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Members of Congress
United States Capitol
Washington, DC 20510

RE: The Constitutionality of The Anti-Semitism Awareness Act

Dear Senator/Representative:

I write on behalf of the ADL, the Simon Wiesenthal Center, AIPAC, and the Jewish Federations of North America. These four organizations have differing perspectives on many issues, but they speak with one voice in their support of the Anti-Semitism Awareness Act. That bill would supplement existing law prohibiting anti-Semitic harassment on college campuses by providing a much-needed and workable definition of anti-Semitism, one that is already employed by the federal government in other contexts. This proposal passed the Senate unanimously last year, but it stalled in the House of Representatives based in part on suggestions that the Act would violate the First Amendment.

While efforts by public universities to directly regulate student speech do raise serious First Amendment issues, the Act is fundamentally different and concerns about its constitutionality are misplaced for multiple reasons. First, the Act includes a savings clause that ensures the Act will be implemented consistently with the First Amendment. Second, the Act adds a definition to an existing law that addresses conduct, not speech. Title VI already has been interpreted to charge universities with prohibiting harassment on a number of forbidden bases, including anti-Semitism. That charge is compatible with the commands of the Supreme Court's First Amendment jurisprudence because it does not license universities to prohibit any speech, but only to reach certain conduct that rises to a level of harassment when it is undertaken on a forbidden basis such as racism or anti-Semitism. Supreme Court precedent allows the government to police such conduct and to consider speech as evidence of a forbidden intent, and it distinguishes the evidentiary use of speech from direct prohibitions on the speech itself. The Act builds on those existing laws and distinctions. Third, the Act simply adds a definition of anti-Semitism to existing law. Existing law prohibits harassment motivated by anti-Semitism without providing Education Department officials or university officials with a workable definition of anti-Semitism.[1] It is hard to see how providing those officials with such a definition will create a First Amendment problem. To the contrary, defining this critical term by

[1] Although the text of Title VI itself does not expressly reference anti-Semitism, the Education Department has interpreted the statute to extend to anti-Semitism.

statute advances First Amendment values by providing clarity and ensuring that the definition of this term does not vary from official to official or from administration to administration.

The ADL, the Simon Wiesenthal Center, AIPAC, and the Jewish Federation of North America all support the Anti-Semitism Awareness Act as sound policy. Indeed, if policy objections to the Act are raised, these organizations stand ready to join issue. But the debate over the Act should take place as a policy matter, not based on misplaced constitutional concerns. The Act conforms with Supreme Court precedent and adds a savings clause for good measure. Indeed, all the Act adds to existing law is a definition which provides clarity and serves, rather than defeats, First Amendment values.

Background

Anti-Semitism on college campuses is a serious and growing problem. According to a recent report, there were 941 anti-Semitic incidents in the United States in 2015, including 56 assaults.[2] The FBI has found that over half of the religiously-motivated hate-crimes in 2015 were motivated by anti-Jewish bias.[3] And the number of anti-Semitic incidents on college campuses *doubled* in 2015—accounting for 10 percent of all domestic anti-Semitic incidents.[4] These 90 incidents, across 60 college campuses, include: spray-painting and drawing swastikas on residency halls and predominantly Jewish fraternities; taping the word "JEW" and a swastika next to a student's Israeli flag in his room; and writing that "Zionists should be sent to the gas chamber" in a campus bathroom.[5]

Existing federal law already charges universities with protecting students from such harassment on campus. Under Title VI, "[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." As the U.S. Supreme Court has explained, that law obligates universities receiving federal funds to prevent peer-to-peer harassment when the harassment "is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[6] A

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[2] Anti-Defamation League, "ADL Audit: Anti-Semitic Assaults Rise Dramatically Across the Country in 2015," June 22, 2016, *available at* http://www.adl.org/press-center/press-releases/anti-Semitism-usa/2015-audit-anti-Semitic-incidents.html#.WIoWTme7qoR.

[3] Federal Bureau of Investigation, "Uniform Crime Report: Hate Crime Statistics, 2015," *available at* https://ucr.fbi.gov/hate-crime/2015/topic-pages/victims_final.pdf.

[4] ADL Audit, *supra*.

[5] Anti-Defamation League, "Anti-Semitic Incidents on College Campuses in 2015," May 26, 2015, *available at* http://www.adl.org/anti-Semitism/united-states/c/campus-anti-Semitic-incidents-2015.html.

[6] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

university may not tolerate such extreme forms of harassment, and a failure to take action to redress known incidents of such conduct can lead to federal remedial action.

