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UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

November 8, 2023 hearing on

Free Speech on College Campuses

November 15, 2023

Representative Jim Jordan
Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Representative Jerrold Nadler,
Ranking Member
Committee on the Judiciary

RE: November 8, 2023 hearing on Free Speech on College Campuses

Dear Chairman Jordan, Ranking Member Nadler, and honorable members of the Committee:

The Foundation for Individual Rights and Expression (FIRE; thefire.org) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to the freedoms of speech, expression, and conscience—the essential qualities of liberty. FIRE places a special emphasis on defending these rights on our nation’s campuses because colleges and universities play a vital role in preserving free thought. Since 1999, FIRE has successfully defended First Amendment rights on campuses nationwide through public advocacy, targeted litigation, and *amicus curiae* filings.

Recent events on college campuses across the country have brought into focus the pressing need for colleges and universities to meet their legal and moral obligations to address anti-Semitism and simultaneously protect their communities’ freedom of expression.

Institutions of higher education have legal and moral obligations to address Following the October 7 Hamas attacks and Israel’s response, these dual obligations have been put to the test as college students, faculty, and protesters, as well as others have expressed opinions ranging from support for Israel, to concern for Palestinian civilians caught in the crossfire, to, even in some cases, celebrating Hamas’s atrocities.¹ FIRE is eager to help Congress and institutions across the nation navigate this contentious situation.

¹ See Madeline Halpert, *Growing backlash over Harvard students’ pro-Palestine letter*, BBC (Oct. 10, 2023), <https://www.bbc.com/news/world-us-canada-67067565> (describing a letter from Harvard student groups “[holding] the Israeli regime entirely responsible for all unfolding violence”); Thibault Spirlet, *A Columbia professor called Hamas terror attacks ‘awesome’ and ‘astounding’ in an article. A petition for his removal has passed 34,000 signatures.*, BUSINESS

The First Amendment protects a vast majority of the expression at protests regarding the Israel-Gaza war.

Importantly, most of the protests, demonstrations, and statements related to the conflict, are protected under the First Amendment. No matter how offensive the speech may be, the First Amendment protects all viewpoints equally. Statements supportive of Hamas or against the state of Israel, while heinous to many, do not, in and of themselves, constitute material support for terrorism, incitement, discriminatory harassment, or true threats and thus cannot be burdened, censored, or punished by the government.

Unless an individual's expression falls into one of the narrow exceptions of the First Amendment, as each of those exceptions have been defined by the Supreme Court, their expression is protected by the First Amendment and cannot be grounds for discipline.

The First Amendment protects international students studying in the United States.

Powerful government actors have called for international students to have their student visas revoked for expressing support for Hamas or Palestinians generally.² Some have argued that protests against Israel or membership in student organizations that oppose Israel constitute providing material support for terrorists.³ It is true that providing material support for terrorism is not protected by the First Amendment, but mere expression of agreement with a terrorist organization's cause does not constitute "material support."⁴

INSIDER (Oct. 16, 2023, 8:31 AM), <https://www.businessinsider.com/columbia-professor-faces-removal-petition-after-pro-hamas-attack-article-2023-10>; Rabbi Jamie Korngold, *CU Students Stage Silent Protest to Support Israel*, BOULDER JEWISH NEWS (Nov. 7, 2023), <https://boulderjewishnews.org/2023/cu-students-stage-silent-protest-to-support-israel/>; Rick Sobey, *Tufts Students for Justice in Palestine group is ripped for 'obscene' comments about Hamas' terrorist attacks on Israel*, BOSTON HERALD (Oct. 10, 2023, 7:52 PM), <https://www.bostonherald.com/2023/10/10/tufts-students-for-justice-in-palestine-group-is-ripped-for-obscene-comments-about-hamas-terrorist-attacks-on-israel/> (noting the Tufts Students for Justice in Palestine posted a letter which said "Footage of liberation fighters from Gaza paragliding into occupied territory has especially shown the creativity necessary to take back stolen land").

