

FIRE

Foundation for Individual
Rights and Expression

December 6, 2023

Ronald D. Liebowitz
Office of the President, MS 100
Irving Enclave 074-120
415 South Street
Waltham, Massachusetts 02453

Sent via U.S. Mail and Electronic Mail (president@brandeis.edu)

Dear President Liebowitz:

FIRE¹ is concerned by Brandeis University's November 10 shutdown of an on-campus rally protesting derecognition of Brandeis's Students for Justice in Palestine chapter and the accompanying arrest of protesters. As we explained in our enclosed November 7 letter, denying student groups recognition based on viewpoint, speech, or a fear of disruption violates Brandeis's free speech promises.² Those same protections also prohibit the university from shutting down a protest and arresting peaceful protesters.³

On November 10, Brandeis's Revolutionary Student Organization organized a demonstration on campus to protest the university's November 6 derecognition of SJP.⁴ The demonstration was originally planned for outside the Bernstein-Marcus Administration Center, but students ended up gathering on the Great Lawn instead for unknown reasons.⁵ For the first hour, a

¹ As you know, for more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

² "Peaceful protest is fully appropriate to an environment of vigorous discussion and debate[.]" BRANDEIS UNIV., *Principles, Free Speech and Free Expression* (adopted September 2018), <https://www.brandeis.edu/free-expression/principles.html> [<https://perma.cc/UEA5-436E>].

³ *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228, 253 (6th Cir. 2015) ("The rule to be followed is that when the police seek to enforce law and order, they must do so in a way that does not unnecessarily infringe upon the constitutional rights of law-abiding citizens.") (citing *Gregory v. City of Chicago*, 394 U.S. 111, 120 (1969)).

⁴ Revolutionary Student Organization – Brandeis (@rso.brandeis), INSTAGRAM (Nov. 8, 2023), <https://www.instagram.com/p/CzZJUsGO2BA/> [<https://perma.cc/F9WP-RB5Y>]. The recitation of facts here reflects our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

⁵ Isabel Roseth, *Demonstrators arrested at rally protesting the derecognition of SJP*, THE JUSTICE (Nov. 14, 2023, 11:00 AM), <https://www.thejustice.org/article/2023/11/demonstrators-arrested-at-rally-protesting-the-derecognition-of-sjp#> [<https://perma.cc/6WV6-E628>].

series of speakers addressed the crowd, calling for an immediate ceasefire, criticizing Brandeis's support for Israel and silencing of pro-Palestinian voices, disputing your claim that "From the river to the sea, Palestine will be free" calls for erasure of the Jewish state, and praising the courage of the student-activists present.⁶ In between speakers, the crowd variously chanted, "Intifada, intifada," "Long live the resistance," "Long live the intifada," and "Resistance is just when people are occupied!"⁷

Brandeis and Waltham police were stationed in the area and the rally was reportedly peaceful until a police officer ordered the "unlawful assembly" to "immediately and peacefully disperse" or "reasonable and necessary force will be used."⁸ Many protesters remained and continued chanting.⁹ When one student approached the line of officers, three officers forced the student to the ground and arrested them.¹⁰ In response, some protesters screamed and ran, one student threw a cup of liquid at the officers and was thrown to the ground, and officers tackled and arrested a third student.¹¹ In total, police arrested seven people, including three students.¹²

Addressing the incident on November 11, you urged "there is a level of responsibility that comes with free speech that was not exercised by many of the protestors yesterday, as the demonstration devolved into the invocation of hate speech."¹³ But Brandeis also has assumed the responsibility to protect students' right to peacefully "protest, rally, or demonstrate, provided such protests or demonstrations do not disrupt University operations or obstruct physical movement."¹⁴ That right, enshrined in university policy, prevents Brandeis from shutting down peaceful protests based on the views expressed. Instead, Brandeis must first respond to any violence or disruption with "bona fide efforts" to protect expressive rights "by other, less restrictive means" than shutting down the rally.¹⁵ As we explained in our previous

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* The officer cited Mass. General Law, ch. 261, § 1, which allows "state police and the sheriff of the county and his deputies" to "command all persons so assembled immediately and peaceably to disperse," and if they do not disperse, to "command the assistance of all persons there present in suppressing such riot or unlawful assembly and arresting such persons."

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Letter to the Brandeis Community from Ron Liebowitz, President, Nov. 11, 2023, <https://www.brandeis.edu/president/letters/2023-11-11-open-dialogue-collective-responsibility.html> [<https://perma.cc/2PWT-U9JL>].

¹⁴ BRANDEIS UNIV., Department of Students Rights and Community Standards, *Section 7. Campus Protests and Demonstrations*, <https://www.brandeis.edu/student-rights-community-standards/rights-responsibilities/current/section-7.html> [<https://perma.cc/TAB2-9YKL>].

