Efforts to Weaponize Title VI against Pro-Palestine Speech on University Campuses

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During the past twenty years, prominent opponents of a free Palestine have charged that certain pro-Palestine activities on US college campuses violate the anti-discrimination statute of Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq). Their contention has been that Palestine-related events harm the educational opportunities of students with shared Jewish ancestry. This argument has largely failed to resonate in the federal judiciary and relevant executive branch offices. Still, prominent figures in this effort have persisted in deploying anti-discrimination language as a political cudgel, noting that they can impair pro-Palestine organizing even when they fail in the courts. The cornerstone of this campaign has been the threat of smearing students, faculty, and university administrators as perpetrators of antisemitism, defined broadly to include political criticisms of Israel. These extralegal tactics expanded after Hamas attacked Israel on October 7, 2023 and Israel began its war in the Gaza Strip. As the number of students expressing solidarity with the Palestinian people swelled, some university presidents and elected policymakers accused demonstrators of contravening Title VI by creating a "hostile environment" for Jewish students. This interpretation, however, was not supported by the purpose and language of the statute, or publicly available guidance coming from the Department of Education (ED). ED's Office for Civil Rights (OCR) has consistently maintained that Title VI violations comprise two elements: 1) behaviors that are so "severe, pervasive, and objectively offensive" that they impede the educational rights of a protected class of students and 2) a response from the educational institution that amounts to "deliberate indifference." There is little indication that the bulk of events in the 2023-2024 wave of pro-Palestine campus activism met either of these criteria. Nevertheless, university administrators invoked the statute when justifying restrictions of pro-Palestine activities.

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INTRODUCTION

In December 2023, Erwin Chemerinsky and Howard Gillman, both law professors in the University of California system, reported that the Education Department (ED) was advising universities that the phrase "From the river to the sea, Palestine will be free" "likely create[s] a hostile environment for Jewish students which undermines their equal opportunity to an education, thus requiring investigations [by ED's Office for Civil Rights (OCR)] and mitigation efforts" by the universities involved.[1] Chemerinsky and Gillman noted that such a slogan, while perhaps objectionable to some audiences, was protected by the First

[1] Erwin Chemerinsky & Howard Gillman, *Federal Attempt to Combat Anti-Semitism Puts Universities in an Untenable Position*, SACRAMENTO BEE (Dec. 12, 2023), https://www.sacbee.com/opinion/op-ed/article282921393.html [https://perma.cc/9AUE-GJWZ].

Amendment.[2] So too were opposing statements, such as "We stand with Israel," which "Muslim, Arab and Palestinian students" might find threatening.[3]

Decades of litigation, ED investigations, and campus policymaking have established broad parameters around free speech on the country's public college campuses and nearly all of its private colleges.[4] Title VI of the Civil Rights Act of 1964 proscribes institutions of higher education receiving federal funding from discriminating against students on the basis of race or ethnicity, while Title IX of the Education Amendments Act of 1972 prohibits sex-based discrimination.[5] Nothing in these *anti-discrimination* laws or in OCR's mission, though, was "intended to restrict the exercise of any expressive activities protected under the U.S. Constitution . . . [or] regulate the content of speech."[6]

Safeguards around speech were under fresh *political* assault amid the domestic and international outcry over the Hamas attack of October 7, 2023 (Operation Al Aqsa Flood) and subsequent Israeli military campaign (Operation Swords of Iron).[7] Still, this heated climate did not change the legal framework covering controversial ideas.[8] Therefore, OCR would have no basis to counsel educational leaders to violate the Constitution or to pose an artificial dilemma between upholding the Civil Rights Act *or* honoring the Bill of Rights.[9] Chemerinsky and Gillman observed a yawning gulf between slogans such as "[f]rom the river to the sea" and activities that were "subjectively and objectively" offensive, as well as "so severe or pervasive," that they impaired the educational benefit for members of a protected racial or ethnic group.[10] ED and OCR, they concluded, should "make it clear that, on college campuses, a discriminatory educational environment cannot be created merely through

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[2] *Id.*

[3] *Id.*

[4] *See* Derek P. Langhauser, *Drawing the Line Between Free and Regulated Speech on Public College Campuses: Key Steps and the Forum Analysis*, 181 WEST'S EDUC. L. REP. 339, 354–355 (2003).