That protection extends to Jewish students under existing law. As the Departments of Education and Justice have both concluded, schools must protect Jewish students (as well as Muslims, Sikhs, and any other religious groups perceived to share ethnic characteristics) from "discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics."[7] Given those findings, universities are obligated under current law to protect their Jewish students from severe, pervasive, and objectively offensive harassment that is motivated by anti-Semitism.

As with any kind of discrimination, it can sometimes be hard to tell whether a specific incident was actually motivated by anti-Semitism. And officials charged with implementing Title VI face a unique challenge when it comes to addressing anti-Semitic conduct, namely that anti-Semitism can be disguised as criticism of Israel or Zionism. Despite that difficulty, to date, the Education Department has not set forth any definition of anti-Semitism to guide universities or officials charged with implementing Title VI. The impact of this omission on enforcement has been dramatic. Even though the Education Department interprets Title VI to reach anti-Semitism and even though the Department has promised, since 2004, to combat anti-Semitism on campuses, the Department's Office of Civil Rights has not brought *a single action* relating to anti-Semitic harassment on college campuses.[8] (At the same time, OCR has pursued a range of actions relating to harassment of non-Jewish students on college campuses based on racial or ethnic bias.) Without a clear definition of anti-Semitism, the Department evidently does not have the confidence and clarity to act.

The Anti-Semitism Awareness Act is designed to fill that definitional gap. For the first time, the Act offers a clear definition of anti-Semitism for the Department to "take into consideration" when deciding if an incident "was motivated by anti-Semitic intent." Specifically, the Act, which draws its definition from the State Department's established approach, clarifies that anti-Semitism "is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of anti-Semitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities."[9] And in an effort to provide further clarity—including on

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[7] U.S. Department of Education, Office of Civil Rights, Dear Colleague Letter, Oct. 26, 2010, *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf; U.S. Department of Justice, Civil Rights Division, Letter to U.S. Department of Education, Office of Civil Rights, Sept. 8, 2010, *available at* 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.

[8] U.S. Department of Education, Office of Civil Rights, Title VI and Title IX Religious Discrimination in Schools and Colleges, Sept. 13, 2004, *available at* https://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html.

[9] U.S. Department of State, Defining Anti-Semitism: Fact Sheet, June 8, 2010, *available at* https://2009-2017.state.gov/j/drl/rls/fs/2010/122352.htm.

whether and when extreme anti-Zionist acts indicate anti-Semitic intent—the Act offers a series of concrete examples of anti-Semitism. The Act directs the Department to consider both the definition and examples when deciding whether Jewish students are being denied the discrimination-free education that everyone deserves and is guaranteed under law.

The Act Is Consistent With The First Amendment

The Senate unanimously passed the Anti-Semitism Awareness Act on December 1, 2016, but the bill stalled in the House of Representatives based at least in part on suggestions that the Act is unconstitutional. Opponents of the bill have suggested that the Act is unconstitutional because it improperly regulates campus speech against Israel and because its definition of anti-Semitism is too vague. These constitutional objections to the Act are misplaced for three principal reasons.

First, any suggestion that the Act is unconstitutional immediately runs into the clear text of the Act's savings clause. That clause in the bill passed by the Senate last year provides that: "Nothing in this Act, or an amendment made by this Act, shall be construed to diminish or infringe upon any right protected under the First Amendment." At one level, the savings clause states a truism, as no statute can diminish a constitutional right, and a statute that in fact infringes upon a right protected under the First Amendment would be unconstitutional to that extent. But at a more fundamental level, the savings clause underscores that the Act can be implemented consistent with the First Amendment and, more important, *directs* that the Act be implemented in that manner. As the balance of this letter indicates, the implementation of Title VI undeniably implicates First Amendment issues, since speech may be relevant in judging whether harassment is motivated by the specific forms of animus addressed by Title VI. But Title VI can be implemented consistent with First Amendment values and precedent as long as Education Department officials honor the speech/conduct and prohibition/evidence distinctions (discussed below) that underlie the Supreme Court's First Amendment jurisprudence. The savings clause underscores Congress' intent that Education Department officials do just that—*i.e.*, that they implement both Title VI and the Act in a manner that is fully consistent with the First Amendment.

Second, opponents are wrong to suggest that the Anti-Semitism Awareness Act regulates anti-Israel speech and therefore violates the First Amendment. Congress cannot pass a law preventing individuals from speaking out against Israel any more than Congress can prohibit criticism of the United States (or any other country). The Act, however, does nothing of the sort. Not only does the Act feature a savings clause, but the definition that the Act adopts expressly underscores that any "criticism of Israel similar to that leveled against any other country cannot be regarded as anti-Semitic."[10] Put simply, the bill does not punish political speech against Israel; it says that such political criticism is fair game.