² See e.g., Douglas Soule, *Lawmaker, DeSantis' call to expel pro-Hamas protesters pits safety and free speech*, FLORIDA TODAY (Oct. 13, 2023), <https://www.floridatoday.com/story/news/politics/2023/10/13/israel-hamas-war-should-some-florida-student-protesters-be-expelled/71169019007/>; H. Res. 796, 118th Cong. (2023) ("calls on the President of the United States to enforce existing law to revoke visas and initiate deportation proceedings for any foreign national who has endorsed or espoused the terrorist activities of Hamas, Palestinian Islamic Jihad, Hezbollah, or other FTOs that have participated in terrorist attacks against Israel and United States citizens before, on, or after October 7, 2023."); Press Release, Senator Tom Cotton, *Cotton to Mayorkas: Deport Any Foreign National Supporting Hamas* (Oct. 16, 2023), <https://www.cotton.senate.gov/news/press-releases/cotton-to-mayorkas-deport-any-foreign-national-supporting-hamas>.

³ Filip Timotija, *DeSantis accuses pro-Palestine students of 'material support to terrorism'*, THE HILL (Oct. 27, 2023), <https://thehill.com/homenews/campaign/4279635-desantis-accuses-pro-palestine-students-support-terrorism/>.

⁴ *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25-26 (2010); see also *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 499 (2023); Charles Doyle, Cong. Research Serv., R41333, *Terrorist Material Support: An Overview of 18 U.S.C. § 2339A and § 2339B* (2023).

Foreigners who lawfully reside in America enjoy First Amendment protections. In *Bridges v. Wixon*, the Supreme Court said, “Freedom of speech and press is accorded aliens residing in the country.”⁵

The Court reiterated this proposition in *Chew vs. Colding* writing, “The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides within our country, it becomes invested with the rights guaranteed by the Constitution to all people within our borders.”⁶ To strip visas from students for exercising their right to freedom of speech is unlawful and will not survive judicial scrutiny.

Violence is never protected by the First Amendment. Nor is vandalism or blocking egress.

The various instances of assaults and physical altercations, vandalism, and blocking of egress conversely cross far beyond what the First Amendment protects. It is necessary and important for universities to keep their campus communities safe and to punish those responsible for these unlawful acts, after according them the appropriate due process. Simply put, the First Amendment never protects acts of actual physical violence, nor is it a safe harbor for the destruction of someone else’s property or blocking the egress of others.

Congress must avoid the constitutional pitfall of defining “anti-Semitism.”

During the hearing, you were urged to adopt the International Holocaust Remembrance Alliance’s working definition of “antisemitism” for use in campus efforts to address discriminatory anti-Semitic harassment. Congress must resist doing so because that approach would be unconstitutional.

The IHRA defines antisemitism as:

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.⁷

To be clear, FIRE has no objection to the definition’s employment for its originally intended use: as a tool to measure anti-Semitism.⁸ But it is too vague

⁵ 326 U.S. 145 (1945).

⁶ 344 U.S. 590, 596 n.5 (1953).

⁷ International Holocaust Remembrance Alliance, *What is antisemitism?* (last visited November 11, 2023), <https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism> (This non-legally binding working definition of antisemitism was adopted by the IHRA Plenary in Bucharest on May, 26 2016.).

⁸ Kenneth S. Stern, Opinion, *Will Campus Criticism of Israel Violate Federal Law?*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/opinion/will-campus-criticism-of-israel-violate-federal-law.html>.

and overbroad to constitutionally use to determine whether campus administrators should punish expression as discriminatory harassment. What constitutes a “certain perception of Jews” sufficient to qualify is anyone’s guess. Moreover, the First Amendment protects most speech perceived as hateful.⁹

The “contemporary examples of antisemitism in public life” that accompany the IHRA definition only compounded chilling effect, as many of them encompass clearly protected speech. Two egregious examples on the list include “[a]pplying double standards by requiring of [Israel] a behavior not expected or demanded of any other democratic nation” and “[d]rawing comparisons of contemporary Israeli policy to that of the Nazis.”

Applying double standards may be worthy of criticism, but the First Amendment protects people from liability for hypocrisy. And to be perfectly clear, the First Amendment allows every country in the world’s policies to be compared to those of Nazis. Many prominent figures across the political spectrum have compared American policies to those of Nazi Germany.¹⁰ Even the United States Holocaust Memorial Museum’s Holocaust Encyclopedia compares the United States to Nazi Germany on its website, noting “discriminatory and segregationist practices in Germany and the United States were similar” during the 1920s through the 1940s.¹¹ All of these comparisons are constitutionally protected.