[5] Civil Rights Act of 1964, 42 U.S.C. § 2000(d); Education Amendments Act of 1972, 20 U.S.C. §§ 1681–1688.

[6] U.S. Dep't of Educ., Off. For Civ. Rts., First Amendment: Dear Colleague Letter (July 28, 2003).

[7] *See* Marc Tracy, *Since the War, Events About Palestinian Culture Have Been Called Off*, N.Y. TIMES (Oct. 20, 2023), https://www.nytimes.com/2023/10/20/arts/palestinian-events-cancelled-war.html [https://perma.cc/PNP9-UJ56].

[8] *Holding Campus Leaders Accountable and Confronting Antisemitism: Hearing Before the Committee on Education & the Workforce*, 118 Cong. 5 (2014) (written testimony of Pamela S. Nadell).

[9] *See* Len Gutkin, *The Review: Should Columbia be Worried About Title VI?*, CHRON. HIGHER EDUC. (May 6, 2024), https://www.chronicle.com/newsletter/the-review/2024-05-06?sra=true [https://perma.cc/H9T7-4SDQ].

[10] Chemerinsky & Gillman, *supra* note 1.

exposure to objectionable ideas and speech that is protected by the First Amendment."[11]

In subsequent months, the number of civil rights cases related to the Israel-Gaza war remained historically high.[12] Between October 7, 2023 and March 22, 2024, OCR opened seventy-eight investigations (an average of more than three per week) "involving national origin discrimination and religion."[13] While the office issued additional guidance, it did not resolve the ambiguity around its Title VI mandate and constitutionally-protected calls for a free Palestine.[14] Political pressure emanating from Congress, the uncertainty of the 2024 presidential race, and security measures by university administrators further occluded the rights that students enjoy when it comes to public solidarity with the Palestinian people.[15]

The present paper traces how opponents of the Palestinian solidarity movement have attempted to use Title VI since 2004 to constrain pro-Palestine advocacy. Part One considers the original language of the statute, its contemporary interpretation by OCR in the early 2000s, and the ways that OCR applied the law while honoring constitutional protections on speech. Part Two turns to the struggle over defining the line between antisemitism and political criticism of the state of Israel. OCR treats antisemitism as a form of discrimination based on shared heritage. For that reason, the effort to broaden the range of antisemitic statements and activities to include engagement on Israeli policies toward Palestinians was a critical forerunner to the current controversies on college campuses. The third and final Part examines the conjunction of OCR policy and the expansive definition of antisemitism as a constraint on pro-Palestine organizing through the spring 2024 encampment movement that radiated out from Columbia University. At that time, university administrators invoked Title VI as they conducted the largest crackdown on student protests on American campuses since the Vietnam War era.[16]

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[11] *Id.*

[12] ABIGAIL A. GRABER, CONGR. RSCH. SERV., RLSB11129, RELIGIOUS DISCRIMINATION AT SCHOOL: APPLICATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, at 1 (2024).

[13] *Id.*

[14] Gutkin, *supra* note 9.

[15] Natasha Lennard, *College Administrators Spent Summer Break Dreaming Up Ways to Squash Gaza Protests*, INTERCEPT (Aug. 27, 2024), https://theintercept.com/2024/08/27/zionist-nyu-gaza-campus-protests [https://perma.cc/4N82-84G3]; Zach Montague, *Campus Protest Investigations Hang Over Schools as New Academic Year Begins*, N.Y. TIMES (Oct. 5, 2024), https://www.nytimes.com/2024/10/05/us/politics/college-campus-protests-investigations.html [https://perma.cc/23RT-WR8C].

[16] *Where Protesters on U.S. Campuses Have Been Arrested or Detained*, N.Y. TIMES (July 22, 2024), https://www.nytimes.com/interactive/2024/us/pro-palestinian-college-protests-encampments.html [https://perma.cc/U63V-QCQL].

