



May 24, 2024

U.S. Department of Education
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Washington, DC 20202-1100
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Office for Civil Rights, Boston Office
U.S. Department of Education
5 Post Office Square, 8th Floor
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**RE: Title VI Complaint Regarding Harvard University's Unsafe Learning Environment
for Jewish Students**

Dear Sir or Ma'am:

On behalf of Jewish students enrolled at Harvard University (Harvard) experiencing harassment, intimidation, and discrimination, and outright danger on the basis of race and national origin and who are being denied a safe learning environment, we respectfully submit this Complaint against Harvard. We urge your Office to investigate and hold Harvard accountable for its ongoing violations of Title VI of the Civil Rights Act of 1964.

Introduction

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in several significant cases involving the freedoms of speech and religion.¹ We write to raise and seek a remedy for the antisemitic harassment and violence that has effectively taken over many areas of Harvard's campus through an "encampment," riots, and the like. We urge you to immediately enforce Title VI here to *stop* any antisemitic harassment on Harvard's campus and to prevent it, by virtue of its standing, stature, and authority, from continuing to *create, contribute to, or tolerate* a hostile and harassing environment on campus.

I. The Law: Title VI of the Civil Rights Act of 1964 Prohibits What Harvard Allows.

"Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." (President John F. Kennedy, in his message calling for the enactment of Title VI, 1963).

Title VI of the Civil Rights Act of 1964 (Title VI) requires recipients of federal funding, including institutes of higher learning, to ensure its programs and activities are free from harassment, intimidation, and discrimination on the basis of race, color, and national origin. 42 U.S.C. § 2000d, *et seq.*² In a September 13, 2004 letter, the United States Department of Education Office for Civil Rights (OCR) clarified that your jurisdiction extends to antisemitism complaints to the extent that they implicate ethnic.³ As the OCR policy directive explained, "[g]roups that face discrimination on the basis of shared ethnic characteristics may not be denied the protection of our civil rights laws on the ground that they also share a common faith." *Id.* This application of Title VI to antisemitism has been confirmed by courts as well. *See T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 354 (S.D.N.Y. 2014). Moreover, the Supreme Court has confirmed that Jewish individuals may bring racial discrimination claims. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987) (holding "that the Court of Appeals erred in holding that Jews cannot state a § 1982 claim against other white defendants").

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. This duty most certainly encompasses a duty to protect students from a hostile educational environment. As your agency has explained:

¹ *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause).

² The Title VI implementing regulations (34 C.F.R. § 100) provide a detailed discussion of discrimination prohibited by Title VI.

³ Letter from Kenneth L. Marcus, Deputy Assistant Sec'y for Enf't, Off. of Civ. Rts., U.S. Dep't of Educ., to Colleague (Sept. 13, 2004), <https://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>.

An educational institution has a duty to provide a nondiscriminatory environment that is conducive to learning. In addition to the curriculum, students learn about many different aspects of human life and interaction from school. The type of environment that is tolerated or encouraged by or at a school can therefore send a particularly strong signal to, and serve as an influential lesson for, its students.

Department of Education Investigative Guidance, 59 Fed. Reg. 11,448, 11,449 (Mar. 10, 1994).

The Supreme Court has recognized that under Title IX, a university is required to regulate the conduct of other students to protect students from gender harassment. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643-44 (1999). A university has violated its responsibilities under Title IX when it acts with deliberate indifference to conduct that is “so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that [the statute] is designed to protect.” *Id.* at 652. Importantly, the same principles of liability apply to Title VI. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694-95 (1979)) (“Congress modeled Title IX after Title VI of the Civil Rights Act of 1964, and passed Title IX with the explicit understanding that it would be interpreted as Title VI was.”).

As this office has expressed, Title VI protection covers students who are or are perceived to be Jewish, Christian, Muslim, Sikh, Hindu, Buddhist, or other groups that are or are perceived to: 1) “share[] ancestry or ethnic characteristics”; or 2) have “citizenship or residency in a country with a dominant religion or distinct religious identity.”⁴ “Title VI prohibits discrimination based on race, color, or national origin against students of any religion . . . when the discrimination, for example”:

- “involves racial, ethnic, or ancestral slurs or stereotypes”;
- is based on a student’s “skin color, physical features, or style of dress that reflects both ethnic and religious traditions”; or
- is based on the country or region where a student is from or is perceived to have come from, including, for example, discrimination based on a student’s accent or name, a student’s limited English proficiency, or a student speaking a language other than English.⁵

Courts have accordingly recognized that the obligations imposed on schools under Title VI include an obligation to protect students from discrimination and harassment. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 n.5 (3d Cir. 2001) (suggesting that Title VI hostile environment claims may lie); *see also Bryant v. Indep. Sch. Dist. No. 1-38*, 334 F.3d 928, 934 (10th Cir. 2003) (“[D]eliberate indifference to known instances of student-on-student racial harassment is a viable theory in a Title VI intentional discrimination suit[.]”); *Sewell v. Monroe City Sch. Bd.*, 974 F.3d

⁴ *See Protecting Students from Discrimination Based on Shared Ancestry or Ethnic Characteristics*, DEP’T OF EDUC. (Jan. 2023), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-shared-ancestry-202301.pdf>.