¹⁵ *Bible Believers*, 805 F.3d at 255. Students reasonably look to First Amendment jurisprudence to understand the expressive freedoms Brandeis promises.

letter, the “bedrock principle underlying” freedom of speech is that it may not be restricted on the basis that others find it offensive or even hateful.¹⁶

We again strongly urge you to honor the university’s commitment to student expressive freedom by dropping any charges against student protesters who did not engage in violence, ceasing any investigatory or disciplinary actions against such student protesters, and reinstating Brandeis’s SJP chapter. We request a substantive response to this letter no later than close of business December 19, 2023.

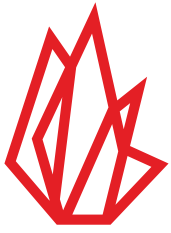
Sincerely,



Jessie Appleby
Program Officer, Campus Rights Advocacy

Encl.

¹⁶ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).



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November 7, 2023

Ronald D. Liebowitz
Office of the President, MS 100
Irving Enclave 074-120
Brandeis University
415 South Street
Waltham, Massachusetts 02453

URGENT

Sent via Electronic Mail and U.S. Mail (president@brandeis.edu)

Dear President Liebowitz:

FIRE¹ is deeply disappointed that Brandeis University has derecognized its campus chapter of Students for Justice in Palestine based on the university's opposition to the group's views, specifically students' "chants and social media posts calling for violence against Jews or the annihilation of the state of Israel."² The university also cited the National SJP's "call[] on its chapters to engage in conduct that supports Hamas in its call for the violent elimination of Israel and the Jewish people," tactics Brandeis says "are not protected by the University's Principles."³

While criminal conduct such as issuing true threats, incitement, or providing material support to terrorist groups is unprotected, there is no evidence these students have done anything other than engage in fully protected speech—even if it is speech many members of the Brandeis

¹ As you know, for more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

² Ronald D. Liebowitz, *How universities should confront antisemitism on campus*, THE BOSTON GLOBE (Nov. 6, 2023), www.bostonglobe.com/2023/11/06/opinion/brandeis-university-antisemitism-protests-israel-hamas. You also cited the group's use of "phrases such as 'from the river to the sea, Palestine will be free' — which calls for the erasure of the Jewish state; 'there is only one solution' — which echoes the Nazi strategy of killing all Jews; and 'intifada, intifada' — an incitement to violence against Israeli civilians." *Id.* Note that the recitation here reflects our understanding of the pertinent facts, though we appreciate you may have additional information to offer, and if so, we invite you to share it with us.

³ Haley Cohen, *Brandeis becomes first private university to ban Students for Justice in Palestine on campus*, JEWISH INSIDER (Nov. 6, 2023), <https://jewishinsider.com/2023/11/brandeis-becomes-first-private-university-to-ban-students-for-justice-in-palestine-on-campus>.

community find deeply offensive. Derecognition is the harshest form of punishment Brandeis can mete out on a student group, and imposing it here gravely contravenes Brandeis' clear and legally binding promises to honor students' expressive freedoms on campus. We urge Brandeis to swiftly reverse its decision to derecognize this student group and publicly recommit to the institution's laudable free expression policies.

Those policies include Brandeis' 2018 adoption of a version of the Chicago Statement, a gold-standard free speech policy statement that articulates the university's "commitment to free, robust, and uninhibited debate and deliberation among all members of the University's community."⁴ Brandeis further expressly acknowledges its "responsibility to encourage the airing of the widest range of political and scholarly opinions and to prevent attempts to shut down conversations, no matter what their topic."⁵

These promises to protect faculty and students' freedom of speech represent not just a moral obligation, but a contractually binding legal duty on the part of the university.⁶ Under Massachusetts law, the relationship between a student and a university is contractual in nature, the terms of which are contained in the student handbook and other college materials.⁷ The university's policy statement on "Free Speech and Free Expression" principles is one such document.⁸

Students and faculty thus reasonably look to First Amendment jurisprudence to understand the contours of the expressive freedoms Brandeis promises. Broadly, the First Amendment prohibits viewpoint discrimination. For example, it bars public universities from denying student groups recognition or funding due to the "ideology or the opinion or perspective of the speaker[.]"⁹ The First Amendment also provides "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends"—a fundamental right "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas."¹⁰

It is settled law that denying student group recognition based on viewpoint, speech, or fear of disruption violates free speech principles, particularly with regard to campus chapter groups' ties to a national organization. More than fifty years ago, in *Healy v. James*, the Supreme Court held that the president of a public college violated the First Amendment when he refused to grant recognition to a chapter of Students for a Democratic Society ("SDS").¹¹ Following a "climate of unrest" on college campuses, replete with "widespread civil

⁴ *Adopting the Chicago Statement*, FIRE (last accessed Nov. 6, 2023), <https://www.thefire.org/research-learn/adopting-chicago-statement>.