The terrain for university-based pro-Palestine expression is in flux, but the present analysis identifies enduring trends. Efforts at turning Title VI into a weapon against political speech have foundered in the realm of law but achieved success as extralegal intimidation. Even when groups accusing universities of Title VI violations against Jewish students fail to convince OCR officials and federal judges, they have found they can tarnish university officials, faculty, and students as contributing to antisemitism.[17] The risk of reputational damage or political controversy appears to have increased the likelihood that university leaders will take an excessively strict line on pro-Palestinian organizing.[18] After spring 2024, universities tightened their guidelines on student expression, even though recent events did not indicate a credible risk of an OCR finding of educational discrimination or harassment based on shared ancestry.[19] But ad hoc efforts to appease actors invoking Title VI for political purposes are likely to cast doubt on the university's commitment to intellectual growth.[20] They may also invite countervailing litigation for First Amendment violations.[21] Regardless of how such cases are ultimately resolved, viewpoint-partial policies and pronouncements pose an immediate impingement upon student learning and expression.

University administrators ought not to bend before extra-legal pressure campaigns, whether they originate from local organizations, outside groups, or Washington, D.C. Rather, they ought to respond with a confident grasp of existing antidiscrimination doctrine and by pursuing consistent, measured responsiveness to Title VI concerns. Fortunately, past OCR guidance memos provide firm guardrails for preserving equal access to education. They delineate how institutions can uphold their obligations under the Civil Rights Act of 1964 without jeopardizing their educational mission or intruding on the constitutionally protected speech rights of the campus community.

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[17] Kenneth L. Marcus, *Standing Up for Jewish Students*, JERUSALEM POST (Sept. 9, 2013), https://www.jpost.com/opinion/op-ed-contributors/standing-up-for-jewish-students-325648 [https://perma.cc/F7Q3-4YVK].

[18] Alice Speri, *'A Police State': US Universities Impose Rules to Avoid Repeat of Gaza Protests*, GUARDIAN (Aug. 17, 2024), https://www.theguardian.com/us-news/article/2024/aug/17/campus-protest-rules [https://perma.cc/ZZV8-8A47].

[19] Lennard, *supra* note 15.

[20] *See* Cary Nelson & Kenneth Stern, *Antisemitism on Campus*, AM. ASSOC. OF UNIV. PROFESSORS, https://web.archive.org/web/20110424083257/https://www.aaup.org/AAUP/about/pres/let/antisemitism.htm (2011) ("It is a perversion of the definition [of anti-Semitism] to use it, as some are doing, in an attempt to censor what a professor, student, or speaker can say.").

[21] Kate McGee, *UT-Austin Student Sues Over Arrest During Pro-Palestinian Demonstrations*, TEX. TRIB. (Aug. 29, 2024), https://www.texastribune.org/2024/08/29/ut-austin-student-sues [https://perma.cc/3XN4-NZLN]; *see also* Students for Justice in Palestine v. Greg Abbott, No. 1:24-cv-523 (W.D. Tex. filed May 16, 2024).

I. TITLE VI'S PROHIBITION ON EDUCATIONAL DISCRIMINATION

Passed by super-majorities in Congress and signed into law by President Lyndon B. Johnson, the Civil Rights Acts of 1964 was a landmark prohibition on discrimination in "places of public accommodation [including schools] and private employers" that empowered the federal government to challenge the obstructionists fighting racial desegregation in American schools.[22] "TITLE VI—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS" of the law states: "No 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."[23]

A handful of educational institutions in southern states that continued to discriminate against Black students lost federal funding for defying the Civil Rights Act.[24] These were exceptional cases, however.[25] After America's schools were formally integrated, ED and the Office for Civil Rights (tasked with investigating alleged Title VI violations) did not call for suspending funds to other colleges or universities.[26]

Discussions of Title VI related to campus debates over the Israel-Palestine conflict began in a different educational setting than Jim Crow schools and occurred under a new interpretation of the statute's language.[27] The law did not originally include discrimination based on religion.[28] However, its prohibition of racial discrimination became understood to protect descendants of historically non-"white" ancestors (as understood at the time of the Civil Rights Act of 1866).[29] In 2004, ED clarified the purview of Title VI to include Jewish and Muslim students in certain circumstances. OCR considered its mandate to extend to "Arab Muslim, Sikh and Jewish students," when an affected student's "shared ancestry" would have been treated as a "race" in earlier jurisprudence.[30]

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[22] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 564, 783 (6th ed. 2019).

[23] Civil Rights Act of 1964, Pub. L. 88–352, 78 Stat. 252 (codified at 42 U.S.C.A. § 2000(d)).

[24] Gutkin, *supra* note 9.

[25] *Id.*

[26] *Id.*

[27] *See generally* GRABER, *supra* note 12.

[28] *Id.* at 3.

