September 26, 2019

Re: H.R. 4009 Enlists Education Department As Government Censor

As civil and human rights organizations, we support efforts to confront the racism and bigotry that are increasingly rampant and deadly across the United States, including on campuses. Incidents of racism, xenophobia, Islamophobia, antisemitism, and other forms of discrimination have been on the rise in recent years.[1] In light of deadly acts of bigotry against Jewish, Muslim, Black, and other communities in Pittsburgh, Christchurch, San Diego, and elsewhere, it is incumbent on lawmakers at all levels to take action to ensure safety and security for all people.

We write to raise concerns with H.R. 4009, the Anti-Semitism Awareness Act of 2019 (the Act), which fails to achieve this goal. The Act instead directs the U.S. Department of Education (DOE) to consider a widely contested redefinition of antisemitism in assessing whether alleged violations of Title VI of the Civil Rights Act are "motivated by anti-Semitic intent."[2] This vague and overbroad redefinition conflates political criticism of Israel with anti-

[1] Southern Poverty Law Center, The Year in Hate: Rage in Change, https://www.splcenter.org/fighting-hate/intelligence-report/2019/year-hate-rage-against-change (documenting 30% increase in hate groups during the Trump era).

[2] Anti-Semitism Awareness Act of 2019, H.R. 4009, sec. 3, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/4009. The redefinition of antisemitism endorsed by the Act is the International Holocaust Remembrance Alliance (IHRA) redefinition, which is also listed on the U.S. Department of State website. *See* IHRA, Working Definition of Antisemitism (adopted May 26, 2016), https://www.holocaustremembrance.com/working-definition-antisemitism (last visited September 16, 2019); U.S.

Jewish hate, encouraging infringements on constitutionally protected speech related to a human rights movement, and undermining the fight against real antisemitism.

Indeed, in our experience defending civil rights on college campuses we have seen first-hand how the redefinition endorsed by the Act has been used as a tool to silence students, faculty, and staff who advocate for Palestinian rights.[3] This experience makes clear that the primary aim of this bill is to censor First Amendment-protected criticism of Israeli government policies and speech calling for freedom, justice, and equality for Palestinians. It invites the DOE and universities to violate free speech rights by discriminating against certain viewpoints and chilling one side of an important political debate.

We urge you to reject this bill that will chill free speech, just as Congress rejected substantially similar bills in 2016 and 2018.[4]

I. The redefinition of antisemitism endorsed by the Act equates criticism of the Israeli government with antisemitism

The Act purports to address rising antisemitism on college campuses, but a plain reading reveals that its real purpose is to silence advocacy for Palestinian rights and to censor criticism of Israeli government policies.

The Act would direct the DOE to consider a redefinition of antisemitism when determining whether alleged violations of Title VI of the Civil Rights Act are motivated by antisemitism. Much of that redefinition is uncontroversial and aligns with a traditional

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Department of State, Defining Anti-Semitism, https://www.state.gov/defining-anti-semitism/ (last visited September 16, 2019). The IHRA definition is substantially similar to, and was based on, previous definitions on the State Department website, and promoted in other forums. For a detailed backgrounder on the origins and various incarnations of this redefinition, see Palestine Legal, "Backgrounder on Efforts to Redefine Antisemitism as a Means of Censoring Criticism of Israel," May 2019, http://palestinelegal.org/s/Backgrounder-on-Efforts-to-Redefine-Antisemitism.pdf.

[3] See Part III *infra* for examples. *See also* Palestine Legal and the Center for Constitutional Rights, THE PALESTINE EXCEPTION TO FREE SPEECH (2015), https://palestinelegal.org/the-palestine-exception (documenting incidents where the redefinition of antisemitism was deployed to allege violations of Title VI at universities where students/faculty have engaged in the following speech activities: a screening of the film *Occupation 101*; an event critical of Israeli policies featuring a Holocaust survivor; using the term "apartheid" to describe Israeli government policies; equating Zionism with racism; calling for a boycott for Palestinian rights; and wearing a Palestinian keffiyeh, or scarf). For a more recent update, see Palestine Legal, 2018 Year-In-Review: Censorship of Palestine Advocacy in the U.S. Intensifies, https://palestinelegal.org/2018-report.