The IHRA definition includes a savings clause that “criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic,” but that ineffective caveat does not square with the provision quoted above, given that numerous other nations have had their policies compared to those of Nazi Germany. The overbreadth and vagueness of the definition will lead to unconstitutional enforcement against protected speech.

Nor is FIRE alone in our concerns that the IHRA working definition’s use to regulate campus conduct presents a serious threat to free speech rights. Kenneth Stern, for example – the primary author of the definition adopted by the IHRA – opposed legislation requiring its use because of the likelihood it would chill

⁹ See *Matel v. Tam*, 582 U.S. 218, 246 (2017) (“Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting))).

¹⁰ Tamar Lapin, *Ex-CIA head compares US immigration policy to Nazi Germany*, NEW YORK POST (June 17, 2018, 12:29 PM), <https://nypost.com/2018/06/17/ex-cia-head-compares-us-immigration-policy-to-nazi-germany/>; Sam Levine, *Hillary Clinton likens Trump to Hitler and warns he would end democracy*, GUARDIAN (Nov. 9 2023, 8:55PM), <https://www.theguardian.com/us-news/2023/nov/09/hillary-clinton-donald-trump-adolf-hitler>; Gerrard Kaonga, *Joe Biden Compared to Adolf Hitler by Trump Loyalists*, NEWSWEEK (Sep. 2, 2022, 4:05 AM), <https://www.newsweek.com/joe-biden-speech-donald-trump-nazi-germany-adolf-hitler-backlash-latest-1739224>.

¹¹ UNITED STATES HOLOCAUST MEMORIAL MUSEUM, *How did different goals and political systems shape racism in Nazi Germany and the United States?* (last visited November 12, 2023), <https://encyclopedia.ushmm.org/content/en/question/how-did-different-goals-and-political-systems-shape-racism-in-nazi-germany-and-the-united-states>.

campus speech.¹² Many First Amendment scholars, including Erwin Chemerinsky, Howard Gillman, and Eugene Volokh, as well as other civil liberties organizations, including the American Civil Liberties Union, have also raised First Amendment concerns about the definition’s adoption.¹³

Rather than try to define “antisemitism,” Congress should help institutions consistently determine the line between protected expression, speech falling into proscribable categories the Supreme Court established, and unprotected conduct.

How Congress can help.

There are three legislative solutions that will both protect First Amendment rights and provide the Department of Education and institutions the necessary tools to best address anti-Semitic discriminatory harassment, as well as other forms of discriminatory harassment.

Confirming that Title VI prohibits discrimination based on ethnic stereotypes.

Currently, federal law prohibits institutions of higher education from discrimination on the basis of religion during the admissions process. However, once admitted, federal law’s prohibition on discriminatory harassment does not protect students from harassment based on religion.

Thankfully, since 2004,¹⁴ the Department of Education of each successive administration has attempted to protect students by stating Civil Rights Act of 1964 protects students from discriminatory harassment based on “their actual or perceived: (i) shared ancestry or ethnic characteristics; or (ii) citizenship or residency in a country with a dominant religion or distinct religious identity.”¹⁵ As such, while discrimination based on religious practice was still not covered,

¹² Stern, *supra* note 8.

¹³ Erwin Chemerinsky & Howard Gillman, Opinion, *A Bill to Police Campus Speech*, WALL ST. J. (Dec. 15, 2016, 7:31AM), <https://www.wsj.com/articles/a-bill-to-police-campus-speech-1481846338>; Eugene Volokh, Opinion, University of California Board of Regents is wrong about ‘anti-Zionism’ on campus, WASH. POST (Mar. 16, 2016, 11:27AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/31/the-university-of-california-microaggressions-and-supposedly-anti-semitic-criticism-of-israel/?wpisrc=nL_volokh&wpmm=1; Center for Constitutional Rights et al, Letter to Reps. Bob Goodlatte & John Conyers Jr. regarding First Amendment concerns with Anti-Semitism Awareness Act (Dec. 5, 2016), <https://ccrjustice.org/sites/default/files/attach/2017/02/AntiSemitism%20Awareness%20Act%20Opposition%20Letter%20final.pdf>; Press Release, ACLU, ACLU Statement on Senate Introduction of ‘Anti-Semitism Awareness Act’, (May 23, 2018), <https://www.aclu.org/press-releases/aclu-statement-senate-introduction-anti-semitism-awareness-act>.

