

February 6, 2024

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: Reject Definitions of Anti-Semitism that Encompass Protected Speech

Dear Secretary Cardona:



**National Political
Advocacy Department**
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Washington, DC 20005-2112
aclu.org

Deirdre Schifeling
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Advocacy Officer

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Executive Director

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President

The American Civil Liberties Union (ACLU), one of the nation’s foremost defenders of free speech, urges you to reject the International Holocaust Remembrance Alliance (IHRA) working definition of “antisemitism” (and similar definitions) in any proposed rule your office may formulate in response to Executive Order 13899, or in any other policy or practice to enforce civil rights law.¹ This definition of antisemitism conflates protected political speech with unprotected discrimination, and enshrining it into regulation will chill the exercise of First Amendment rights and risk undermining the agency’s legitimate and important efforts to combat discrimination.

The IHRA working definition of antisemitism includes protected criticism of Israel and its policies. For example, the 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 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 If the Department of Education were to adopt this definition, and investigate universities for Title VI complaints based on it, college and university administrators would likely silence a range of protected speech including criticism of the Israeli government’s treatment of Palestinians, analogies likening Israeli policies to those of Nazi Germany, or sharing differing beliefs about the right to a Jewish state. People may disagree about whether such speech is antisemitic, but that debate is irrelevant to the First Amendment, which prohibits the government from censoring or penalizing core political speech.

While the ACLU does not take a position on the conflict between Israel and Palestine, we do 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.

¹ Exec. Order No. 13899, 84 Fed. Reg. 68779 (Dec. 11, 2019).

² Working Definition of Antisemitism, International Holocaust Remembrance Alliance, <https://holocaustremembrance.com/resources/working-definition-antisemitism> (last accessed Jan. 29, 2024).

In fact, the Supreme Court has held that political speech is “at the core of what the First Amendment is designed to protect.”³ Promoting discussion and debate on issues of public interest are critical for “the bringing about of political and social changes desired by the people.”⁴ Likewise the principles of academic freedom require higher education institutions to safeguard protected speech and political debate in order to help students pursue knowledge.

Harassment of Jewish students is wrong and illegal. As the ACLU has articulated in other contexts, the federal government is equipped with the standards to address hostile environment harassment, including when speech is involved.⁵ But the IHRA definition of antisemitism is not rooted in the legal protections against hostile environments and instead seeks to prohibit speech based on viewpoint alone. The speech we censor today will set the stage for what we censor tomorrow. And as Justice Kennedy noted in a concurrence in the case *Matal v. Tam*, “a law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government’s benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.”⁶

If the Department of Education were to use the IHRA working definition of antisemitism in its investigations of Title VI complaints, protected speech would inevitably be chilled. In fact, the lead author of the original IHRA definition, Kenneth Stern, has himself opposed the application of this definition to campus speech, noting 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.”⁷ Even if lawsuits and complaints are dismissed, merely bringing them would likely be sufficient motivation for schools to censor their communities, fearing recourse from donors, faculty, political leaders and prospective students.

Even in the absence of this definition, advocacy groups have 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. We believe this would become even more common if the Department of Education formally adopts the IHRA working definition of

³ *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality opinion)).

⁴ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)).

⁵ See, e.g., ACLU Letter to Raymond Windmiller, Executive Officer, U.S. Equal Employment Opportunity Commission re: Proposed Enforcement Guidance on Harassment in the Workplace RIN 3046-ZA02 (Nov. 1, 2023).

⁶ *Matal v. Tam*, 582 U.S. 218 opinion of Kennedy, J.

⁷ 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.

antisemitism. 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."⁸ Additionally, there have been multiple instances of university censorship of pro-Palestinian expression after the October 7 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,⁹ and Brandeis University banning the student group Students for Justice in Palestine.¹⁰

In other countries that have adopted this definition, universities have routinely censored speech in a manner that would be unconstitutional if conducted by an American public university. For example, students in British universities were subjected to disciplinary proceedings for sharing a Human Rights Watch infographic, signing a letter in support of a former President of the UK National Students' Union who was accused of antisemitism, and even liking and sharing a social media post which stated "If you are silent when it comes to Palestine, you would have been silent at the time of the Holocaust."¹¹ In other cases, student events for Israeli Apartheid Week, like an event entitled "Debunking misconceptions on Palestine and the importance of BDS" were disrupted or canceled because they were deemed antisemitic under the IHRA working definition.¹²

⁸ Letter from the David Horowitz Freedom Center to Pomona and Pitzer Colleges, Feb 3, 2020, available at <https://drive.google.com/file/d/12jTDUIG3AITOI58VKg8n7MrUEb34icRJ/view>.

⁹ 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/>.

¹⁰ 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>.

¹¹ *Suppressing Palestinian Rights Advocacy Through the IHRA Working Definition of Antisemitism*, European Legal Support Center (June 2023) at 27,

<https://res.cloudinary.com/elsc/images/v1685978238/The-Practice-of-Suppressing-Palestinian-Rights-Advocacy-FINAL-PP/The-Practice-of-Suppressing-Palestinian-Rights-Advocacy-FINAL-PP.pdf?i=AA>.

¹² *Id.* at 28.

Adopting 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 and harassment through Title VI complaints and investigations, we strongly caution against adopting the IHRA definition, or any definition of discrimination that threatens to censor or penalize political speech laying at the heart of the First Amendment. If you have any questions, please do not hesitate to reach out to jleventoff@aclu.org.

Sincerely,



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American Civil Liberties Union



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