⁵ *Id.*

577, 584 (5th Cir. 2020); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033-34 (9th Cir. 1998); *Whitfield v. Notre Dame Middle Sch.*, 412 Fed. App'x 517, 521 (3rd Cir. 2011).

An educational facility is responsible for a racially hostile environment “if it has effectively caused, encouraged, accepted, tolerated or failed to correct a racially hostile environment.” Department of Education Investigative Guidance, 59 Fed. Reg. at 11,449. As you have emphasized, “an alleged harasser need not be an agent or employee of the recipient, because this theory of liability under title VI is premised on a recipient’s general duty to provide a nondiscriminatory educational environment.” *Id.* You have clarified, “the existence of a racially hostile environment that is created, encouraged, accepted, tolerated, or left uncorrected by a recipient also constitutes different treatment on the basis of race.” *Id.* at 11448.

The executive order, “Combating Anti-Semitism,” not only restated longstanding OCR policy that Jewish students are protected against antisemitism under Title VI; it stated that all federal agencies—including the Department of Education—should consider the International Holocaust Remembrance Alliance’s (IHRA’s) definition of antisemitism as guidance for their enforcement of Title VI.⁶ The Biden administration has repeatedly confirmed that this executive order remains binding policy for the Department. By signing the annual Title VI compliance form and accepting federal assistance, Harvard has accepted an affirmative obligation to ensure that *all* students, including Jewish students, have a harassment-free educational environment in which to learn. Under the IHRA definition, discriminating against or harassing a Jewish person because of a real or perceived connection to the State of Israel is antisemitic. Accordingly, it is Harvard’s obligation to protect Jewish students from a racially hostile environment, including from a hostile environment that targets those students for their connection with Israel.

II. The First Amendment Provides No Defense to Race-Based Threats, Intimidation, and Violence Facilitated by Harvard.

To the extent there is confusion, the First Amendment does not protect any unlawful conduct, which includes trespassing, vandalism, harassment, assault, and the destruction of property. It does not protect someone who is making true threats, which the Supreme Court in *Virginia v. Black*, 538 U.S. 343 (2003), defined as “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Id.* at 359. Nor does it protect intimidation, which is “a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *Id.* at 360. There is no First Amendment protection for speech that involves incitement, which the Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), explained includes speech that “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Id.* at 447.

Here, it is important to address the meaning of “intifada” or “globalize the intifada” and other similar statements that have recently been made or chanted by students on campuses, including

⁶ Exec. Order No. 13,899, 84 Fed. Reg. 68,779 (Dec. 11, 2019). That definition states, “Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.”

that of Harvard. “Intifada” is an Arabic word that translates to “uprising,” “shaking off,” or “rebellion.”⁷ Historically, it is tied to periods of intense violence against Israel by the terrorist organization Hamas,⁸ including the intifada from 1987-1990 and again in 2000-2005. Acts of violence, or “intifada,” include attacks on innocent civilians via car bombs,⁹ suicide bombers,¹⁰ and bus attacks.¹¹ Now, calls for “intifada” and to “globalize the intifada” are connected to anti-Israel groups that support violence against Israel and its supporters around the world. In fact, pro-Hamas groups have posted maps on social media of locations around the world, including locations in New York City, that it claims are associated with “genocide” in Gaza. Student groups that chant or post these phrases on college campuses are actively calling for violence against anyone who supports or is perceived to support Israel, including Jewish students on those same campuses. They are specifically targeting Harvard’s Jewish students for their Jewish identity and for their connection with the State of Israel. This is antisemitism. These statements are calls to kill Jews and, as such, are inherently in conflict with Harvard’s Title VI obligations.

Reports indicate that rioters were encamped since April 24, 2024, on the Harvard Yard.¹² For thirteen days, the Harvard Yard was occupied by anti-Israel protests. “For 13 days, the University has let them.”¹³ These agitators even raised the Palestinian flag on the Harvard flagpole and chanted the antisemitic slogan, “From the river to the sea, Palestine will be free.”¹⁴ It is only two weeks after this “occupation” began that Harvard threatened to actually take action against these students for their misconduct.¹⁵ Even after Harvard finally took some initial action, the agitators have indicated that the encampment would continue as part of the “student intifada” which has “engulfed the entire country.”¹⁶ A call for intifada is a call for violence against Jews, and it creates a hostile environment under Title VI.

⁷ *Intifada, Palestinian-Israeli History*, BRITANNICA, <https://www.britannica.com/topic/intifada> (Nov. 21, 2023).

⁸ FOREIGN TERRORIST ORGANIZATIONS, BUREAU OF COUNTERTERRORISM, U.S. DEP’T OF STATE, <https://www.state.gov/foreign-terrorist-organizations> (last visited May 24, 2024).

⁹ David Hoffman, *8 Killed, 40 Injured in Car Bomb Blast at Israeli Bus Stop*, THE WASHINGTON POST (Apr. 6, 1994), <https://www.washingtonpost.com/archive/politics/1994/04/07/8-killed-40-injured-in-car-bomb-blast-at-israeli-bus-stop/6feb4aef-1e8f-4d32-bfe5-79bf5d468760/>. *Suicide and Other Bombing Attacks in Israel Since the Declaration of Principles* (Sept 1993), WORLD MINISTRY OF FOREIGN AFFAIRS (JUN. 6, 1994), <https://www.gov.il/en/pages/suicide-and-other-bombing-attacks-since-the-declaration-of-principles>.

