April 29, 2025

Re: Vote "NO" on S. 558, the Antisemitism Awareness Act; HELP Committee Markup on April 30

Dear Senator:

The American Civil Liberties Union strongly urges you to vote "NO" on S. 558, the Antisemitism Awareness Act, during the April 30 Health, Education, Labor and Pensions Committee markup.

The ACLU has long supported existing federal law that already prohibits antisemitic discrimination, including harassment, in federally funded programs and activities. S. 558 is not needed to protect against antisemitic discrimination. But to be clear, the bill is not merely unnecessary--instead, it would cause harm by likely chilling free speech of students, faculty, and staff in both colleges and universities and elementary and secondary schools, by incorrectly equating criticism of the Israeli government with antisemitism. The HELP Committee should protect the First Amendment by rejecting this harmful legislation.

S. 558 would direct the Department of Education to take the International Holocaust Remembrance Alliance (IHRA)'s working definition of "antisemitism" into consideration when determining whether alleged harassment was motivated by antisemitic intent and violates Title VI of the Civil Rights Act of 1964. Title VI prohibits discrimination on the basis of race, color, or national origin in programs receiving federal financial assistance, including in both elementary and secondary schools and higher education. The federal government itself has long interpreted and applied Title VI--through both Republican and Democratic administrations--to prohibit harassment or discrimination against Jews, Hindus, Muslims, and Sikhs as well as others when that discrimination is based on the group's actual or perceived shared ancestry or ethnic characteristics.[1] Enforcement of these existing protections is critically important, particularly in the current environment.

The IHRA working definition, however, is overbroad and would result in harm. It would equate protected political speech with unprotected discrimination, and enshrining it into regulation would both chill the exercise of First Amendment rights and risk undermining the Department of Education's legitimate and important efforts to combat discrimination. Criticism of Israel and its policies is political speech, squarely protected by the First Amendment. But the IHRA working definition declares that "denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist

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[1] Know Your Rights: Title VI and Religion, U.S. Department of Education (2017), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201701-religious-disc.pdf.

endeavor," "drawing comparisons of contemporary Israeli policy to that of the Nazis," and "applying double standards by requiring of [Israel] a behavior not expected or demanded of any other democratic nation" are all examples of antisemitism.[2]

The IHRA definition of antisemitism is also unconstitutional. Recently, in Students for Justice in Palestine v. Abbott, the United States District Court for the Western District of Texas found that an executive order directing all Texas higher education institutions to update and enforce campus free speech policies to address antisemitic speech and use the IHRA definition of antisemitism likely violates the First Amendment. The judge found that "the incorporation of [the IHRA definition of antisemitism] is viewpoint discrimination" because it makes the utterance of specific content punishable.[3]

Speech that is critical of Israel or any other government cannot, alone, constitute harassment. Although this bill does not change the definition of harassment, it does direct the Department of Education to consider protected speech in determining whether any actionable harassment under Title VI, including allegations that the school is responsible for a "hostile environment," was motivated by antisemitism. A determination of a violation may ultimately lead to cuts to school funding.

The ACLU does not take a position on the conflict between Israel and Palestine, but it does staunchly defend the right of those in the United States to speak out on domestic and international political matters. The ability to criticize governments and their policies is a critical component of our democracy. In fact, the Supreme Court has held that political speech is "at the core of what the First Amendment is designed to protect."[4] Promoting discussion and debate on issues of public interest are critical for "the bringing about of political and social changes desired by the people."[5] Likewise the principles of academic freedom require higher education institutions to safeguard protected speech and political debate in order to help students pursue knowledge.

If this bill becomes law, political speech critical of Israel will likely be censored in several ways. The lead author of the original IHRA definition, Kenneth Stern, has himself opposed the application of this definition to campus speech, noting

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[2] Working Definition of Antisemitism, International Holocaust Remembrance Alliance, https://holocaustremembrance.com/resources/working-definition-antisemitism (last accessed April. 11, 2024).

[3] Students for Justice in Palestine v. Abbott, the United States District Court for the Western District of Texas, https://storage.courtlistener.com/recap/gov.uscourts.txwd.1172787806/gov.uscourts.txwd.1172787806.62.0.pdf.

[4] Morse v. Frederick, 551 U.S. 393, 403 (2007) (quoting Virginia v. Black , 538 U.S. 343, 365 (2003) (plurality opinion)).