[10] *Ibid.*

More fundamentally, the Act does not regulate campus speech against Israel because it does not regulate speech at all. The Act does *not* prohibit individuals from claiming that "Jewish citizens [are] more loyal to Israel," that Jewish people "invent[ed] or exaggerate[ed] the Holocaust," or anything else on the State Department's list.[11] That kind of speech, no matter how offensive and despicable, receives full protection under the First Amendment—and the Act does not purport to punish it. In fact, the Act does not impose any new obligations, but simply provides a clarifying definition to help Education Department officials identify what is already prohibited under existing law. All of the relevant obligations already exist and are imposed by Title VI, not by the Act itself. Current law already requires universities to prevent severe, pervasive, and objectively offensive peer-to-peer harassment motivated by several forms of prohibited animus, including anti-Semitism. The Act does not alter what qualifies as sufficient harassment under that statute or the relevant precedents that distinguish between prohibited harassment and protected speech. All the Act does is help Education Department and university officials figure out which severe, pervasive, and objectively offensive harassing conduct actually reflects anti-Semitic intent. In that way, this bill offers a rule of evidence, not a restriction on speech. The fact that certain speech is protected does not mean that officials have to close their eyes to that speech entirely when determining the impetus behind a particularly severe act of harassment.

In fact, this distinction is critical to ensuring that all the prohibitions in Title VI (and other statutes) conform with the First Amendment. To take one example, the Supreme Court has held that hateful, racist speech gets full First Amendment protection.[12] For that reason, Congress cannot pass a law simply barring all individuals from employing that kind of language, no matter how odious, on college campuses. That is why direct efforts by public universities to regulate student speech through speech codes raise serious First Amendment difficulties. But at the same time, the Education Department is permitted to consider such hateful speech when deciding if severe, pervasive, and objectively offensive harassment aimed at African American students is motivated by racism.[13] The same is true under current law when it comes to severe, pervasive, and objectively offensive harassment motivated by anti-Semitism. Current Title VI law already reaches such improperly-motivated conduct, and current Supreme Court doctrine makes clear that as long as the government addresses improperly-motivated conduct and not speech itself, the

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[11] *Ibid.*

[12] *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

[13] For example, the Tenth Circuit found that teachers "facilitat[e] and maintain[] a racially hostile educational environment" in violation of Title VI when they are "aware of … racial slurs, graffiti inscribed in school furniture, and notes placed in students' lockers and notebooks" and fail to address the harassment. *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin County, OK*, 334 F.3d 928, 932, 933 (10th Cir. 2003); *see also Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 409 (5th Cir. 2015) (finding that a school qualifies as a racially hostile environment where students are repeatedly "referred to by [their] peers by the most noxious racial epithet in the contemporary American lexicon") (citation omitted).

First Amendment is not violated. As the Court explained in an opinion authored by Justice Scalia, some speech "can be swept up incidentally within the reach of a statute directed at conduct rather than speech."[14] And as former Chief Justice Rehnquist explained for a unanimous Court: "The First Amendment … does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."[15] All the Act adds to this existing framework is a definition for anti-Semitism, which is currently undefined in Title VI and its implementing regulations. Thus, the suggestions that the Act violates the First Amendment is really an attack on the constitutionality of Title VI as a whole.

The principle that protected speech can permissibly serve as evidence of improper motive is hardly unique to Title VI. Just as Title VI protects individuals from discrimination by federally funded organizations, Title VII prohibits workplace discrimination. In this context, the Supreme Court has made clear that speech, though protected under the First Amendment, can serve as evidence that workplace harassment was motivated by discriminatory intent. The distinction between a direct prohibition on speech and the use of protected speech as evidence is critical. Congress plainly could not enact a law putting individuals in jail for using sexist language without violating the First Amendment. But that same constitutionally-protected speech *can* be offered as evidence of illegal sex-based discrimination in hiring, promotions, and the like. As Justice Scalia wrote for the Court, while certain sexist speech may not be directly banned based on its content, that same speech "may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices."[16] And so the Supreme Court has repeatedly—in opinions written by justices across the ideological spectrum—allowed for claims that relied, at least in part, on coworker and manager statements as evidence.[17] The distinction is straightforward and critical: The speech is protected, but it can reveal that workplace harassment or other mistreatment was, in fact, motivated by sexism. The Act is fully consistent with that constitutionally vital distinction: it in no way directly prohibits any speech, but it helps the Education Department understand which incidents were motivated by anti-Semitic intent.