⁵ BRANDEIS UNIV., *Principles, Free Speech and Free Expression* (adopted September 2018), <https://www.brandeis.edu/free-expression/principles.html> [<https://perma.cc/UEA5-436E>].

⁶ *Doe v. W. New England Univ.*, 228 F. Supp. 3d 154, 169 (D. Mass. 2017).

⁷ *Id.*

⁸ *Principles, Free Speech and Free Expression*, *supra* note 5.

⁹ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *see also Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).

¹⁰ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

¹¹ 408 U.S. at 187–88.

disobedience . . . accompanied by the seizure of buildings, vandalism, and arson,” causing some “colleges [to] shut down altogether,” students sought to form a new chapter of SDS at the college.¹² The college president refused to grant the group recognition, citing its philosophy and ties to the national SDS organization, which had “published aims . . . which include disruption and violence.”¹³ The Court held that “denial of official recognition, without justification, to college organizations burdens or abridges” their student members’ First Amendment rights.¹⁴ Brandeis similarly lacks adequate justification for derecognizing SJP, and therefore its actions violate students’ expressive rights.

Your assertion that SJP engaged in punishable harassment is also unsubstantiated.¹⁵ The Supreme Court established a strict definition of peer harassment: the expression must be unwelcome, discriminatory on the basis of protected status, and “so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school.”¹⁶ The U.S. Department of Education’s Office of Civil Rights has clarified that discriminatory harassment “must include something beyond the mere expression of views, words, symbols, or thoughts that some person finds offensive.”¹⁷

SJP’s alleged comments, even considered together, do not approach this high bar and are thus fully protected by Brandeis’ free speech promises. Yet Brandeis advances no evidence regarding the severity or the pervasiveness of SJP’s political advocacy, nor has it demonstrated any students were deprived of educational opportunities.¹⁸ Mere philosophical support for or general endorsement of violence is protected speech.¹⁹ Asserting the “moral propriety or even moral necessity for a resort to force or violence” is also protected.²⁰ As the Court has held: “What is a threat must be distinguished from what is constitutionally protected speech,” including “political hyperbole,” given our country’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”²¹

¹² *Id.* at 171–72.

¹³ *Id.* at 174–75, n. 4.

¹⁴ *Id.* at 181.

¹⁵ Letter from Brandeis to Students for Justice in Palestine Leadership (Nov. 6, 2023) (on file with author).

¹⁶ *Davis v. Monroe County Board of Education*, 526 U.S. 629, 650 (1999).

¹⁷ U.S. Dep’t of Educ., Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec’y for Civil Rights (July 28, 2003), <https://www2.ed.gov/about/offices/list/ocr/firstamend.html> [<https://perma.cc/9DCA-XMFD>].

¹⁸ Additionally, allegations of student group misconduct are disciplinary matters properly handled under the university’s Student Conduct Process, where Brandeis must afford the group notice of the allegations and opportunity to contest them before punishment. BRANDEIS UNIV., *Rights and Responsibilities*, <https://www.brandeis.edu/student-rights-community-standards/rights-responsibilities/current/section-18.html> [<https://perma.cc/Q4VP-ZR3C>].

¹⁹ *Watts v. United States*, 394 U.S. 705, 708 (1969) (man’s statement, after being drafted to serve in the Vietnam War—“If they ever make me carry a rifle the first man I want to get in my sights is L. B. J.”—was rhetorical hyperbole protected by the First Amendment, not a true threat to kill the president).

²⁰ *Noto v. United States*, 367 U.S. 290, 297–98 (1961).

²¹ *Watts*, 394 U.S. at 707-08.

Brandeis' free speech commitments invoke these important First Amendment principles that exist for precisely the moments when social and political unrest triggers high emotions, deep divisions, and the temptation to turn to censorship. When universities depart from their core principles and silence views they consider odious, they significantly undermine the expressive rights of all on campus.

In this difficult moment, we urge you to honor your commitment as the leader of a university whose mission depends on the vast expressive freedoms afforded to all on campus. We urge you in the strongest possible terms to stand by the university's preeminent obligation to honor students' core expressive freedoms, by reinstating the university's SJP chapter. Given the urgent nature of this matter, we request a substantive response to our inquiry no later than close of business November 10, 2023.

Sincerely,

A handwritten signature in black ink, appearing to read 'Alex Morey', with a stylized, cursive flourish at the end.

Alex Morey
Director, Campus Rights Advocacy