[5] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1997) (quoting Buckley v. Valeo , 424 U.S. 1, 14 (1976)).

that codifying this definition would lead campus administrators to "fear lawsuits when outside groups complain about anti-Israel expression, and the University doesn't punish, stop or denounce it."[6]

First, S. 558 could result in colleges and universities suppressing a wide variety of speech critical of Israel or in support of Palestinian rights in an effort to avoid investigations by the Department and the potential loss of funding, even where such speech is protected and does not qualify as harassment. Even without S. 558, advocacy groups have already filed or threatened to file numerous Title VI complaints and lawsuits, alleging that colleges have violated Title VI merely by condoning Palestinian rights groups, events, and advocacy. For example, in September 2023, the pro-Israel group Santa Fe Middle East Watch claimed that the University of New Mexico's anthropology department would violate the New Mexico Governor's executive order using this same definition of antisemitism if they hosted Mohammed El-Kurd, a Palestinian poet and writer currently serving as the Nation's Palestine correspondent. Moreover, in February 2020, the David Horowitz Freedom Center sent a letter to Pomona and Pitzer college officials alleging "the colleges' liability under Title VI" for, among other things, co-sponsoring a Students for Justice in Palestine event featuring a screening of the film 'Gaza Fights for Freedom,' and funding a panel on "Perspectives on Colleges and the Israeli-Palestinian Conflict."[7] Additionally, there have been multiple instances of university censorship of pro-Palestinian expression after the October 7, 2023 Hamas attack on Israel. These include the University of Pennsylvania denying a screening of a documentary which raises concerns some young Jews have about Israel's treatment of Palestinians,[8] and Brandeis University banning the student group Students for Justice in Palestine.[9] Equating criticism of Israel with antisemitism by law under a threat of investigation will only create more fear in schools, prompting administrators to silence this speech regardless of whether it is protected.

Second, even where administrators do not take formal action, students and their organizations, faculty, and university staff may be deterred from speaking and

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[6] Kenneth S. Stern, *S.C. antisemitism bill isn't needed*, The Post and Courier (Sept. 14, 2020), https://www.postandcourier.com/s-c-anti-semitism-bill-isn-t-needed/article_f17d607e-29e5-11e7-b4a7-a35035f3dc38.html.

[7] Letter from the David Horowitz Freedom Center to Pomona and Prizer Colleges, Feb 3, 2020, available at https://drive.google.com/file/d/12jTDUIG3AITOI58VKg8n7MrUEb34icRJ/view.

[8] Aziza Shuler, *Film screening about Israel and Palestine Causes Controversy at UPenn*, CBS News Philadelphia (Nov. 27, 2023), https://www.cbsnews.com/philadelphia/news/israel-hamas-war-university-of-pennsylvania-israelism-screening/.

[9] Jordan Howell, *Free Speech Promises be Damned, Brandeis Bans Students for Justice in Palestine*, Foundation for Individual Rights and Expression (Nov. 7, 2023), https://www.thefire.org/news/free-speech-promises-be-damned-brandeis-bans-students-justice-palestine#:~:text=Share-,Free%20speech%20promises%20be%20damned%2C%20Brandeis%20bans%20Students%20for%20Justice,campus%20chapter%20since%20October%207.&text=The%20Brandeis%20University%20chapter%20of,in%20Palestine%20is%20no%20more.

organizing on these issues. Activists would be understandably hesitant to engage in political expression criticizing Israel or advocating for Palestinian rights if they have reason to believe the federal government will actively investigate such expression in connection with harassment complaints and investigations. We have already heard anecdotal evidence that many students on campus are afraid to speak up.

Finally, the bill would likely inspire an increasing number of complaints focused on constitutionally protected criticism of Israel. These complaints will not only cause schools to limit speech out of fear, but will also force both the Department and covered schools and universities to devote time and resources to addressing complaints about constitutionally protected speech, instead of meritorious harassment complaints.

Encouraging the Department of Education to consider the IHRA working definition of antisemitism would lead to more censorship on campus, and change the nature of universities, which exist to promote the free flow of information and marketplace of ideas. While we wholly support efforts to fight discrimination, including harassment, through Title VI complaints and investigations, we strongly oppose use of the IHRA definition, or any definition of discrimination that threatens to censor or penalize political speech protected by the First Amendment. We urge you to vote "No" on S. 558. If you have any questions, please do not hesitate to reach out to canders@aclu.org.

Sincerely,

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