[4] *See* Anti-Semitism Awareness Act of 2018, S. 2940/H.R. 5924, 115th Cong. (2018); Anti-Semitism Awareness Act of 2016, S. 10/H.R. 6421, 114th Cong. (2016). Previous versions of the bill were widely criticized in the media for endorsing a substantially similar redefinition. *See, e.g.*, Editorial Board, *Undermining Free Speech on Campus*, LOS ANGELES TIMES, Dec. 6, 2016, https://www.latimes.com/opinion/editorials/la-ed-senate-antisemitism-20161202-story html; Tana Geneva, *How Legitimate Fear Over Bias-Motivated Crimes is Generating Potentially Unconstitutional Policies*, WASHINGTON POST, Dec. 6, 2017, https://www.washingtonpost.com/news/the-watch/wp/2016/12/07/how-legitimate-fear-over-bias-motivated-crimes-is-generating-potentially-unconstitutional-policies/?utm_term=.3e780ecbef4b; Jesse Singal, *The Anti-Anti-Semitism Bill the ADL Is Pushing Is (Still) Such a Free-Speech Mess*, NEW YORK MAGAZINE, Dec. 7, 2016, http://nymag.com/intelligencer/2016/12/the-adl-is-pushing-a-bad-anti-free-speech-campus-law.html?gtm=top&gtm=bottom.

understanding of the term.[5] But the redefinition radically departs from that understanding with its illustrative contemporary examples related to criticism of Israel, including:

- "Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor" and
- "Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation."[6]

This redefinition falsely conflates political criticism of Israel with antisemitism. Human rights advocacy calling for freedom, justice, and equality for Palestinians, or discussions that vigorously criticize Israeli policies, are simply not comparable to anti-Jewish hate, and are in fact based on its opposite: principles of universal human rights and dignity.

Moreover, the redefinition is so vague and broad that it could encompass any and all criticism of Israel and would put the DOE in the position of government censor. What is a "double standard" with regards to criticism of Israel and how and by whom will it be judged? How many additional countries would students and professors be required to criticize when they criticize Israel, and what degree or depth of criticism would they be required to make in order to avoid applying a "double standard" to Israel? Would a legal panel on the constitutional right to engage in boycotts for Palestinian rights be considered a double standard? Are universities required to punish students and faculty who call the Israeli state, or the United States, or any other government, "racist"? Is a campus discussion of Israel's "Nation State" law (enacted in July 2018, to enshrine the right of national self-determination for Jews only[7]) grounds for a federal investigation?

Requiring the DOE, and universities by extension, to enter such a morass of viewpoint-based distinctions would chill and invite punishment of constitutionally protected speech.

II. Adopting a redefinition of antisemitism that conflates antisemitism with criticism of Israel will result in First Amendment violations

Adoption of the redefinition of antisemitism as a standard to assess whether political speech constitutes discrimination has unconstitutional implications, and requiring DOE to consider the redefinition is tantamount to inviting the DOE to violate the First Amendment.[8] It is

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[5] For example, the IHRA redefinition states: "Anti-Semitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of anti-Semitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities." IHRA, Working Definition, *supra* note 2. Merriam-Webster defines antisemitism as, "Hostility toward or discrimination against Jews as a religious, ethnic or racial group." https://www.merriam-webster.com/dictionary/anti-Semitism (last visited September 16, 2019).

[6] Anti-Semitism Awareness Act of 2019, H.R. 4009, sec. 3, 116th Cong. (2019); IHRA, Working Definition, *supra* note 2.

[7] *See* David M. Halbfinger and Isabel Kershner, *Israeli Law Declares the Country the 'Nation-State of the Jewish People,'* NEW YORK TIMES, July 19, 2018, https://www nytimes.com/2018/07/19/world/middleeast/israel-law-jews-arabic.html.