[29] *Id.*

[30] U.S. Dep't of Educ., Off. For Civ. Rts., Dear Colleague Letter (Sep. 13, 2004); *see also* Kenneth L. Marcus, *Hostile Environment: Campus Antisemitism as a Civil Rights Violation*, *in* ANTISEMITISM ON THE CAMPUS: PAST AND PRESENT 357 (Eunice G. Pollack ed., 2010); Gavriella Fried, *On the Outer Reaches of the Marketplace of Ideas: The Weaponization of Title VI against Palestinian College Activists*, 30 J. L. & POL'Y 157, 177 (2021); *see also* Civil Rights Act of 1866, 42 U.S.C. § 1981 (1866).

Another way of putting the matter: Title VI could apply when acts of religious discrimination, which fell outside the law, "comingled" with acts of national origin discrimination, which the law covered.[31]

The author of this reinterpretation was attorney Kenneth L. Marcus. Marcus served at OCR from 2004–2008 and subsequently became one of the preeminent advocates for applying Title VI against speech and events criticizing Israeli repression of Palestinians, deeds Marcus considered antisemitic.[32] However, Marcus's policy legacy stretched beyond his personal ideology. In October 2010, during the Obama administration, Assistant Secretary for Civil Rights Russlynn Ali preserved the shared ancestry approach Marcus had developed.[33]

A. Identifying Violations

Even as Marcus and subsequent OCR officials expanded the scope of Americans protected by Title VI, the range of discriminatory *acts* that were prohibited remained constant.[34] A "Dear Colleague" letter from Assistant Secretary Ali in October 2010 stated that OCR was concerned with harassment of students from protected categories and with any educational environment that was deficient for those particular students' learning.[35] On the phenomenon of harassment, she wrote:

> Harassment creates a hostile environment 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.[36]

The letter describes several hypothetical scenarios "of how a school's failure to recognize student misconduct as discriminatory harassment violates students' civil rights."[37] Two of these examples involved racial, ethnic, or shared ancestry discrimination; one was directed

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[31] *See* Fried, *supra* note 30.

[32] Vimal Patel, *The Man Who Helped Redefine Campus Antisemitism*, N.Y. TIMES (Mar. 24, 2024), https://www.nytimes.com/2024/03/24/us/politics/kenneth-marcus-college-antisemitism-complaints.html [https://perma.cc/5TV8-RRPD].

[33] U.S. Dep't of Educ., Off. of Civ. Rts., Dear Colleague Letter, OCR-00056 (Oct. 26, 2010), 5.

[34] *Id.* at 2.

[35] *Id.* at 1.

[36] *Id.* at 2.

[37] *Id.* at 4.

at African-American students, the other at students who were Jewish or perceived to be Jewish.[38]

The second scenario comprised a series of middle school incidents that included antisemitic graffiti, invocation of Jewish stereotypes, bullying of students thought to be Jewish, monetary extortion, verbal taunts, and physical intimidation that prompted some Jewish students to alter their daily routine. The full scenario reads as follows:

> Over the course of a school year, school employees at a junior high school received reports of several incidents of anti-Semitic conduct at the school. Anti-Semitic graffiti, including swastikas, was scrawled on the stalls of the school bathroom. When custodians discovered the graffiti and reported it to school administrators, the administrators ordered the graffiti removed but took no further action. At the same school, a teacher caught two ninth-graders trying to force two seventh-graders to give them money. The ninth-graders told the seventh-graders, "You Jews have all of the money, give us some." When school administrators investigated the incident, they determined that the seventh-graders were not actually Jewish. The school suspended the perpetrators for a week because of the serious nature of their misconduct. After that incident, younger Jewish students started avoiding the school library and computer lab because they were located in the corridor housing the lockers of the ninth-graders. At the same school, a group of eighth-grade students repeatedly called a Jewish student "Drew the dirty Jew." The responsible eighth-graders were reprimanded for teasing the Jewish student.[39]

While the scenario's administrators did not ignore the incidents, they failed to uphold their legal obligation to ensure the inclusion and equal treatment of all students because they failed to recognize the incidents created a hostile environment, instead addressing the incidents in isolation.[40] The repetition of antisemitic acts (including when the targeted students were not actually Jewish) showed that school leaders "failed to take prompt and effective steps reasonably calculated to end the harassment and prevent its recurrence."[41] In particular, the prompt discipline of specific perpetrators did not stem a climate of fear: some

[38] *Id.* at 4–5.
[39] *Id.* at 5.
[40] *Id.* at 5–6.
[41] *Id.* at 6.