¹⁰ *Jerusalem Bombing*, NPR (Feb. 25, 1996), <https://www.npr.org/1996/02/25/1008898/jerusalem-bombing>.

¹¹ Marjorie Miller & Mary Curtius, *20 Killed, 10 Injured in Jerusalem Bus Explosion*, LOS ANGELES TIMES, (Mar. 3, 1996), <https://www.latimes.com/archives/la-xpm-1996-03-03-mn-42559-story.html>.

¹² Michelle N. Amponsah, *Protesters March To Harvard President Garber’s Home, Demand Start of Negotiations*, HARVARD CRIMSON (May 7, 2024), <https://www.thecrimson.com/article/2024/5/7/harvard-palestine-march-to-garber-residence/#:~:text=Pro%2DPalestine%20students%20first%20mounted,of%20student%20arrests%20and%20suspensions>.

¹³ Julian J. Giordano, *Garber is Taking a Patient Approach to the Harvard Encampment. So Far, It’s Working*, HARVARD CRIMSON (May 6, 2024), <https://www.thecrimson.com/article/2024/5/6/garber-patient-strategy-palestine-encampment/>.

¹⁴ Madeline A. Hung, *Encampment Protesters Briefly Raise 3 Palestinian Flags Over Harvard Yard*, HARVARD CRIMSON (Apr. 28, 2024), <https://www.thecrimson.com/article/2024/4/28/palestine-flag-harvard-yard/>.

¹⁵ *Protesters Won’t Say if Harvard Encampment Will Continue as Garber Threatens Major Disciplinary Action*, HARVARD CRIMSON (May 6, 2024), <https://www.thecrimson.com/article/2024/5/7/harvard-encampment-protesters-press-conference/>.

¹⁶ *Id.*

Rather than taking action and clearing the encampment, Harvard negotiated a settlement with those calling for intifada, agreeing to reinstate students that had been suspended for their conduct and offering “protesters a meeting with members of the University’s governing boards about divestment.”¹⁷ The Harvard Yard was occupied for 20 days, and when finally cleared, it was only cleared by agreeing to the protestors’ demands. Harvard agreed to process cases involving these students with “precedents of leniency for similar actions in the past.”¹⁸ Most strikingly, “[m]embers of the encampment will also meet with Garber and Faculty of Arts and Sciences Dean Hopi E. Hoekstra to discuss their perspectives on the Israel-Hamas war.”¹⁹ Harvard agreed, in other words, to discuss the perspectives of those calling for an intifada.

To make matters even worse, when some students did receive some discipline and were suspended for their conduct, the Harvard Faculty overwhelmingly voted to let those students graduate anyway and confer degrees on those students, despite their conduct.²⁰

III. The United States Department of Education Must Investigate Harvard for its Ongoing Title VI Violations.

The danger to Jewish students is real and ongoing. We respectfully urge your office to act quickly and decisively to immediately curb the violence and disruptive harassment of these encampments. Failing to do so will have disastrous results, not only for the Jewish community, but also for all Americans. As the late Chief Rabbi Jonathan Sacks once explained, “Antisemitism is the world’s most reliable early warning sign of a major threat to freedom. . . . It matters to all of us. Which is why we must fight it together.”²¹

Clearly, a university has a legal duty to provide a nondiscriminatory environment that is conducive to learning. Instead, the existence of these encampments at Harvard, tolerated and facilitated by Harvard, were fatal to any possibility of Jewish students learning on this campus. In many circumstances, they have been unable to attend class at all because their Jewish status renders them a target of attacks by these enactments. Even though the encampment has ended, Harvard gave it legitimacy, giving in to the encampment’s demands in a manner that will continue to make Jewish students unsafe. We urge OCR to redress this problem immediately so that Jewish students are once again safe from harassment and able to receive the full benefit of their education.

We stand ready to provide any assistance.

¹⁷ Joyce E. Kim, *Harvard Out of Occupied Palestine Ends Harvard Yard Encampment*, HARVARD CRIMSON (May 14, 2024), <https://www.thecrimson.com/article/2024/5/14/harvard-encampment-ends/>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Tilly R. Robinson, *Harvard Faculty Overwhelmingly Vote to Allow Seniors Disciplined Over Encampment to Graduate*, HARVARD CRIMSON (May 20, 2024), <https://www.thecrimson.com/article/2024/5/21/faculty-vote-allow-suspended-seniors-graduate/>.

²¹ *The Mutation of Antisemitism*, THE RABBI SACKS LEGACY, <https://rabbisacks.org/videos/the-mutation-of-antisemitism/> (last visited May 24, 2024).

TYPE OF COMPLAINT:

1. Does your complaint involve employment discrimination?

Yes ___ No X

2. Does your complaint involve intimidation or retaliation, separate and apart from civil rights discrimination?

Yes ___ No X

3. Contact Information

Jordan Sekulow, Esq.
American Center for Law and Justice



4. What is the most convenient time and way for us to contact you about this complaint?

We will make ourselves available to discuss this Complaint at your convenience.