[8] The redefinition of antisemitism endorsed by the Act is not currently binding law in the United States, although the State Department may be using it to monitor antisemitism abroad. *See* 22 U.S.C. § 2731(b); U.S. Department of State, Defining Anti-Semitism, *supra* note 2. In recent years, there has been a concerted push to get state and local governments to adopt similar redefinitions of antisemitism. In 2018, South Carolina enacted a state-version of the

especially inappropriate for Congress to impose on the DOE a definition of antisemitism that encompasses criticism of Israel and discussions about violations of Palestinian human rights because of the essential role that academic freedom and unfettered debate play in U.S. universities.[9]

Kenneth Stern, the redefinition's original drafter, has repudiated its application on college campuses and stated during his testimony before a House Judiciary Committee hearing on antisemitism on college campuses in 2017 his opposition to an earlier, similar version of the Act.[10] A May 2018 *Los Angeles Times* editorial cautioned against the substantially similar 2018 version of the Act, noting, "freedom of speech on college campuses is under enough pressure without the federal government adding to the problem by threatening to withdraw funding to punish people for expressing their political opinions."[11]

The DOE's Office for Civil Rights (OCR) under the Obama Administration affirmed in four separate cases—after conducting lengthy investigations into alleged harassment of Jewish students based on student and faculty advocacy for or academic engagement on Palestinian rights issues—that expression of political viewpoints does not, standing alone, give rise to actionable harassment under Title VI simply because some may find it offensive.[12] OCR, in addressing the

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Anti-Semitism Awareness Act as an amendment to the state budget after it failed to pass as a standalone bill. *See* Ali Younes, *Critics denounce South Carolina's new 'anti-Semitism' law*, AL JAZEERA, May 16, 2018, https://www.aljazeera.com/news/2018/05/critics-denounce-south-carolina-anti-semitism-law-180513113108407.html. The Florida legislature adopted a similar redefinition earlier this year. H.B. 741 (Fla. 2019), https://www.flsenate.gov/Session/Bill/2019/00741. All of these legislative efforts raise similar constitutional concerns.

[9] The U.S. Supreme Court has recognized the importance of this role, stating that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

[10] *Examining Anti-Semitism on College Campuses; Hearing before the H. Judiciary Comm.*, 115th Cong. (2017) (testimony of Kenneth S. Stern, Executive Director, Justus & Karin Rosenberg Foundation), *available at* https://docs.house.gov/meetings/JU/JU00/20171107/106610/HHRG-115-JU00-Wstate-SternK-20171107.pdf; *see also* Kenneth Stern, *Will Campus Criticism of Israel Violate Federal Law?*, NEW YORK TIMES, Dec. 12, 2016, https://www.nytimes.com/2016/12/12/opinion/will-campus-criticism-of-israel-violate-federal-law.html; Kenneth Stern, *Should a major university system have a particular definition of anti-Semitism*, JEWISH JOURNAL, June 22, 2015, http://www.jewishjournal.com/opinion/article/should_a_major_university_system_have_a_particular_definition_of_anti_semit.

[11] Editorial Board, *Enough Already. Not all critcism of Israel is Anti-Semitism*, LOS ANGELES TIMES, June 8, 2018, http://www.latimes.com/opinion/editorials/la-ed-anti-semitism-20180608-story.html.

