



June 4, 2018

Re: Anti-Semitism Awareness Act, S. 2940, H.R. 5924

Dear Senator/Representative:

On behalf of the American Civil Liberties Union (ACLU) and our nearly two million members and supporters, we urge members of the Senate to oppose H.R. 5924/S. 2940, the “Anti-Semitism Awareness Act.” Federal law already prohibits anti-Semitic discrimination and harassment by federally-funded entities. The proposed legislation is therefore unnecessary—and likely to chill free speech of students on college campuses by incorrectly equating criticism of the Israeli government with anti-Semitism.

A previous version of this bill was introduced in 2016. Without hearing, committee consideration, committee or floor vote, or any meaningful floor debate, the Senate passed the bill just hours after it was introduced. Later the same day, a parallel bill was introduced in the House. The ACLU opposed the bill in the House along with other organizations, raising free speech concerns. Because of these concerns, this version never made it out of the House. Many of the same concerns remain in the current bill.

The proposed bill directs the Department of Education (Department) to take the State Department’s definition of anti-Semitism “into consideration” when determining whether alleged harassment was motivated by anti-Semitic 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 higher education. It has been interpreted to prohibit harassment or discrimination against Jews, Hindus, Muslims, and Sikhs as well as others.¹ These existing protections are critically important, particularly in the current environment. According to the Federal Bureau of Investigation, hate crimes are on the rise and bias-motivated incidents against Jews are increasing.² Anti-Semitic harassment is a serious problem in the United States and it has no place in our government-funded institutions.

Unfortunately, the overbroad definition of anti-Semitism in this bill risks incorrectly equating constitutionally protected criticism of Israel with anti-Semitism, making it likely that free speech will be chilled on campuses. The examples incorporated into the bill’s definition of anti-Semitism include actions and statements critical of Israel, including many constitutionally protected statements. For example, it includes applying a “double standard for Israel,” “blaming Israel for all inter-religious or political tensions,” or “denying the Jewish people their right to self-determination.” The State Department’s definition of anti-

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

FAIZ SHAKIR
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

¹ Religious Discrimination, U.S. Department of Education (last modified Jan. 24, 2017) available at <https://www2.ed.gov/about/offices/list/ocr/religion.html>.

² Hate Crimes Statistics, Federal Bureau of Investigation, Department of Justice (2016) available at <https://ucr.fbi.gov/hate-crime/2016/topic-pages/incidentsandoffenses>.

Semitism was itself adapted from one used by the European Monitoring Centre to facilitate data collection about anti-Semitism in Europe. Kenneth Stern, the lead author of the original definition, has himself opposed application of this definition to campus speech. Stern noted the definition was “never intended as a vehicle to monitor or suppress speech on campus” and that it was not only unnecessary, but would also “hurt Jewish students and the academy”³ by preventing conversations of the issues and isolating Jewish students. In his testimony before Congress last year, Stern also discussed the ways in which the definition has been used to curtail protected speech.⁴

The First Amendment squarely protects political speech, including criticism of Israel or any other government. Such speech cannot itself constitute harassment. Although this bill does not change the definition of harassment, it does direct the Department to consider such speech in determining whether any actionable harassment under Title VI, including allegations that the school is responsible for a “hostile environment,” was motivated by anti-Semitism, which may ultimately lead to cuts to school funding. While the bill includes rules of construction to clarify that this does not change the standard by which the Department determines whether actionable harassment has in fact occurred, it will almost certainly result in the chilling of protected political speech.

If this bill becomes law, political speech critical of Israel will likely be censored in a number of ways. First, colleges and universities may suppress 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 in the absence of such a law, advocacy groups have filed or threatened to file numerous Title VI complaints and lawsuits, alleging that colleges have violated Title VI by condoning Palestinian rights groups, events, and advocacy.⁵ To avoid Title VI complaints and investigations, schools have cancelled events, prevented student groups from forming, or penalized students or groups engaged in political activism.⁶ Equating criticism of Israel with anti-Semitism 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. Kenneth Marcus, the current nominee for the Department of Education’s Office of Civil Rights—the office that investigates Title VI complaints—has argued that these complaints are successful, *even when they are dismissed by the Department on the merits*, precisely because they pressure schools to suppress speech critical of Israel.⁷

Second, even where administrators do not take formal action, students and their organizations, faculty, and university staff may be deterred from speaking and organizing on these issues. Activists will 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.

Finally, the bill will likely inspire an increasing numbers of complaints focused on constitutionally protected criticism of Israel. Thus far, the Department has rejected these complaints on the ground that such speech is protected under the First Amendment.⁸ But the proposed bill will encourage

³ Kenneth S. Stern, *S.C. anti-Semitism bill isn’t needed* (April 25, 2017) available at https://www.postandcourier.com/s-c-anti-semitism-bill-isn-t-needed/article_f17d607e-29e5-11e7-b4a7-a35035f3dc38.html.

⁴ Testimony of Kenneth S. Stern, Hearing on Examining Anti-Semitism on College Campuses, U.S. House of Representatives, Committee on the Judiciary (Nov. 7, 2017) available at <https://judiciary.house.gov/wp-content/uploads/2017/10/Stern-Testimony-11.07.17.pdf>.

⁵ Palestine Legal, Center for Constitutional Rights, *The Palestine Exception to Free Speech* (2015) available at <https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/560b0bcee4b016db196d664b/1443564494090/Palestine+Exception+Report+Final.pdf>.

⁶ *Id.*

⁷ Kenneth Marcus, *Standing Up for Jewish Students* (Sept. 9, 2013) available at <https://www.jpost.com/Opinion/Op-Ed-Contributors/Standing-up-for-Jewish-students-325648>.

⁸ Palestine Legal, *FAQ: What to Know About Efforts to Re-define Antisemitism to Silence Criticism of Israel* (last updated April 18, 2018) available at

more such complaints and lawsuits.⁹ In turn, these complaints will not only cause schools to limit speech out of fear, but will also force both the Department and covered universities to devote time and resources to addressing complaints about constitutionally protected speech, instead of meritorious harassment complaints.

Religious liberty and free speech are both fundamental rights under our Constitution and protecting them is at the core of the ACLU's values. Both can be protected without having to compromise one to allow for the other. In this case, protections against discrimination and harassment in schools for Jewish students already exist; the Department of Education has successfully investigated such cases.¹⁰ Requiring the Department to investigate criticism of Israel will not meaningfully help it combat anti-Semitism, but it will chill constitutionally protected speech.

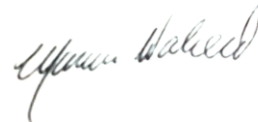
College campuses should be havens for free expression—not spaces that limit one viewpoint to elevate another—and students must be free to express their opinions and exercise their rights. We urge Members to oppose this dangerous bill that is likely to chill the speech and expression of students, faculty, and other members of university communities around the country.

If you have any questions, please feel free to contact Chris Anders (canders@aclu.org) or Manar Waheed (mwaheed@aclu.org).

Sincerely,



Christopher Anders
Deputy Director



Manar Waheed
Legislative and Advocacy Counsel

<https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/5ad7b16603ce646d1a0d59d9/1524085097669/FAQ+on+Definition+of+Antisemitism+4.18.18+.pdf> (citing the Department's rejection of four complaints on campuses because criticism of Israel is protected speech).

⁹ Numerous complaints were filed against universities such as Barnard College, Brooklyn College, UC Irvine, UC Santa Cruz, UC Berkeley, and Rutgers University, claiming that events or actions criticizing Israel or advocating for Palestinian rights violated Title VI. *See supra* note 5.

¹⁰ *Id.* *See also supra* note 1.