5. Are you represented by an attorney in this matter? Yes ___ No ___. If yes, provide his or her contact information below:

N/A. We are attorneys. Our information is as follows:

Jordan Sekulow, Esq.
Benjamin P. Sisney, Esq.
American Center for Law and Justice



6. Information about person(s) who experienced the prohibited discrimination, intimidation or retaliation, if different from complaint filer (Attach additional sheets, if necessary.):

These students are fearful for their safety and professional livelihood. Many choose to remain anonymous. Given the pervasiveness and widespread media coverage, it will not be difficult for your office to establish the victimization of Jewish students.

7. Identify who performed the alleged prohibited act(s) (Attach additional pages, if necessary.):

Media coverage of the ongoing acts of racial discrimination being facilitated by Harvard is widespread. All media stories cited above are incorporated here by reference.

8. Explain the events that took place and why you believe you or another person was subject to a discriminating, intimidating or retaliating act(s). For example, indicate who was involved and how another person treated you differently than others. (Attach additional sheets, if necessary. Attach a copy of written materials that support your complaint.)

Please see the description set forth above, incorporated here by reference.

9. Identify the basis on which you believe the discrimination, intimidation, or retaliation occurred.

Race/National Origin.

10. When and where did the alleged discrimination, intimidation or retaliation take place? Provide date(s), time(s) and location(s).

Earliest date: Approximately April 17, 2024.

Most recent date: Ongoing

11. If the discrimination, intimidation or retaliation occurred more than 180 days ago, and you are requesting a waiver to file late, explain in detail why you filed after 180 days.

N/A

12. Supporting Contacts/Witnesses - List any person(s) (witnesses, fellow employees, supervisors, or others) whom we may contact for additional information to support your complaint.

Harvard President Alan M. Garder
Office of the President
Harvard University
Massachusetts Hall
Cambridge, MA 02138 USA

13. Do you have any other information that you think is relevant to the investigation of your complaint?

Yes. Please see the Memorandum, as Exhibit A to this Complaint, containing a further assessment of the law and regulations, and how they have developed, specifically in the context of Executive Orders and adoption of International Holocaust Remembrance Alliance's (IHRA's) definition of antisemitism, to assist OCR in enforcing Harvard's obligations under Title VI.

14. What remedy are you seeking?

Any and all remedies available under the law, including but not limited to the termination of federal funding and mandates that any actions necessary are taken to ensure this type of rampant antisemitism is not allowed at this University again.

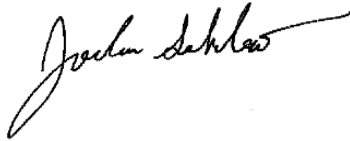
15. Have you (or the person who experienced the discrimination, intimidation or retaliation) filed the same or any other complaint(s) with our office or another office in the Department of Education?

Yes ___ No X

* * * * *

On behalf of Jewish students enrolled at Harvard, we appreciate your Office's mission and role in enforcing Title VI in protecting students from, and the use of federal tax dollars from facilitating, harassment, intimidation, and discrimination on the basis of race and national origin. Again, we stand ready to assist.

Respectfully submitted,



Jordan Sekulow
Executive Director



Benjamin P. Sisney
Senior Litigation Counsel

ANTISEMITISM IN THE UNITED STATES²²

Beyond the current antisemitic riots and “encampments” allowed and fomented by universities across the nation, recent surveys indicated that antisemitism remains a persistent, pervasive, and disturbing problem in contemporary American society, and that Jewish people continue to be a targeted minority in the United States.²³

Data shows, for instance, that although Jews make up only roughly two percent of the population, they are consistently the most likely of all religious groups to be victimized by incidents of hate, and that such incidents are increasing at an alarming rate.²⁴ Moreover, over thirty percent of Americans claim they do not know what the word antisemitism means or have never even heard of the word.²⁵ Worse, eighty-five percent of Americans believe at least one antisemitic trope.²⁶

It is no surprise then, that on campuses across the country antisemitism has become entrenched, systemic, broad, and deep. Based on an Anti-Defamation League (ADL) audit of antisemitic incidents (which include harassment, vandalism, and assaults in the United States), the 2018 incident total was forty-eight percent higher than the number of incidents in 2016 and ninety-nine percent higher than 2015.²⁷

The ACLJ has taken action on numerous occasions to stand in the breach and protect Jewish students and professors from harassment and discrimination using Title VI of the Civil Rights of 1964.²⁸ Here is how Title VI works as it relates to Jewish students. In the United States, Title VI “prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.”²⁹ The Office for Civil Rights (OCR) in the United States Department of Education is responsible for “enforce[ing] Title VI as it applies to programs and

²² Portions of this memorandum are adapted from Mark Goldfeder, *Defining Antisemitism*, 52 SETON HALL L. REV. 119 (2021), <https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1808&context=shlr>, and Mark Goldfeder, *Why We Should Applaud Trump’s Executive Order on Anti-Semitism*, THE HILL (Dec. 16, 2019), <https://thehill.com/opinion/civil-rights/474271-why-we-should-applaud-trumps-executive-order-on-anti-semitism>.