[12] As DOE notes, "harassment must include something beyond the mere expression of views, words, symbols or thought that a student finds personally offensive. The offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment." Letter from Zachary Pelchat, Team Leader, U.S. Department of Education Office for Civil Rights (DOE OCR), San Francisco, to UC Berkeley Chancellor Robert Birgeneau, OCR Case No. 09-2-2259 (August 19, 2013), *available at* http://news.berkeley.edu/wp-content/uploads/2013/08/DOE.OCR_.pdf [UC Berkeley determination letter]. *See also* Letter from Zachary Pelchat, Team Leader, DOE OCR, San Francisco, to Carole E. Rossi, Chief Campus Counsel, UC Santa Cruz, OCR Case No. 09-09-2145 (August 19, 2013), *available at* https://news.ucsc.edu/2013/08/images/OCR_letter-of-findings.pdf [UC Santa Cruz determination letter]; Letter from Zachary Pelchat, Team Leader, DOE OCR, San Francisco, to UC Irvine Chancellor Michael Drake, OCR Case No. 09-07-2205 (August 19, 2013), *available at* https://ccrjustice.org/sites/default/files/assets/files/OCR-UCIrvine_Letter_of_Findings_to_Recipient.pdf; Letter from Emily Frangos, Compliance Team Leader, DOE OCR, New York, to Morton A. Klein, President, Zionist Organization of America, OCR Case No. 02-11-2157 (July 31, 2014), *available at*

importance of diverse viewpoints and expression on college and university campuses,[13] noted that the activities described in the harassment complaints

> constituted expression on matters of public concern directed to the University community. In the University environment, exposure to such robust and discordant expressions, even when personally offensive and hurtful, is a circumstance that a reasonable student in higher education may experience.[14]

The Senate's narrow confirmation of Kenneth Marcus to head the DOE's OCR makes Congressional rebuke of this Act all the more important. Marcus has been a long-time advocate for the redefinition endorsed by the Act and similar state and municipal legislation.[15] He is also a driver of efforts to stifle campus speech critical of Israel, using the redefinition as a tool to justify suppression of protected speech.[16] One of his first acts in office was to re-open the Title VI case filed by the Zionist Organization of America (ZOA) against Rutgers University, a case which OCR closed in 2014 after a three-year investigation cleared the university of allegations that it had tolerated a climate of antisemitism.[17] In re-opening the investigation, Marcus noted that the IHRA definition of antisemitism is "in use" by OCR.[18]

But DOE previously had rejected this redefinition of antisemitism under both the Trump and Obama administrations.[19] In a letter, Secretary of Education DeVos stated that "OCR does not adopt definitions of particular forms of racism or national origin discrimination because such inquiries are inherently fact-specific and because expressions of racism and discrimination can evolve over time."[20] Marcus's declaration that the redefinition is "in use" went through no known process of policy evaluation as is customary, and is apparently contrary to his own

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https://www.documentcloud.org/documents/1300803-ocr-decision-on-title-vicomplaint-7-31-14.html [Rutgers determination letter].

[13] DOE OCR has stated it will not, in its enforcement of anti-discrimination laws, exceed the boundaries of the First Amendment for either private or public universities. *See* Gerald A. Reynolds, Assistant Secretary, Office for Civil Rights, U.S. Department of Education, "Dear Colleague Letter: First Amendment," July 28, 2003, *available at* http://www2.ed.gov/about/offices/list/ocr/firstamend html ("OCR's regulations should not be interpreted in ways that would lead to the suppression of protected speech on public or private campuses.").

[14] *See* UC Berkeley determination letter and UC Santa Cruz determination letter, *supra* note 12.

[15] *See* Letter from Civil Rights Groups to Kenneth L. Marcus, Assistant Secretary for Civil Rights, U.S. Department of Education, Nov. 30, 2018, *available at* https://palestinelegal.org/s/Civil-Rights-Coalition-Letter-to-Marcus-11-30-18.pdf.

[16] *See id.*

[17] Letter from Kenneth L. Marcus, Assistant Secretary for Civil Rights, U.S. Department of Education, to Susan B. Tuchman, Zionist Organization of America, OCR Case No. 02-11-2157, August 27, 2018, *available at* https://palestinelegal.org/s/US-Department-of-Education-and-Working-Definition1-1.pdf. *See also* Rutgers determination letter, *supra* note 12.

[18] 2018 Letter from Kenneth L. Marcus to Susan B. Tuchman, OCR Case No. 02-11-2157, *supra* note 17.