Jewish students became so fearful that upperclassmen would aggress against them that they began avoiding key school facilities (library and computer lab).[42]

An appropriate response, wrote Ali, would have entailed efforts to address the overarching problem of antisemitism. Such a program would likely include overtly acknowledging the pattern of antisemitic behaviors, training teachers on how best to handle incidents of antisemitism when they observed them, educating students about the historic problem of antisemitism, and raising awareness about antisemitism among parents and members of the local community.[43]

B. First Amendment Guarantees

Just as the OCR letter made clear the extent of prejudicial conduct that meets the threshold of pervasive harassment and a hostile environment, it also implied that a large range of behaviors, including speech, could be deemed objectionable but would not violate the Civil Rights Act.[44] Establishing that a "hostile environment" exists" depends on the same type of holistic assessment that OCR's scenarios demanded from the hypothetical school officials.[45] In an ongoing situation that appears to jeopardize student's rights in an educational setting, petitioners and investigators must consider "the severity, pervasiveness, and persistence of the discrimination in light of the particular individuals and groups involved."[46] It is not enough for a student to be personally offended by certain expressions.[47]

In OCR cases and in litigation, a bright line has separated the gamut of statements that may be controversial and offensive from the more narrowly defined speech acts that would cross Title VI.[48] This boundary was built up through generations of jurisprudence. In a 1943 Supreme Court decision that overturned a compulsory pledge of allegiance, Justice Robert H. Jackson referred to the First Amendment as the "fixed star in

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[42] *Id.* at 5–6.

[43] Id. at 6.

[44] *Id.* at 2 & n.8.

[45] The Letter repeatedly recommends a more "comprehensive response" when school officials' response is inadequate. *See id.* at 8–9.

[46] Fried, *supra* note 30, at 176; *see also* Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance; Notice DEPARTMENT OF EDUCATION, 59 Fed. Reg. 11175, 11449 (Mar. 10, 1994) ("the severe, pervasive or persistent standard must be understood in light of the age and impressionability of the students involved and with the special nature and purposes of the educational setting in mind.").

[47] *See* Fried, *supra* note 30, at 184.

[48] *See* Langhauser, *supra* note 4, at 345–36 (collecting cases).

our constitutional constellation."[49] In the decades after the Civil Rights Acts was passed, nothing in the law has been construed to supersede constitutionally-protected speech.[50]

In 2003, Assistant Secretary Gerald A. Reynolds at OCR insisted that the Office's defense of civil rights was wholly compatible with the First Amendment, and that its mandate to investigate discrimination did not extend into regulating speech content:

> OCR interprets its regulations consistent with the requirements of the First Amendment, and all actions taken by OCR must comport with First Amendment principles. No OCR regulation should be interpreted to impinge upon rights protected under the First Amendment to the U.S. Constitution or to require recipients to enact or enforce codes that punish the exercise of such rights.[51]

With respect to offensive speech directed at specific students, Reynolds described the threshold for discriminatory harassment, compared to statements not covered by the Civil Rights Act:

> Some colleges and universities have interpreted OCR's prohibition of "harassment" as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program.[52]

Just as the First Amendment provided the north star of American jurisprudence, OCR's deference to the constitutional protections of free speech was a guiding principle for investigating and adjudicating alleged educational and civil rights harm around Israel-Palestine events on American campuses.[53]

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[49] Fried, *supra* note 30, at 178 n.124 (2021) (quoting W.Va. State Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943)).

[50] *See* First Amendment: Dear Colleague Letter, *supra* note 6 ("OCR's regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment").

[51] *Id.*

[52] *Id.*

[53] *Id.* ("Let me emphasize that OCR is committed to the full, fair and effective enforcement of these statutes consistent with the requirements of the First Amendment.").

