



August 7, 2018

Hon. Bob Goodlatte
2309 Rayburn Office Building
Washington, DC 20515

Hon. Jerry Nadler
2109 Rayburn Office Building
Washington, DC 20515

Re: First Amendment concerns with Anti-Semitism Awareness Act

Dear Rep. Goodlatte and Rep. Nadler:

As civil and human rights organizations, we support your efforts to confront racism and bigotry on campuses across the U.S. We write to raise concerns with the Anti-Semitism Awareness Act of 2018 (the Act), which directs the U.S. Department of Education (DOE) to consider a widely discredited re-definition of anti-Semitism¹ in assessing whether alleged violations of Title VI of the Civil Rights Act are “motivated by anti-Semitic intent.” This vague and overbroad re-definition conflates political criticism of Israel with antisemitism, encouraging infringements on constitutionally protected speech. We urge you to reject this unconstitutional bill, as you did in 2016.

The re-definition of antisemitism endorsed by the Act is especially detrimental to universities, whose missions necessitate respect for freedom of speech, critical inquiry, and unfettered debate. Kenneth Stern, the re-definition’s original drafter, has repudiated its application on college campuses in several published opinion pieces, as well as in Congressional testimony during a 2017 Judiciary Committee hearing on antisemitism on college campuses.² A May 2018 *Los Angeles Times* editorial also cautioned against 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

¹ The re-definition of antisemitism endorsed by the Act is one that used to appear on a U.S. Department of State webpage. It is no longer listed, but it is archived at: <https://web.archive.org/web/20180117193205/https://www.state.gov/s/rga/resources/267538.htm>. For a detailed FAQ on this re-definition, see <https://bit.ly/2JIVHji>. The Anti-Semitism Awareness Act of 2016 was widely criticized in the media for endorsing this re-definition: <https://palestinelegal.org/news/2016/12/14/media-spotlight-anti-semitism-awareness-act-draws-criticism>.

² Kenneth Stern’s 2017 testimony to the House of Representatives Judiciary Committee is available at <https://judiciary.house.gov/wp-content/uploads/2017/10/Stern-Testimony-11.07.17.pdf>; See also Kenneth Stern, Will Campus Criticism of Israel Violate Federal Law?, *New York Times*, Dec. 12, 2016; 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.

opinions. That would be a real possibility if Congress enacted and President Trump signed a bill called the Anti-Semitism Awareness Act of 2018.”³

It is incumbent on lawmakers at all levels of government to take action to ensure safety and security for all people, especially those vulnerable populations targeted by bias-motivated attacks. The Act does not achieve this goal. Instead of safeguarding against expressions of hatred towards Jewish people, this bill aims to censor First Amendment-protected advocacy for Palestinian rights. It invites the DOE and universities to violate free speech principles by discriminating against certain viewpoints and chilling one side of an important political debate. In our experience defending civil rights and civil liberties on college campuses, we have seen first-hand how the re-definition endorsed by the Act has been used as a tool by the same groups supporting this legislation, including the Brandeis Center, to silence students, faculty, and staff who speak critically of Israeli violations of Palestinian rights.⁴

I. The re-definition of antisemitism endorsed by the Act equates criticism of the Israeli government with anti-Semitism

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

The Act would direct the DOE to consider a re-definition of antisemitism when determining whether alleged violations of Title VI of the Civil Rights Act are motivated by antisemitism. Much of that re-definition is uncontroversial and aligns with a traditional understanding of the term.⁵ But the re-definition, which was briefly used – and subsequently discarded – by a European Union agency,⁶ radically departs from that understanding with its listing of examples of “Anti-Semitism Related to Israel,” known as the “three D’s”: “demonizing Israel,” “applying a double standard to Israel” and “delegitimizing Israel.”⁷ This codifies a false conflation of antisemitism with political speech critical of Israeli policies.

The “three D’s” are so broad and vague that they could encompass any and all criticism of Israel. What is a “double standard” with regards to criticism of Israel and how and by whom

³ Editorial Board, Enough Already. Not all criticism of Israel is Anti-Semitism, LA Times, June 8, 2018, <http://www.latimes.com/opinion/editorials/la-ed-anti-semitism-20180608-story.html>.

⁴ Some Israel-aligned groups have relied on the re-definition of antisemitism 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. Palestine Legal and the Center for Constitutional Rights documented these and other incidents in a 2015 report, *The Palestine Exception to Free Speech*, <https://palestinelegal.org/the-palestine-exception>. Palestine Legal published a 2016 update (<https://palestinelegal.org/2016-report>) and a 2017 update (<https://palestinelegal.org/2017-report>).

⁵ For example, the State Department’s re-definition begins: “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.” Merriam-Webster defines anti-Semitism as, “Hostility toward or discrimination against Jews as a religious, ethnic or racial group.”