[19] Letter from Betsy DeVos, Secretary of Education, U.S. Department of Education, to Congressman Brad Sherman, September 8, 2017, *available at* https://reason.com/assets/db/15369499618934.pdf (last visited May 3, 2019); Letters from Arne Duncan, Secretary of Education, U.S. Department of Education, to Congressman Brad Sherman and Senator Harry Reid, December 18, 2015 (on file with Palestine Legal).

[20] 2017 Letter from Secretary DeVos to Congressman Brad Sherman, *supra* note 19.

department's stated policy.[21] Its current use under Marcus is a substantive policy change that poses a signficant threat to protected expression.

If Congress adopts the Act, DOE will be empowered to investigate the content of political speech of only particular members of the campus community, those who advocate for Palestinian rights, to determine whether the speaker is applying "double standards" to Israel or calling Israel a "racist endeavor." Moreover, enforcement of the Act's requirements would compel speech (for example, by requiring someone to criticize policies of other nations when critiquing the Israeli government) in violation of the First Amendment. The resulting content and viewpoint-based discrimination, essentially a political litmus test, will violate speakers' First Amendment rights.

Administrators, who have a legal duty to mitigate racially-hostile environments, would also be pressured to restrict speech critical of Israel that anti-Palestinian rights groups routinely claim meets the criteria laid out in the redefinition. Under the mistaken illusion that it is appropriate to penalize such speech and advocacy, administrators may end up violating First Amendment rights, exposing universities and well-intentioned administrators to liability.[22]

Further, adoption of the redefinition would almost certainly have a chilling effect on constitutionally protected speech and academic inquiry related to Israel. Students, professors, and researchers will inevitably act in ways to avoid the specter of antisemitism accusations.[23]

III. Impact of the redefinition on protected expression

In recent years, an increasing number of individuals and organizations inside the United States have sought to raise awareness of Israel's military occupation and discriminatory treatment of Palestinians, with many of these discussions and activities taking place on college campuses. The redefinition endorsed by this Act already has been used to threaten these forms of protected expression calling for Palestinian human rights.

In April 2019, a group of anonymous students filed a lawsuit asking the court to force the cancellation of a panel at the University of Massachusetts Amherst. The panel planned to discuss censorship of speech supporting Palestinian rights. The lawsuit argued that the IHRA redefinition of antisemitism justified a court order to cancel the event because the panelists' criticism of Israel and its policies fell within that definition. The court rejected this argument,

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[21] Palestine Legal, Civil Rights Orgs: Stop Abusing Dept. of Ed. To Attack Free Speech, Nov. 30, 2018, https://palestinelegal.org/news/2018/12/3/civil-rights-groups-warn-doe?rq=DOE (criticizing Marcus's decision for its procedural irregularity among other concerns).

[22] *See, e.g.*, *White v. Lee*, 227 F.3d 1214, 1237 (9th Cir. 2000), in which the court denied qualified immunity to Department of Housing and Urban Development officials who investigated protected speech activity – like op-eds, protests and pamphlets – causing unconstitutional chilling effects. The investigators were looking into alleged violations of unlawful intimidation under the Fair Housing Act.

[23] *See, e.g.*, *Monteiro v. Tempe Union High School Dist.*, 158 F.3d 1022, 1029 (9th Cir. 1998) (finding 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 schools to "buy their peace" by avoiding controversial material).

finding "nothing that would justify a prior restraint on speech" and no allegation that the panel "will include any other form of speech that is unprotected by the First Amendment."[24]

In April 2019, professor and former Harvard University president Larry Summers cited the redefinition to label educational activities at Harvard antisemitic. Summers was criticizing Harvard students' Israel Apartheid Week, during which they aimed to educate their peers about Israel's application of different sets of laws to Palestinians and Jewish Israelis. He claimed the events were antisemitic "in both effect and intent" according to the redefinition.[25]

A November 2018 vigil organized by Jewish students at UC Berkeley to jointly mourn the deaths of Palestinian children killed in Gaza and Jewish people killed in the Pittsburgh massacre[26] is now the subject of a Title VI complaint to OCR.[27] Attorneys who filed the complaint alleged that the vigil was to portray "Israel as a barbarian and racist nation," falling under the IHRA definition being applied by Marcus's OCR, and said the students who organized the vigil should be expelled.[28] Instead of the planned public event, students held a small private vigil due to the threats and intimidation.