The distinction between civil rights-violating harassment on one side and offensive statements on the other remained operative in the years after Marcus's letter and the start of OCR's investigations of shared-ancestry discrimination, including antisemitism. In several cases that Marcus led or championed after he left government, complainants maintained that pro-Palestine statements and activities went beyond the boundaries of constitutionally-protected speech, crossing into the types of threatening and prejudicial activities prohibited by law. In response, American Association of University Professors President Cary Nelson and antisemitism expert Kenneth Stern noted in 2011 that most of the complaints about alleged antisemitic content involved specific statements, not a systemic shift toward an antisemitic climate at the universities in question.[54] Such remarks, they observed, "do not rise to the level of creating hostile environments."[55] Time and again, the deciding authorities, whether at OCR or in the courts, found the defendants were operating under the First Amendment and that their behaviors did not produce a "severe, pervasive, or persistent" encumbrance on the petitioning students' educational experience.[56]

Creating a hostile environment must entail more than statements, no matter how appalling. In his study of Israel-Palestine politics on American campuses, Stern noted that even "[he] might be disturbed by some of the anti-Israel ideas, and the forceful manner by which they were communicated."[57] That did not mean, however, that the expression of these ideas violated Title VI, as one complaint alleged. The petitioner in that case, University of California, Santa Cruz lecturer Tammi Rossman-Benjamin, "admitted that her argument was that 'Jewish students . . . deserve to be protected from antisemitic hate speech.'"[58] Yet that was not what the Civil Rights Act of 1964 provided for. "No one likes hateful speech," Stern concluded, "but Rossman-Benjamin's definition of what was hateful was overly broad, and in any event, campus speech that is antisemitic (or racist or homophobic) is expression, and thus allowed. What are prohibited are intimidation and discrimination."[59]

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[54] Nelson & Stern, *supra* note 20 ("It is entirely proper for university administrators, scholars and students to reference the 'working definition' in identifying definite or possible instances of anti-Semitism on campus. [But just b]ecause a statement might be 'countable' by data collectors under the 'working definition' does not therefore mean that Title VI is violated.").

[55] Nelson & Stern, *supra* note 20.

[56] *Id.*; see *supra* notes 46–48 and accompanying text.

[57] KENNETH S. STERN, THE CONFLICT OVER THE CONFLICT: THE ISRAEL/PALESTINE CAMPUS DEBATE 157 (Univ. of Toronto Press. 2020).

[58] *Id.* at 158.

[59] *Id.*

There is no carveout in America's First Amendment tradition for proscribing so-called hate speech, which has no legal definition.[60] Further, hundreds of attempts by colleges and universities to ban such language through speech codes have been overturned.[61] "Every court that considered a university speech code between 1989 and 1995 reached the same conclusion," wrote journalists Emily Bazelon and Charles Homans: "The rules were vague, overbroad or discriminated against speakers because of their points of view and were thus unconstitutional."[62]

C. Dismissal of Uncompelling Title VI Complaints

While the antidiscrimination statutes of the Civil Rights Act of 1964 were not meant to intrude upon constitutionally protected speech, there are a number of things students and university administrators *could* do that fall outside the First Amendment and that *would* present a potential violation of Title VI.[63] Decades after the law's application in school desegregation, OCR has provided hypotheticals and guidance about what present-day cases of educational discrimination *would* look like. OCR has identified situations that invite a plausible claim of a civil rights violation to include a dance party that only Jewish students must pay a fee to enter,[64] using logic that would apply to a lecture that excludes Muslim students or calls for inflicting imminent violence upon Black students. In these scenarios, a complainant would have solid grounds for arguing that the behavior or speech in question did not enjoy First Amendment protections *and* that it contravened Title VI. In contrast to these examples, Title VI discrimination allegations related to Israel-Palestine politics that have reached OCR have typically been far less compelling.

Most groups and attorneys trying to use Title VI to call out Israel-critical and Palestine-solidarity events have been unable to demonstrate that the statements and activities they sought to curtail amounted to proscribed behavior. Instead, Title VI allegations—of discrimination and hostile environment based on shared Jewish ancestry—were lodged against statements and expressions on the political situation in Israel and the occupied Palestinian territories.[65] In August 2013, OCR dismissed

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[60] Univ. of Tex. at Austin, *Celebrating Free Speech Week: A Free Speech Q&A*, YOUTUBE, at 3:56–4:13 (Oct. 15, 2023), https://www.youtube.com/watch?v=17z78BKrzeI [https://perma.cc/7AAB-YGHZ] [hereinafter *Celebrating Free Speech Week*].