²³ *Compare The State of Antisemitism in America 2022: AJC’s Survey of the General Public*, AM. JEWISH COMM., <https://www.ajc.org/AntisemitismReport2022/GeneralPublic> (last visited Apr. 10, 2023), with *The State of Antisemitism in America 2022: AJC’s Survey of American Jews*, AM. JEWISH COMM., <https://www.ajc.org/AntisemitismReport2022/AmericanJews> (last visited Apr. 10, 2023).

²⁴ *AJC Deeply Troubled by FBI Hate Crimes Data Showing Overall Increase, Jews Most-Targeted Religious Group*, AM. JEWISH COMM., <https://www.ajc.org/news/ajc-deeply-troubled-by-fbi-hate-crimes-data-showing-overall-increase-jews-most-targeted> (last visited Apr. 10, 2023).

²⁵ *AJC’s Survey of the General Public*, *supra* note 232.

²⁶ Center for Antisemitism Research, *Antisemitic Attitudes in America: Topline Findings*, ADL (Jan. 12, 2023) <https://www.adl.org/resources/report/antisemitic-attitudes-america-topline-findings>.

²⁷ *Audit of Anti-Semitic Incidents: Year in Review 2018*, ADL (May 3, 2022), <https://www.adl.org/resources/report/audit-anti-semitic-incidents-year-review-2018>.

²⁸ 42 U.S.C. § 2000d.

²⁹ *Title VI of the Civil Rights Act of 1964: 42 U.S.C. § 2000d Et. Seq.*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/fcs/TitleVI-Overview> (June 6, 2023).

activities” funded by the U.S. Department of Education.³⁰

Title VI *does not* give OCR jurisdiction to investigate incidents of *religious* discrimination. And, until 2004, OCR was making the same mistake that many university offices are still making today: OCR had declined to investigate antisemitic complaints under its regular well-established framework for dealing with discrimination against other minorities because they saw Jews as only a religious group, and not a race, ethnicity, or type of national origin. Because Jewish identity is so multifaceted, encompassing aspects of race, religion, ethnicity, national origin, etc., it can sometimes be hard for the untrained eye to identify, and because antisemitism fell outside the bounds of the normal framework, it was much easier to get away with.

Thankfully, in a September 13, 2004, Dear Colleague letter, then U.S. Department of Education Deputy Assistant Secretary for Enforcement Kenneth L. Marcus issued a series of policy statements that emphasized the “right of all students, *including students of faith*, to be free from discrimination in our schools and colleges under Title VI”³¹

Assistant Secretary Marcus wrote the following:

[W]e must remain particularly attentive to the claims of students who may be targeted for harassment based on their membership in groups that exhibit both ethnic and religious characteristics, such as Arab Muslims, Jewish Americans and Sikhs

Groups that face discrimination on the basis of shared ethnic characteristics may not be denied the protection of our civil rights laws on the ground that they also share a common faith. Similarly, the existence of facts indicative of religious discrimination does not divest OCR of jurisdiction to investigate and remedy allegations of race or ethnic discrimination. OCR will exercise its jurisdiction to enforce the Title VI prohibition against national origin discrimination, regardless of whether the groups targeted for discrimination also exhibit religious characteristics

No OCR policy should be construed to permit, much less to require, any form of religious discrimination or any encroachment upon the free exercise of religion.³²

This reasoning was emphasized again by then Assistant Attorney General Thomas E. Perez in his September 8, 2010, letter to then Assistant Secretary for Civil Rights Russlynn H. Ali.³³ Assistant Attorney General Perez wrote:

Although Title VI does not prohibit discrimination on the basis of religion, discrimination against Jews, Muslims, Sikhs, and members of other religious groups violates Title VI when that discrimination is based on the group’s actual or perceived

³⁰ Office for Civil Rights, *Education and Title VI*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html> (last visited May 24, 2024).

³¹ Dear Colleague Letter from Kenneth L. Marcus, Deputy Assistant Sec’y for Enf’t, U.S. DEP’T OF EDUC. (Sept. 13, 2004), <https://www2.ed.gov/about/offices/list/ocr/letters/religious-rights2004.pdf> (emphasis added).

³² *Id.*

³³ Letter from Thomas E. Perez, U.S. Assistant Att’y Gen., to Russlynn H. Ali, Assistant Sec’y for C.R. (Sept. 8, 2010), https://www.justice.gov/sites/default/files/crt/legacy/2011/05/04/090810_AAG_Perez_Letter_to_Ed_OCR_Title%20VI_and_Religiously_Identifiable_Groups.pdf.

shared ancestry or ethnic characteristics, rather than its members' religious practice. Title VI further prohibits discrimination against an individual where it is based on actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity.³⁴

This reasoning has been confirmed in court both in Title VI cases³⁵ and in the Title VII context.³⁶ The Supreme Court has twice held that other statutes that were similarly intended to protect identifiable classes of persons who are subject to intentional discrimination because of their ancestry or ethnic characteristics included Jewish people.³⁷

Even under Title VI, not all forms of harassing behavior are illegal.³⁸ For example, typical school bullying behavior does not run afoul of Title VI, so long as the bullying is not based on race, color, or national origin. It is only illegal, and therefore subject to regulation, if it is based on an illegal discriminatory intent.³⁹ The problem OCR had faced was that without a definition of antisemitism to use as a reference, the unanswered question of how to determine illegal antisemitic intent meant that Jewish students were always vulnerable to attack.