Third, by providing a definition for a critical term, the Act provides clarity and avoids the prospect of the definition of this critical term changing from official to official and from administration to administration. Far from creating any vagueness problem, adding a stable statutory definition advances and protects First Amendment interests. The Constitution, of course, prohibits Congress from enacting statutes so unclear that someone would struggle to

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[14] *R.A.V.*, *supra*, at 390.

[15] *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).

[16] *R.A.V.*, *supra*, at 389.

[17] *See Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (Scalia, J.); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality op.) (Brennan, J.).

distinguish between what the law makes lawful and unlawful.[18] But even leaving aside that the Anti-Semitism Awareness Act does not regulate the primary conduct of ordinary citizens (and instead imposes obligations on recipients of federal funds who maintain the power to decline funding or at least to seek clarity from regulatory officials), the Act can hardly be the source of any vagueness problem because it actually makes the law in this area *more* clear, not less.

As explained above, Title VI already requires universities that receive federal funds to prevent anti-Semitic harassment against their students. Presently, there is *no* guidance given to the Department, universities, or individuals regarding what constitutes anti-Semitic intent, and no guidance regarding when, if ever, anti-Zionist acts can reveal such intent. It is up to individual Education Department officials to decide on an ad hoc basis. Such "ad hocery," to borrow a phrase,[19] is generally an anathema to First Amendment values.[20] The Act answers those open questions by providing a non-exhaustive, clarifying definition and examples, and in doing so helps the Department and universities understand what is (and is not) anti-Semitism. Nothing in current doctrine supports the counterintuitive notion that a law that clarifies what evidence indicates anti-Semitic motive could fail for vagueness, when the current interpretation of Title VI, which reaches anti-Semitism without defining the term, does not. As Justice Thomas wrote for the Court in another context earlier this month, "if a system of unfettered discretion is not unconstitutionally vague, then it is difficult to see how the [proposed] system of guided discretion could be."[21]

That is especially true where, as here, the alternative would be to leave the issue up to the unfettered discretion of Education Department officials. Letting the agency charged with enforcing Title VI decide all questions about whether conduct does or does not reflect anti-Semitism—rather than having Congress lay out a definition—is hardly the better approach under the First Amendment. The Supreme Court has been profoundly skeptical of the idea that First Amendment problems can be avoided by counting on the agency or a prosecutor to adopt a narrow reading of the law.[22] Instead, from the standpoint of First Amendment values, it is far better for Congress to clarify the law for everyone, including for the agency charged with implementation. That is particularly true when it comes to Title VI and peer-to-peer harassment on college campuses. Title VI directs federal funding recipients not only to refrain from direct

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[18] *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

[19] *Comptroller of Treasury of Maryland v. Wynne*, 135 S.Ct. 1787, 1809 (2015) (Scalia, J., dissenting).

[20] *See United States v. Stevens*, 559 U.S. 460, 480 (2010).

[21] *Beckles v. United States*, No. 15-8544, 2017 WL 855781 (U.S. Mar. 6, 2017) (Slip Op., at 8).

[22] *See United States v. Stevens*, *supra* ("the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

discrimination, but to avoid tolerating peer-to-peer harassment that is so pervasive as to deny students access to programs. But it is only appropriate to hold fund recipients responsible for peer-to-peer harassment when the fund recipients themselves fail to take adequate steps to prevent and redress such conduct. To implement the prohibition against anti-Semitism in that context makes it critical that university officials, as well as Education Department officials, have a common conception of what constitutes anti-Semitism. The Act does just that, while the status quo provides a vacuum that coincides with and may well explain the complete absence of any enforcement actions against anti-Semitism on college campuses.

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The Anti-Semitism Awareness Act enjoyed not just bipartisan, but unanimous, support in the Senate last year. When the bill arrived in the House of Representatives, what emerged were not policy objections, but suggestions that the Act was incompatible with the First Amendment. Those concerns are misplaced. Not only does the Act include a savings clause, but it reflects the same distinctions that underlie Title VI and Title VII and make the statutes fully compatible with First Amendment doctrine. Congress cannot prohibit anti-Semitic or racist speech on campus or the workplace, but Congress can prohibit harassment motivated by race or anti-Semitism and government officials can look at protected speech in judging whether such an impermissible motive is present. Indeed, that is precisely what the Education Department is doing with respect to Title VI and anti-Semitism right now, but it is undertaking that task without the benefit of any definition. The Act fills that gap, and in doing so serves First Amendment values rather than creates vagueness problems. None of this is to deny that there are serious First Amendment issues raised by efforts to directly regulate campus speech. But that is not what the Act does, and passage of the Act should not be delayed based on misplaced constitutional concerns.

Very truly yours,

Paul D. Clement