

TESTIMONY OF HON. KENNETH L. MARCUS
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THE LOUIS D. BRANDEIS CENTER FOR HUMAN RIGHTS UNDER LAW
"FREE SPEECH ON COLLEGE CAMPUSES" TESTIMONY
BEFORE THE UNITED STATES HOUSE COMMITTEE ON THE JUDICIARY
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CHAIRMAN JORDANS AND MEMBERS OF THE COMMITTEE ON THE JUDICIARY:

I am honored to appear before you today at this briefing on “Free Speech on College Campuses.”¹ My name is Kenneth L. Marcus. I am the Chairman of the Louis D. Brandeis Center for Human Rights Under Law, which I founded to advance the civil and human rights of the Jewish people and promote justice for all. Our primary focus is anti-Semitism on college and university campuses, in the workplace, and elsewhere. Additionally, I am a former Assistant U.S. Secretary of Education for Civil Rights, Staff Director of the U.S. Commission on Civil Rights, and General Deputy Assistant Secretary of Housing and Urban Development for Fair Housing and Equal Opportunity.

Over the last decade, the Brandeis Center has tracked anti-Semitic incidents on college campuses, provided legal representation and support to affected students, and demanded that university administrators uphold their legal obligation to protect students’ civil rights. Jewish students are entitled to the same rights and protections as their non-Jewish peers on campus. But unfortunately, their voices are being silenced and their rights abridged as university free speech policies are selectively applied under the guise of politics. While the majority of Jews consider Zionism and an affinity for Israel to be an integral part of their identity, Jewish students are forced to shed or hide their religious, historical, and cultural connection to Israel.² Today, many are not even allowed to publicly mourn their Jewish brethren slaughtered by Hamas or call out the rise in anti-Semitism since October 7th, fearing for their physical safety on campus. Instead,

¹ Emma Enig provided research assistance for this testimony.

² “U.S. Jews’ Connections with and Attitudes toward Israel.” Pew Research Center’s Religion & Public Life Project, May 11, 2021. <https://www.pewresearch.org/religion/2021/05/11/u-s-jews-connections-with-and-attitudes-toward-israel/> ; Alyza D. Lewin, *Recognizing Anti-Zionism as an Attack on Jewish Identity*, 68 CATH. U. L. REV. 643 (2019). Available at: <https://scholarship.law.edu/lawreview/vol68/iss4/8>

they stay silent, afraid that they will be harassed or attacked by their fellow students or university faculty. Sadly, they doubt that their university administrators will protect them or their rights.

Ironically, those physically and verbally intimidating Jewish students are the same ones claiming that their discriminatory harassment is protected under the First Amendment. It is not.³ The First Amendment of the Constitution provides students with the right to free speech, even hate speech. This right, when properly enforced, is part of what makes American college campuses so vibrant – the exchange of ideas, encouragement of open debate, and ability to use one’s own voice to protest speech one finds objectionable. The First Amendment does not, however, protect those who violate federal law, incite violence, intimidate, or threaten.⁴ While only public universities are legally bound by the First Amendment, many private institutions are bound to protect free speech by state law or by their own contractual commitments.

Unfortunately, Jewish students are being intimidated into silence. As early as 2005, the U.S. Commission on Civil Rights warned that campus anti-Semitism had become a serious problem. They were right, and it has only gotten worse. A 2013 Pew Research Center survey of Jews found that experience with anti-Semitism was more prevalent among young adults in higher education. In 2014, a Brandeis Center-Trinity College study found that anti-Semitism was particularly pervasive on college campuses, with 54% of responding Jewish students on 55 campuses reported experiencing or witnessing anti-Semitism during the 2013-2014 academic year.⁵ In 2021, the Brandeis Center conducted a survey of Jewish fraternity and sorority students,

³ Marcus, Kenneth L., Higher Education, Harassment, and First Amendment Opportunism. William & Mary Bill of Rights Journal, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=1112189>

⁴ “Limits to Free Speech.” The Foundation for Individual Rights and Expression. Accessed November 5, 2023. <https://www.thefire.org/research-learn/limits-free-speech>.