³⁴ *Id.* at 1-2.

³⁵ *T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 354 (S.D.N.Y. 2014).

³⁶ In the words of Judge Mark Hornsby:

America is no stranger to anti-Semitism, which is often rooted in prejudice against a person based on his heritage/ethnicity without regard to the person's particular religious beliefs . . . Jewish citizens have been excluded from certain clubs or neighborhoods, and they have been denied jobs and other opportunities based on the fact that they were Jewish, with no particular concern as to a given individual's religious leanings.

Michael Kunzelman, *Judge: Jewish Heritage Can be Basis for Race Discrimination*, ASSOCIATED PRESS (July 16, 2018), <https://apnews.com/article/82c5075c54ce4f179e6517f0e4f07824>. Thus, they have been treated like a racial or ethnic group that Title VII was designed to protect from employment discrimination based on membership in that group. *See T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 355 (S.D.N.Y. 2014).

³⁷ *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987). *See Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d at 354-55, for a broad overview of federal courts that have included Jewish people in this identifiable class:

Regardless of whether religious bias alone can form the basis of a Title VI claim or anti-Semitism can provide a basis for national origin discrimination, courts have regularly found that anti-Semitic harassment and discrimination amount to racial discrimination. *See Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18, 107 S. Ct. 2019, 95 L. Ed. 2d 594 (1987) (explaining "that the Court of Appeals erred in holding that Jews cannot state a § 1982 claim against other white defendants"); *Sherman v. Town of Chester*, 752 F.3d 554, 567 (2d Cir. 2014) (holding that "Jews are considered a race for the purposes of §§ 1981 and 1982"); *United States v. Nelson*, 277 F.3d 164, 177 (2d Cir. 2002) (holding that "Jews count as a 'race' under certain civil rights statutes enacted pursuant to Congress's power under the Thirteenth Amendment"); *Bachman v. St. Monica's Congregation*, 902 F.2d 1259, 1261 (7th Cir. 1990) (finding that Jews constitute a race within the meaning of federal civil rights statutes); *Lenoble v. Best Temps, Inc.*, 352 F. Supp. 2d 237, 247 (D. Conn. 2005) (noting that "Jews are a distinct race for § 1981 purposes"); *Powell v. Independence Blue Cross, Inc.*, No. 95-CV-2509, 1997 U.S. Dist. LEXIS 3866, 1997 WL 137198, at *6 (E.D. Pa. Mar. 26, 1997) (finding that "[§] 1981 must be read to encompass discrimination against a plaintiff because of his Jewish ancestry or ethnicity"); *Singer v. Denver Sch. Dist. No. 1*, 959 F. Supp. 1325, 1331 (D. Colo. 1997) (noting that Jews are "a distinct racial group for the purposes of § 1981").

³⁸ Office for Civil Rights, *Race, Color, or National Origin Discrimination: Frequently Asked Questions*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html>.

³⁹ Civil Rights Division, *Section VI: Proving Discrimination—Intentional Discrimination*, in TITLE VI LEGAL MANUAL, <https://www.justice.gov/crt/fcs/T6Manual6> (last visited May 24, 2024).

However, as a result of former President Trump’s December 11, 2019, Executive Order (EO),⁴⁰ this issue was clarified in two important ways. First, so as not to leave any doubt, the EO codified the now longstanding policy that protected Jewish students from antisemitic attacks. The EO reads, in part: “It shall be the policy of the executive branch to enforce Title VI against prohibited forms of discrimination rooted in anti-Semitism as vigorously as against all other forms of discrimination prohibited by Title VI.”⁴¹

Second, “[i]n enforcing Title VI, and identifying evidence of discrimination based on race, color, or national origin,” the EO stated that “all executive departments and agencies (agencies) charged with enforcing Title VI shall consider” the International Holocaust Remembrance Alliance’s (IHRA’s) definition of antisemitism.⁴² This non-legally binding working definition of antisemitism, which was adopted by the IHRA on May, 26, 2016, reads as follows: “Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.”⁴³

There were (and there remain) some critics, including those who were worried that the EO would curtail their own antisemitic actions, who claim that formally adopting the IHRA definition is somehow an attack on free speech.⁴⁴ Properly translated into legal terminology, their critiques are based on either First Amendment overbreadth doctrine concerns, vagueness concerns, or both.⁴⁵ A law or regulation is considered overbroad when it can “prohibit protected as well as non-protected speech.”⁴⁶ A law is considered vague when people “of common intelligence must necessarily guess at its meaning,”⁴⁷ (*i.e.*, when it does not give sufficiently clear notice to a reasonable person of what it demands or prohibits). These arguments, as applied to the EO and similar policies, are wrong, for at least six reasons.⁴⁸

First, the EO simply did not restrict or prohibit speech. Every person remains perfectly free to say what they want, however abhorrent, about Jews and/or the Jewish State of Israel. As the Supreme

⁴⁰ 84 C.F.R. 68779 (Dec. 16, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-12-16/pdf/2019-27217.pdf>. Former President Trump was not creating new laws but clarifying how the executive branch understands and applies the definitions in existing anti-discrimination law. *Defining Antisemitism*, *supra* note 22.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *About the IHRA Non-Legally Binding Working Definition of Antisemitism*, INT’L HOLOCAUST REMEMBRANCE ALL., <https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism> (last visited May 8, 2024).