Referencing the U.S. State Department's definition of antisemitism, the Indiana University campus branch of an Israel lobby group attempted to censor a November 2018 talk about Palestinian rights delivered by Jamil Dakwar, a prominent international human rights lawyer and director of the ACLU's Human Rights Program.[29] The talk proceeded only after the student council rejected several attempts to censor the speaker.

These are only a few of many examples of university members being targeted for their political speech activities. In each of these cases, the speakers and students had to go to significant lengths to defend their right to speak out for Palestinian rights, under the threat of censorship. Instead of safeguarding Jewish community members against discrimination, the redefinition endorsed by the Act is being weaponized to scrutinize and censor protected speech, targeting viewpoints critical of Israel and chilling one side of an important political debate.

IV. Conclusion

The Act's reliance on an overbroad and vague redefinition of antisemitism fails to give universities the proper tools to fight antisemitism and other forms of discrimination. Instead, it

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[24] *Doe v. Manning*, No. 2019-01308-H (Mass. Sup. Ct., Suffolk Div., May 3, 2019) (denying motion for preliminary injunction), *available at* http://palestinelegal.org/s/Doe-v-Manning-19cv1308-Decision-on-Ps-Mtn-Injunctive-Relief.pdf. *See also* Democracy Now!, *Mass. Judge Refuses to Halt Pro-Palestinian Event at UMass Featuring Roger Waters & Linda Sarsour*, May 3, 2019, https://www.democracynow.org/2019/5/3/mass_judge_refuses_to_halt_pro.

[25] Lawrence H. Summers (@LHSummers), Twitter (Apr. 4, 2019, 9:34 AM), https://twitter.com/LHSummers/status/1113842399183351808.

[26] Students for Justice in Palestine at UC Berkeley, *Joint Statement on Vigil With Jewish Voice for Peace at Berkeley*, Facebook (Nov. 9, 2018), https://www facebook.com/notes/students-for-justice-in-palestine-at-uc-berkeley/joint-statement-on-vigil-with-jewish-voice-for-peace-at-berkeley/1917395535013465/.

[27] Aaron Bandler, *Pro-Israel Students File Complaint to Department of Education About SJP Vigil at Berkeley*, JEWISH JOURNAL, Nov. 13, 2018, http://jewishjournal.com/news/nation/241882/pro-israel-students-file-complaint-department-education-sjp-vigil-berkeley/.

[28] *Id.*

[29] Palestine Legal, IIPAC Tries to Censor Jamil Dakwar's Lecture at Indiana University, Dec. 17, 2018, https://palestinelegal.org/news/2018/12/17/iipac-jamil-dakwar?rq=jamil%20dakwar.

will encourage the DOE and universities to infringe on campus free speech in violation of the First Amendment, and encourage attacks on human rights defenders.

We urge you to drop consideration of this bill and, instead, engage in meaningful efforts to address anti-Jewish, racist, anti-Muslim, anti-immigrant, and anti-LGBTQ incidents and other forms of discrimination that threaten vulnerable communities. This bill will ultimately undermine civil liberties, while failing to address real bigotry on campuses.

Sincerely,

Adalah Justice Project
American-Arab Anti-Discrimination Committee (ADC)
American Muslims for Palestine (AMP)
Asian Americans Advancing Justice- Asian Law Caucus
Center for Constitutional Rights
Civil Liberties Defense Center
Council on American-Islamic Relations (CAIR)
Defending Rights and Dissent
Jewish Voice for Peace
Muslim Justice League
National Lawyers Guild
Palestine Legal
Partnership for Civil Justice Fund
Project South
US Campaign for Palestinian Rights