⁶ The European Union Monitoring Centre (EUMC), where this description first appeared in 2005 as the result of lobbying efforts by Israel-aligned groups, meant it to be only a “guide for data collection.” (See Seth Berkman, “Anti-Semitism Fight Hinges on Definition,” *Forward*, September 25, 2012, <http://forward.com/articles/163105/anti-semitism-fight-hinges-on-definition/?p=all>). It was ultimately discarded even for that limited use due to objections from European organizations, including free speech concerns. In 2013, it was removed from the agency’s website altogether, over protests by Israeli officials and U.S.-based Israel-aligned groups. (JTA, “EU drops its ‘working definition’ of anti-Semitism,” *The Times of Israel*, Dec. 5, 2013, <http://www.timesofisrael.com/eu-drops-its-working-definition-of-anti-semitism/>).

⁷ Defining Anti-Semitism, *supra* note 1.

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? How would the DOE or a university define “delegitimizing” or “demonizing” Israel? Would a mock-checkpoint on a campus quad, aimed at raising awareness about Israeli military checkpoints that restrict Palestinian freedom of movement, be considered demonizing? Would a lecture on Israel’s violations of international law be considered delegitimization? Would a legal panel on the constitutional right to engage in boycotts for Palestinian rights be considered a double standard?

Enforcement of these requirements would necessitate viewpoint discrimination and could compel speech (for example, by requiring someone to criticize policies of other nations when critiquing the Israeli government) in violation of the First Amendment. Moreover, 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 re-definition of antisemitism that conflates antisemitism with criticism of Israel would violate the First Amendment

Adoption and enforcement of the re-definition of antisemitism to assess whether political speech activities constitute discrimination on campuses or elsewhere in the U.S. would violate the First Amendment, and requiring DOE to consider the re-definition is tantamount to inviting DOE to violate the First Amendment.⁸ It is especially inappropriate for Congress to impose on the DOE a definition of antisemitism that encompasses criticism of Israel because of the essential role that academic freedom and unfettered debate play in U.S. universities. 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.”⁹

Requiring the DOE to consider this re-definition in its investigation of Title VI complaints essentially puts DOE officials and university administrators in the position of violating free speech rights. Indeed, the DOE’s Office for Civil Rights (OCR) has already affirmed in four separate cases—after conducting lengthy investigations of 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.¹⁰

⁸ The re-definition of antisemitism endorsed by the Act is not binding law in the United States, although it may have been used by the State Department for the limited purpose of “monitoring and combatting acts of antisemitism and antisemitic incitement *that occur in foreign countries*.” See 22 U.S.C. § 2731(b) (emphasis added). Some of the organizations that back the Act have pushed state and local governments to similarly adopt the re-definition of antisemitism. Those efforts have largely failed due to constitutional concerns, with two notable exceptions: in 2018, South Carolina enacted a state-version of the Anti-Semitism Awareness Act as an amendment to the state budget (<https://www.aljazeera.com/news/2018/05/critics-denounce-south-carolina-anti-semitism-law-180513113108407.html>), and in 2017, Bal Harbour, Florida adopted the re-definition for the purposes of hate crimes investigations.

⁹ *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

¹⁰ 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 U.S. Department of Education to UC Berkeley, Aug. 19, 2013, re: Case No. 09-12-2259, available at <http://bit.ly/doeuchb>. Kenneth Marcus, who was recently confirmed by the U.S. Senate to head the Office for Civil Rights, has been a long-time advocate for the Anti-Semitism Awareness Act of 2018 and similar state and municipal legislation. His confirmation and demonstrated efforts to stifle student speech critical of Israel, makes Congress’ rebuke of this bill all the more important. For additional background, see <https://palestinelegal.org/news/2018/6/7/kenneth-marcus-confirmed>.

To the contrary, OCR, in addressing the importance of diverse viewpoints and expression on college and university campuses,¹¹ 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.¹²

If enacted, DOE will be required to investigate the content of political speech by members of the campus community who advocate for Palestinian rights to determine whether the speaker is “demonizing,” “delegitimizing” or applying “double standards” to Israel. The resulting political litmus test will violate the speakers’ First Amendment rights.

Administrators, who have a legal duty to mitigate racially-hostile environments, would also be pressured to respond to speech and advocacy critical of Israel that Israel-aligned groups already routinely claim meets the criteria laid out in the re-definition. Under the mistaken illusion that it is appropriate to penalize such speech and advocacy, administrators may end up violating First Amendment rights. This could expose universities and well-intentioned administrators to liability.¹³

Further, adoption of the re-definition would almost certainly have a chilling effect on constitutionally-protected speech and academic inquiry. Students, professors, and researchers will inevitably act in ways to avoid review of their activities and avoid the specter of being accused of antisemitism for their political speech activities.