⁵ Barry A. Kosmin & Ariella Keysar, *National Demographic Survey of American Jewish College Students 2014: Anti-Semitism Report*, The Louis D. Brandeis Center for Human Rights Under Law & Trinity College (2015), available at https://www.bjpa.org/content/upload/bjpa/c__c/Anti-SemitismReportFinal.pdf.

finding that most have felt unsafe as a Jew at some point while on campus or in virtual campus settings.⁶ Over 80% of these students were pro-Israel, yet more than half of them avoided expressing their views on Israel.⁷ As Jews and Zionists, they were concerned about being verbally or physically attacked, being socially excluded or harassed online, and being marginalized or penalized by a professor.⁸

These fears are not imaginary – they parallel the anti-Semitic incidents we have seen in recent years. At University of Southern California, a Jewish student body vice-president was forced to resign after anti-Zionist harassment.⁹ At Tufts University, a Jewish student was harassed and marginalized by his fellow judiciary council members, pressured to recuse himself for his Zionist identity.¹⁰ At University of California, Berkeley Law School, student groups amended their constitutions and bylaws to ensure that their organizations will never invite any speakers, on any topic, that support Israel or Zionism.¹¹ At SUNY New Paltz, two Jewish students were excluded from a sexual assault support group.¹² The Department of Education’s Office of Civil Rights (OCR) found that University of Vermont had failed to address campus antisemitism after a teaching assistant threatened to treat Jewish students in a discriminatory

⁶ “ANTI-SEMITISM @ College Survey (Spring 2021).” The Louis D. Brandeis Center for Human Rights Under Law. Accessed November 5, 2023. <https://brandeiscenter.com/wp-content/uploads/2021/09/Brandeis-Survey-Findings.pdf>.

⁷ Ibid.

⁸ Ibid.

⁹ Vera, Amir, and Stella Chan. “US Department of Education Opens Investigation into USC after a Student Accused the School of Allowing Antisemitism on Campus.” CNN, July 27, 2022. <https://www.cnn.com/2022/07/27/us/usc-antisemitism-complaint-us-education-department-reaj/index.html>.

¹⁰ Weiss, Melissa. “Tufts Student Alleges Antisemitism and Harassment at University.” Jewish Insider, February 24, 2021. <https://jewishinsider.com/2021/02/tufts-university-student-harassment/>.

¹¹ Marcus, Kenneth L. “Berkeley Develops Jewish-Free Zones.” Jewish Journal, January 15, 2023. <https://jewishjournal.com/commentary/opinion/351854/berkeley-develops-jewish-free-zones/>.

¹² Bandler, Aaron. “Two Jewish College Students Claim They Were Excluded from Sexual Assault Survivors Group Because of Pro-Israel Views.” Jewish Journal, August 23, 2022. <https://jewishjournal.com/news/united-states/350832/complaint-filed-to-education-dept-after-jewish-students-allege-suny-new-paltz-sexual-assault-survivors-group-excluded-them/>.

fashion and urged others to join her in bullying and ostracizing students based on their Jewish and Zionist identities. She ultimately fostered a hostile environment on campus that led student organizations to ban Zionist students from joining their clubs.¹³ These are just a few examples. But I believe we can all agree that targeting students based on their ethnic and ancestral identity – forcing them to hide their Jewish heritage and affinity for Israel – is egregious. All students, including Jewish students, should be able to express themselves.

In the wake of Hamas’ October 7th attack on Israel, the situation for Jewish students on many campuses has become dire. At Cooper Union in New York City, visibly Jewish students were forced to shelter inside a library as pro-Palestinian protesters tried to gain entry, banging on doors and windows.¹⁴ Jewish Tulane University students were physically assaulted at a nearby protest – one ending up with a broken nose.¹⁵ An Israeli student at Harvard Business School was physically and verbally assaulted while pleading with protesters to stop grabbing him.¹⁶ A Cornell University student was arrested for making death and rape threats against Jewish students on campus.¹⁷ Hamas’ call for a “Global Day of Jihad” on October 13th led Jewish students at University of California, Berkeley to fear for their physical safety on campus.¹⁸ On many campuses across the country, Jewish students are hanging flyers of kidnapped civilians

¹³ Dion J. Pierre, Dion J. “‘Historic Victory’: US Gov’t Rules That University of Vermont Failed to Address Campus Antisemitism.” *Algemeiner*, April 4, 2023. <https://www.algemeiner.com/2023/04/03/historic-victory-us-govt-rules-that-university-of-vermont-failed-to-address-campus-antisemitism/>.

¹⁴ Shanahan, Ed, and Maria Cramer. “Israel-Hamas War Protest Leads to Tense Scene at Cooper Union Library.” *The New York Times*, October 26, 2023. <https://www.nytimes.com/2023/10/25/nyregion/cooper-union-protest-israel-hamas.html>.

¹⁵ Smilk, Carin M. “Anti-Israel Protesters ‘Broke My Nose,’ Says Jewish Student at Tulane.” *Jewish News Syndicate*, November 2, 2023. <https://www.jns.org/they-broke-my-nose-jewish-tulane-student-tells-jns-of-anti-israel-protesters/>.