⁴⁴ See, e.g., David Jackson, *Trump Signs Executive Order on Anti-Semitism that Critics Say Attacks Free Speech*, USA TODAY (Dec. 11, 2019), <https://www.usatoday.com/story/news/2019/12/11/trump-sign-anti-semitism-order-critics-say-stifles-free-speech/4396213002/>.

⁴⁵ See, e.g., *Submission by the Foundation for Individual Rights in Education to the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression Regarding Academic Freedom on College Campuses*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. 10 (Apr. 28, 2020), https://www.ohchr.org/Documents/Issues/Opinion/Submissions/NGOs/Foundation_for_Individual_Rights_in_Education_FIRE.pdf.

⁴⁶ Richard Parker, *Overbreadth*, FIRST AMEND. ENCYC., <https://police.mtsu.edu/first-amendment/article/1005/overbreadth> (last updated Feb. 18, 2024).

⁴⁷ *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

⁴⁸ See *Why We Should Applaud*, *supra* note 22; *Defining Antisemitism*, *supra* note 22.

Court of the United States explained in *Tinker v. Des Moines*, the “vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”⁴⁹ Hate speech is protected, obviously, but that does not mean that we cannot call it what it is: hateful. If that speech should cross the line and reach the level of discriminatory harassment, with or without accompanying acts,⁵⁰ “then and only then is regulation appropriate. Speech codes are constitutionally problematic; regulating *discriminatory conduct* is not.”⁵¹ The EO only addresses harassment, not speech, and harassing actions (or verbal acts that rise to the level of harassment) are already impermissible.⁵²

Second, “for there to be a violation of free speech, the order would have to be about regulating private speech, not government speech.”⁵³ All the EO does (and, for that matter, all that similar school policies and state bills would do) is explain how the government defines antisemitism when it is deciding where to allocate its money. The Supreme Court of the United States, in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* explained that “[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. . . . Were the Free Speech Clause interpreted otherwise, government would not work.”⁵⁴

Third, for those who would complain that the government was somehow taking sides by adopting a well-accepted definition of antisemitism, thereby raising the specter of viewpoint discrimination, the answer to that question is once again right there in *Walker*: “We have . . . refused ‘[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals.’”⁵⁵ The government is free to advance its own permissible goals, including being against antisemitic discrimination as defined by a well-accepted standard. Doing so is not impermissible viewpoint discrimination.⁵⁶

Fourth, the EO does not chill speech because there is no threat that the government will ever even investigate let alone bar any permissible speech of any kind. The EO directs those charged with enforcing Title VI to consider the IHRA definition only to help ascertain the motivation for discriminatory conduct, and not, as some would contend, as a substitute for either the applicable harassment standard (*i.e.*, what counts as discriminatory conduct in the first place) or the applicable First Amendment speech analysis.

Fifth, for those who argue that it is hard to distinguish acts from speech, the EO does not create

⁴⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

⁵⁰ Dear Colleague Letter from Russlynn Ali, Assistant Sec’y for C.R., U.S. DEP’T OF EDUC. (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>. The letter reads, in pertinent part:

Harassing conduct may take many forms, including verbal acts . . . when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces.

Id. at 2.

⁵¹ Goldfeder, *Why We Should Applaud*, *supra* note 22 (emphasis added).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245-46 (2015).

⁵⁵ *Id.* at 2246 (quoting *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

⁵⁶ See Mark Goldfeder, *Stop Defending Discrimination: Anti-Boycott, Divestment, and Sanctions Statutes are Fully Constitutional*, 50 TEX. TECH. L. REV. 207, 219 (2018).

any new gray areas of overly broad speech/act non-distinction. It simply uses the longstanding definition of harassing conduct in Title IX and Title VI cases, a definition that has been upheld numerous times in a variety of cases and contexts. The standard, and therefore the EO, only affects conduct that is “sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school.”⁵⁷ To the extent that speech is at all implicated, it is only for evidentiary purposes, *i.e.*, to clarify what is considered discriminatory towards Jewish people within those contexts in which the law has declared discrimination unacceptable.

And finally, the EO has a savings clause, which specifically limits the use of the IHRA definition to fall within constitutional parameters.⁵⁸

To summarize, the EO is clearly not overbroad or vague. Regarding overbreadth, as the Supreme Court of the United States emphasized in *Broadrick v. Oklahoma*,⁵⁹ declaring a regulation overbroad is “manifestly strong medicine,” to be employed “sparingly and only as a last resort,” and not in situations in which “a limiting construction has been or could be placed on the challenged statute.”⁶⁰ The EO (like all similar policies) is limited to assessing intent for discriminatory conduct, not speech, and is to be constructed in a limited fashion, consistent with constitutional law. Regarding vagueness, as the Supreme Court explained in *Kolender v. Lawson*, “the void-for-vagueness doctrine requires . . . sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”⁶¹ A policy using the IHRA definition to contextually assess the motivation behind potentially illegal discriminatory conduct before assuming it did or did not involve antisemitism provides just such definiteness and clarity. It uses the well-accepted and constitutionally upheld definition of discriminatory conduct used in all similar circumstances to reiterate that discriminatory antisemitic conduct is unacceptable. And it ensures that the application of the law will not be applied arbitrarily, by providing an objective and clear definition of what antisemitism is specifically for the purpose of *discouraging* the possibility of subjective enforcement.