¹⁴ See Kenneth L. Marcus, Assistant Sec’y for Enforcement, U.S. Dep’t of Educ., Dear Colleague Letter: Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004), <https://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>.

¹⁵ Catherine E. Lhamon, Assistant Sec’y for Civ. Rts., Off. for Civ. Rts., U.S. Dep’t of Educ., Dear Colleague Letter: Discrimination, including Harassment, Based on Shared Ancestry or Ethnic Characteristics (Nov. 7, 2023), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-202311-discrimination-harassment-shared-ancestry.pdf>.

harassment based on a Jewish students’ “real or perceived . . . ancestry” is prohibited.

The guidance is helpful and should be codified into statute, but it does not assist every religious student deserving of protection. More is needed.

Prohibiting harassment on the basis of “religion.”

For Congress to properly address anti-Semitism – and other forms of anti-religious discrimination – on campus, it must also make it unlawful for institutions of higher education to ignore allegations of student-on-student harassment on the basis of religion.

This change would ensure that students of all faiths may practice their religions openly on campus without fear that doing so will subject them to discriminatory harassment. Congress should thus amend federal law to prohibit discrimination on the basis of “religion.”¹⁶

Codifying the Supreme Court’s speech-protective definition of discriminatory harassment.

Colleges and universities have both a legal and a moral duty to effectively respond to all accusations of discriminatory harassment that, if true, would be actionable. However, institutions must accomplish this goal without trampling student and faculty First Amendment rights. Institutions can meet this dual mandate effectively if Congress statutorily defines when conduct constitutes unlawful discriminatory harassment based on the Supreme Court’s ruling in *Davis v. Monroe County Board of Education*.¹⁷

In *Davis*, the Court defined student-on-student harassment as targeted, discriminatory conduct which is “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”¹⁸ This standard ensures that schools address discriminatory conduct without infringing on the First Amendment. Using a lesser standard, which the Department of Education has attempted previously,¹⁹

¹⁶ Such an expansion would require an exemption, excluding religious institutions who have a First Amendment right to exclude on the basis of religion.

¹⁷ 526 U.S. 629 (1999).

¹⁸ *Id.* at 651.

¹⁹ *Joined by a Broad Coalition, FIRE Urges Departments of Education and Justice to Protect Campus Speech, Retract Controversial ‘Blueprint’*, FIRE (Apr. 12, 2013), <https://www.thefire.org/news/joined-broad-coalition-fire-urges-departments-education-and-justice-protect-campus-speech>.

will no doubt sweep in broad swaths of protected expression and open institutions up to costly litigation that they will undoubtedly lose.²⁰

By codifying the Supreme Court’s decades old ruling, Congress can set a standard that will survive judicial scrutiny and effectively combat unlawful anti-Semitic harassment.

Conclusion

Anti-Semitic expression and other forms of anti-religious speech is distasteful to many. We must remember that reprehensible speech is not new in the history of the United States, and it is not the first time there have been calls to censor unpopular speech. But we must look to the wisdom of the First Amendment and avoid the danger of allowing the government to dictate which expression is acceptable. Censorial measures usable against speech one finds despicable can just as easily target ideas one holds dear. As the Supreme Court stated in *West Virginia v. Barnette*: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.”²¹

As we hope is clear, the three prongs discussed above are not revolutionary. Instead, they are practical legislative solutions that build upon and strengthen current practice and law that Congress can employ to effectively address anti-Semitic discriminatory harassment. If you are interested in discussing our suggestions further, or have any questions regarding free speech on campus, please feel free to contact us at (215) 717-3473 or at joe@thefire.org.

Respectfully submitted,



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²⁰ See Letter from Att’y Gen. of Montana Austin Knudsen et al. to Assistant Sec’y Catherine E. Lhamon, U.S. Department of Education’s Title IX Rulemaking (Apr. 5, 2022), <https://dojmt.gov/wp-content/uploads/Title-IX-Coalition-Letter-4.5.22.pdf>.

²¹ 319 U.S. 624, 642 (1943).