The University of California (UC) and other universities have already been pressured to adopt, and ultimately rejected the antisemitism definition endorsed by the Act due to free speech concerns.¹⁴ Israel-aligned organizations pushed for its adoption by the UC system in March 2015, causing outcry from free speech advocates¹⁵ across the political spectrum, from media,¹⁶

¹¹ 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 Dear Colleague Letter from U.S. Department of Education, July 28, 2003, <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.”).

¹² See UC Santa Cruz and UC Berkeley DOE determination letters, <http://bit.ly/doeuch> (Berkeley) and <http://bit.ly/doeucsc> (Santa Cruz).

¹³ Courts have held that speech addressing public issues – such as Palestine/Israel – is afforded maximum First Amendment protection (“This Court has recognized that expression on public issues ‘has always rested on the highest rung of the hierarchy of First Amendment values.’” *NAACP v. Claiborne Hardware*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455 (1980)). A federal district court recently held that political boycotts for Palestinian rights are protected by the First Amendment. See *Koontz v. Watson*, 5:17-cv—04099 (D. Kan. 2018). Attempts by a government body or a public university to silence one side of the conversation – by claiming that opposition to Israel’s policies and practices is antisemitic, for example – is contrary to First Amendment principles.

¹⁴ See UC Drops Consideration of State Department Anti-Semitism Definition, Palestine Legal, July 22, 2015, <http://palestinelegal.org/news/2015/7/22/uc-drops-consideration-of-state-department-anti-semitism-definition>.

¹⁵ Will Creely, State Department’s Anti-Semitism Definition Would Likely Violate First Amendment on Public Campuses, Foundation for Individual Rights in Education, May 22, 2015, <https://www.thefire.org/state-departments-anti-semitism-definition-would-likely-violate-first-amendment-on-public-campuses/>.

¹⁶ Editorial, How far should UC go with an anti-Semitism policy, Los Angeles Times, July 16, 2015, <http://www.latimes.com/opinion/editorials/la-ed-anti-semitism-20150716-story.html>.

students,¹⁷ graduate student instructors,¹⁸ and Jewish¹⁹ and other civil rights organizations.²⁰ Jewish commentators,²¹ including – as mentioned above – the definition’s original drafter, Kenneth Stern, repudiated its use on a college campus.²² We urge you to similarly reject this measure, as you did in 2016.

III. Conclusion

We appreciate the importance of addressing allegations of antisemitism on campus and elsewhere. The Act’s reliance on an overbroad and much-criticized re-definition of antisemitism unfortunately fails to give universities the proper tools to fight antisemitism and other forms of discrimination. Instead, it will encourage the DOE and universities to infringe on free speech and academic freedom on campus, in violation of the First Amendment.

We urge you to drop consideration of this bill and, instead, engage in meaningful efforts to address antisemitic, racist, anti-Muslim, anti-immigrant, and anti-LGBT incidents and other forms of discrimination that have been fueled by increasing tolerance for bigotry. This bill will ultimately undermine civil liberties on campuses, while failing to address or hold accountable the sources of the alarming incidents of bigotry that are occurring on campuses and elsewhere.

Sincerely,

American-Arab Anti-Discrimination Committee (ADC)
American Muslims for Palestine
Council on American-Islamic Relations (CAIR)
Center for Constitutional Rights
Defending Rights and Dissent
Jewish Voice for Peace
National Lawyers Guild
Palestine Legal
US Campaign for Palestinian Rights

cc: House Judiciary Committee

¹⁷ Letter, Students ask Janet Napolitano not to endorse conflation of anti-Semitism with critique of Israel, SJP West, June 29, 2015, <http://sjpwest.org/2015/06/29/students-ask-janet-napolitano-not-to-endorse-conflation-of-anti-semitism-with-critique-of-israel>.

¹⁸ UAW Letter to Janet Napolitano, UC Student Workers Union – UAW Local 2865, July 6, 2015, <http://www.uaw2865.org/uaw-letter-to-president-napolitano/>.

¹⁹ Action alert, Tell UC President Napolitano and the UC Regents: criticizing Israel is not anti-Semitic, Jewish Voice for Peace, http://org.salsalabs.com/o/301/p/dia/action3/common/public/?action_KEY=18000.

²⁰ Palestine Legal, Jewish Voice for Peace, National Lawyers Guild, and the Center for Constitutional Rights sent a letter to Janet Napolitano and the UC Regents outlining First Amendment concerns with the State Department’s re-definition of anti-Semitism. The letter is available at <http://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/558abe8ae4b050f36b381190/1435156106563/UCOPLetterAntiSemitismFinal.pdf>.

²¹ See, e.g., Jay Michaelson, Why U. of California Should Dump “Three D” Definition of Anti-Semitism, The Forward, July 22, 2015, <http://forward.com/opinion/312358/why-u-of-california-should-dump-three-d-definition-of-anti-semitism/>.

²² Kenneth Stern, *supra* note 2.