Despite some pushback both domestically (described above) and internationally,⁶² the IHRA antisemitism definition is gaining momentum on the world stage in a variety of important contexts. For example, since 2010, the United States Department of State has “used a working definition, along with examples, of antisemitism”⁶³ **Both former President Trump⁶⁴ and President Biden⁶⁵ have**

⁵⁷ Dear Colleague Letter from Russlynn Ali, *supra* note 50.

⁵⁸ 84 C.F.R. 68,780 (Dec. 11, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-12-16/pdf/2019-27217.pdf>.

⁵⁹ See generally *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

⁶⁰ *Id.* at 613; see also Parker, *supra* note 46 (describing other cases in which the Court refused to invalidate statutes for overbreadth, and instead applied limiting constructions).

⁶¹ *Kolender v. Lawson*, 461 U. S. 352, 357 (1983).

⁶² *HRW Leads NGO Campaign Against Consensus IHRA Definition of Antisemitism*, NGO MONITOR (Apr. 5, 2023), <https://www.ngo-monitor.org/reports/ngo-campaign-against-ihra-definition-of-antisemitism/>.

⁶³ *Defining Antisemitism*, U.S. DEP’T OF STATE, <https://www.state.gov/defining-antisemitism/> (last visited Apr. 11, 2023).

⁶⁴ Donald Trump, *Executive Order on Combating Anti-Semitism*, WHITE HOUSE (Dec. 11, 2019), <https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-combating-anti-semitism/>.

⁶⁵ Omri Nahmias, *US Accepts IHRA's Definition of Antisemitism, Biden Official Says* *AJC CEO David Harris Called McDonald's Remarks "a solid reaffirmation of American leadership in the global fight against antisemitism."*, JERUSALEM POST (Feb. 3, 2021), <https://www.jpost.com/diaspora/antisemitism/jewish-org-welcome-us-support-for-ihra-definition-of-antisemitism-657621>.

endorsed IHRA's definition.

On June 1, 2017, the European Parliament “adopted with anonymity a first ever Resolution solely on combating antisemitism calling on Member States to ‘appoint national coordinators on combating anti-Semitism’ and ‘to adopt and apply the working definition of anti-Semitism employed by the International Holocaust Remembrance Alliance (IHRA).’”⁶⁶ In the September 20, 2019, *Report of the Special Rapporteur on freedom of religion or belief*, the UN Special Rapporteur encouraged States to adopt IHRA’s definition “for use in education and awareness-raising and for monitoring and responding to manifestations of antisemitism.”⁶⁷ To date, about thirty-nine UN Member States have adopted or endorsed IHRA’s definition.⁶⁸ In addition to the above, various other “international organizations, national governments, municipalities, institutions, NGOs, universities, athletic clubs, corporations, and other groups have adopted the IHRA Working Definition of Antisemitism as the guiding framework for their policies against antisemitism”⁶⁹

Despite these significant and positive steps, antisemitism is still on the rise,⁷⁰ as evidenced by the shameful debacle Harvard has fomented on its campus in utter disregard for its Jewish students’ safety and learning environment.

⁶⁶ *Key EU Documents: EU Resolutions, Conclusions and Other Documents Relevant in the Fight Against Antisemitism*, EUROPEAN COMM’N, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/combating-antisemitism/key-eu-documents_en#:~:text=The%20European%20Parliament%20adopted%20with%20anonymity%20a%20first,employed%20by%20the%20International%20Holocaust%20Remembrance%20Alliance%20%28IHRA%29 (last visited Apr. 11, 2023).

⁶⁷ *Elimination of all Forms of Religious Intolerance: Report of the Special Rapporteur on Freedom of Religion or Belief*, UNITED NATIONS (Sept. 20, 2019), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/289/00/PDF/N1928900.pdf>.

⁶⁸ *Information on Endorsement and Adoption of the IHRA Working Definition of Antisemitism*, INT’L HOLOCAUST REMEMBRANCE ALL., <https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism/adoption-endorsement> (last visited Apr. 11, 2023).

See also, *Adoption of the Working Definition*, AM. JEWISH COMM., <https://www.ajc.org/adoption-of-the-working-definition> (last visited Apr. 11, 2023).

⁶⁹ *IHRA Working Definition of Antisemitism Worldwide Adoption & Endorsement Report*, COMBAT ANTISEMITISM MOVEMENT & CTR. FOR THE STUDY OF CONTEMP. EUR. JEWRY AT TEL AVIV UNI., <https://combatantisemitism.org/wp-content/uploads/2022/05/CAM-IHRA-Definition-of-Antisemitism-Adoption-Endorsement-Report.pdf> (last visited Apr. 11, 2023).

⁷⁰ Krystina Shveda, *Antisemitic Incidents in the US are at the Highest Level Recorded Since the 1970s*, CNN (Mar. 23, 2023), <https://www.cnn.com/2023/03/23/us/antisemitism-report-unprecedented-rise-dg/index.html>.