¹⁶ “Israeli Student at Harvard Business School Attacked as Video Shows Him Saying ‘Don’t Grab Me.’” *National Post*, November 3, 2023. <https://nationalpost.com/news/harvard-law-review-antisemitic-attacker>.

¹⁷ Barr, Luke, and Sarah Beth Hensley. “Student Charged with Making Antisemitic Threats to Cornell’s Jewish Students.” *ABC News*, November 1, 2023. <https://abcnews.go.com/Politics/fbi-investigating-antisemitic-threats-targeting-cornell-universitys-jewish/story?id=104480004>.

¹⁸ <https://www.nbcbayarea.com/news/local/tensions-uc-berkeley-israel-hamas-war/3356755/>

currently being held in Gaza. Their fellow students are tearing them down while calling it propaganda.¹⁹

With the drastic surge in antisemitism on college campuses, it is now more apparent than ever why Jewish students are fearful of being verbally or physically attacked, socially excluded, harassed online, and marginalized on campus. It is happening across the country. It is being reported in the media. Most importantly, it is happening to their Jewish peers. It is, however, the universities' responsibility to ensure that Jewish students receive the same civil rights protections as everyone else. Jewish students should not be forced into silence and submission. They should not be forced to downplay their religious, historical, and cultural connection to Israel, nor should they be forced to downplay or hide their Jewish identity on campus. They should be able to act in accordance with the First Amendment or their university's comparable free speech policies. If their rights are abridged, the university must act.

So, what can be done to ensure American campuses are a safe place for Jewish students to express themselves? To begin with, the U.S. Department of Education should not wait for complaints to come in. The Secretary of Education has authority to commence self-directed investigations and pro-active compliance reviews. University administrators need not wait for more incidents to occur. Instead, administrators should ensure that they are following federal and state law, as well as their own on-the-books free speech and academic freedom policies.

Additionally, the Biden administration has long promised to deliver important regulation, which would implement President Donald Trump's Executive Order 13899 on Combating Anti-

¹⁹ Alexander, Harriet. "Student at George Mason Destroys Poster of Hamas Hostage Claiming It's 'propaganda' - While Yale Censors pro-Israel Writer's Column on Terror Atrocities - and Man Goes on Disgusting Antisemitic Rant Outside Harvard University." Daily Mail Online, November 2, 2023. <https://www.dailymail.co.uk/news/article-12691203/ivy-league-antisemitism-yale-harvard-upenn-cornell-columbia.html>.

Semitism.²⁰ The Executive Order codified important rules under which Jewish students receive civil rights protections on American campuses. It also directed federal agencies to use the “gold-standard” International Holocaust Remembrance Alliance (IHRA) Working Definition of Antisemitism.²¹ By codifying the IHRA Working Definition, OCR would have a clear guide to follow during investigations into antisemitic incidents on campuses. Finally, legislative efforts to promote free speech and call out antisemitism on university campuses are always welcome.

Last week, the House passed a bipartisan resolution condemning the support of terrorist organizations and antisemitism on college campuses.²² The bipartisan Antisemitism Awareness Act was also introduced, which would require the Department of Education to consider antisemitism while enforcing federal anti-discrimination laws and to ensure that antisemitism on college campuses is “properly investigated and prosecuted.”²³ Now is the time to give the Department of Education the tools needed to protect free speech as forcefully as it does other civil rights. Legislative efforts to promote free speech and call out antisemitism on university campuses are always welcome.

²⁰ Executive Order 13899 (Combating Anti-Semitism), 84 Fed. Reg. 68779 (Dec. 11, 2019), <https://www.federalregister.gov/documents/2019/12/16/2019-27217/combating-anti-semitism>.

²¹ “What Is Antisemitism?” The International Holocaust Remembrance Alliance. Accessed November 5, 2023. <https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism>.

²² H. Res. 798; Quilantan, Bianca. “House Passes Resolution Disavowing Antisemitism, Support for Hamas on Campuses.” POLITICO, November 2, 2023. <https://www.politico.com/news/2023/11/02/house-antisemitism-hamas-college-campuses-00125135>.

²³ Christ, Lacey. “GOP and Dem Lawmakers Back Bill to Crack down on College ‘Hotbeds of Antisemitism.’” Fox News, October 26, 2023. <https://www.foxnews.com/politics/gop-dem-lawmakers-back-bill-crack-down-college-hotbeds-antisemitism>.