be evaluated for, *inter alia,* "the degree to which activities of centers…address national needs, and generate information for and disseminate information to the public," but no reference to 'diverse perspectives'). A Republican initiative to include a reference to "diverse perspectives" in Section 1127(b) failed. In September 2003, House Republicans proposed House Resolution 3077 to re-authorize Title VI funding under the Higher Education Act, proposing to amend selection criteria for grant recipients such that "the Secretary shall take into account the degree to which activities of centers… foster debate on American foreign policy from diverse perspectives." H.R. 3077, 108th Cong. (2003). That bill died, but similar language was re-introduced the following Congressional cycle. *See* H.R. 509, 109th Cong. (2005). However, Republicans lost the House in 2006 and, in 2007, when comprehensive legislation to re-authorize the Higher Education Act was introduced, the proposed language regarding "diverse perspectives" was not included; instead, the language proposed "the Secretary shall take into account the degree to which activities of centers… foster debate on international issues." *See* H.R. 4137, 110th Cong. (2007).

The Brandeis and Amcha proposals threaten to inhibit—not promote—wide-ranging debate on world affairs. Their likely outcome is not more debate, but less—in other words, a chilling effect on engagement with the Israeli-Palestinian conflict in Middle East Studies centers altogether. As such, their recommendations are intolerable intrusions on academic freedom that will undermine the purpose of the HEA. If the Department pursues guidance on Title VI's "diverse perspectives" language, it must ensure the guidance is immune to the harmful politicization described above.

3. A complaint and investigation mechanism will be vulnerable to political abuse and will chill academic inquiry on controversial subjects.

Amcha and Brandeis also urge the Department to create a mechanism to receive and investigate complaints of "bias" in Middle East Studies. Such a mechanism would simply create new opportunities for political abuse. Amcha and Brandeis's reports suggest there are organizations prepared to aggressively use those procedures against Middle East Studies centers featuring critical examination of Israeli state policy. However, this procedure would be available for every other area studies program, too, threatening to open the floodgates to "bias" complaints and investigations anytime someone objects that their point of view was not included in an academic panel about a certain topic.

The prospect of federal investigation, even for claims ultimately deemed to be meritless, will have an inherent chilling incentive on scholars and universities to steer clear from controversial issues that tend to invite criticism from partisans outside the university.[17] The Ninth Circuit has noted that the threat of civil liability based on academic programming protected by the First Amendment has the inevitable and undesirable effect of motivating schools to "buy their peace" by "avoiding the use of books or other materials that express messages" likely to invite complaints.[18] Faced with the prospect of "bias" complaints, the directors of national resource centers and other Title VI-funded programs, who are often busy scholars themselves, will likely avoid organizing panels on controversial topics if they may be required to devote their limited time and resources to responding to a government investigation rather than fulfilling their research and teaching missions.

That outcome would contradict the Higher Education Act's express purpose of "generat[ing] debate on world regions and international affairs" by creating an incentive for federally funded Middle East Studies programs to avoid controversial topics.[19]

4. Existing law already guards universities and students from anti-Semitism.

Amcha and Brandeis's proposals also make the spurious claim that MES centers promote anti-Semitism or create a hostile educational environment for Jewish students.[20] Such claims, if true, would be troubling. However, the Department's Office for Civil Rights has investigated allegations

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[17] *See, e.g., Monteiro v. Tempe Union High School Dist.,* 158 F.3d 1022, 1029 (9th Cir. 1998) (noting that "[legal] complaints based on speech protected by the First Amendment have far-ranging and deleterious effects, and the mere threat of civil liability can cause potential defendants to 'steer far wider of the unlawful zone'") (citation omitted).

[18] *Id.* (quotation omitted).

[19] *See* 20 U.S.C. § 1122(e)(1).

[20] *See supra* 2.

of anti-Semitism related to the Israeli-Palestinian conflict in at least five universities, determining they were unfounded.[21] Further, it makes little sense to alter the Department's administration of the Higher Education Act to do something already achieved by Title VI of the Civil Rights Act of 1964. Federally funded universities are already obligated to eliminate discrimination against students on the basis of race, color or national origin, among other protected characteristics.[22] Such protections are enforced by a comprehensive regulatory scheme[23] and can also be enforced by private parties in federal court.[24]

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Given the serious issues at stake, we ask the Department to consider the concerns outlined above, and to proactively solicit input from scholars in the field, such as the Middle East Studies Association and current funding recipients. Please also inform and include the undersigned groups regarding possible policy changes to the funding structure for area studies programs under Title VI of the Higher Education Act.

You may be in touch with the undersigned organizations via Yaman Salahi, staff attorney with the Asian Law Caucus, at 415-848-7711, yamans@advancingjustice-alc.org.

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[21] *See, e.g.,* OCR Case No. 09-12-2259 (UC Berkeley, closed Aug. 19, 2013) (alleging student activism criticizing Israeli policies creates a hostile environment); Case No. 09-07-2205 (UC Irvine, closed Aug. 19, 2013) (same); Case No. 09-09-2145 (UC Santa Cruz, closed Aug. 19, 2013) (alleging university created hostile environment by 'sponsoring' panels featuring speakers or films critical of Israel); Case No. 02-11-2157 (Rutgers University, closed July 31, 2014) (alleging, inter alia, that Center for Middle East Studies created hostile environment through programming critical of Israel); Case No. 02-11-2193 (Barnard College, closed Jan. 11, 2012) (alleging university unlawfully "steered" a Jewish student away from a professor's course based on his criticism of Israel). Some of these complaints were filed by the AMCHA Initiative, the Brandeis Center, or their partners.

[22] See 42 U.S.C. § 2000d *et seq.* (1964) and 20 U.S.C §§ 1681-1688 (1972).

[23] *See* 34 C.F.R. § 100 *et seq.*

[24] *See Alexander v. Sandoval,* 532 U.S. 275 (2001) (recognizing implied private cause of action for intentional discrimination in violation of Title VI of the Civil Rights Act of 1964).

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