[61] Emily Bazelon & Charles Homans, *The Battle Over College Speech Will Outlive the Encampments*, N.Y. TIMES MAG. (May 31, 2024), https://www.nytimes.com/2024/05/29/magazine/columbia-protests-free-speech.html [https://perma.cc/FBM4-GUML].

[62] *Id.*

[63] *See* Langhauser, *supra* note 4; *see* Dear Colleague Letter, OCR-00056, *supra* note 33.

[64] STERN, *supra* note 57, at 159.

[65] *See, e.g.*, STERN, *supra* note 57, at 157–8 (describing examples of such cases).

"three Title VI complaints [including Rossman-Benjamin's] against . . . University of California campuses" (Berkeley, Irvine and Santa Cruz) because "the allegedly discriminatory activity was protected political speech."[66]

In the first complaint, a former student at UC Berkeley (later joined by a second student) sued in federal court over an alleged antisemitic and hostile environment at the school, exemplified by events organized by Students for Justice in Palestine (SJP).[67] The court dismissed the complaint, noting that the actions in question involved "pure political speech and expressive conduct, in a public setting, regarding matters of public concern, which is entitled to special protection under the First Amendment."[68] The plaintiffs then requested an OCR investigation, but officials there also dismissed the complaint, in language that matched the court's reasoning.[69] The second complaint was at UC Irvine; The Zionist Organization of America alleged that administrators had "tolerated a hostile environment with regular antisemitic harassment," but OCR assessed that the cited disagreements and material concerned "the students' political views" and was not a matter of shared national origin or ancestry.[70] The final complaint was Rossman-Benjamin's claim that the holding of events critical of Israel, including lectures by two Jewish speakers and a documentary film, harmed the educational experience of Jewish students at UC Santa Cruz. OCR deemed all the content cited in the complaint as consistent with the "robust and discordant expression" of a college campus.[71]

During the period around these cases, Palestine Legal identified three more "meritless complaints . . . alleging that campus expression in support of Palestinian rights creates a hostile educational environment for Jewish students."[72] A complaint against Barnard College was dismissed in 2012, as was a case against Rutgers University.[73] Finally, an investigation into an alleged Title VI violation at Brooklyn College ended when the complainant and the college reportedly agreed to a settlement.[74]

This general trend in formal complaints, litigation, and investigations continued. Even as OCR expanded its interpretation of Title

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[66] Fried, *supra* note 30, at 183.

[67] PALESTINE LEGAL & CTR. FOR CONST. RTS., THE PALESTINE EXCEPTION TO FREE SPEECH 86–87 (2015).

[68] *Id.* at 87.

[69] *Id.*

[70] *Id.* at 89.

[71] *Id.* at 93.

[72] *Id.* at 36.

[73] *Id.* at 36–37.

[74] *Id.*

VI to cover issues of national origin and shared ancestry that comingled with religion, the bar for identifying antisemitic harassment and other category-based infringements on the educational experience has remained high. This standard has aligned with a continued reverence, in the federal judiciary, for the First Amendment, and an accompanying unwillingness to tamper with the broad allowances for controversial speech—no matter which political direction it was directed.[75] A legislative attorney from the Congressional Research Services (CRS) reported in spring 2024 that:

> CRS has not located any judicial opinion holding that opposition to Israel, or to Jewish claims in Israel, can be antisemitic for purposes of federal antidiscrimination law. Nor has it located any case holding that pro-Israel conduct, or hostility to pro-Palestinian advocacy, constitutes discrimination on the basis of Palestinian, Arab, or Muslim identity. In the few cases that have addressed claims in the former category, courts have avoided ruling that certain anti-Israel conduct or speech is inherently antisemitic, observing that the issue is "hotly disputed" and emphasizing First Amendment protections for political speech. Courts have also held that discrimination against people for pro-Palestinian expression is not the same as discrimination on the basis of Palestinian identity.[76]

OCR's almost complete dismissal of the aforementioned University of California cases and other Israel-Palestine-related antisemitism complaints may be attributable, in part, to the office's reticence to suppress speech content the courts have deemed protected.

Further, to the extent that jurisprudence around Title VI remains underdeveloped in the courts, federal officials have looked to case law surrounding Title IX of the Education Amendments Act of 1972 (20 U.S.C. §§ 1681–1688) and its criteria for establishing sex-based discrimination and hostile environments.[77] In that area, demonstrating that a college or university has not upheld its legal obligations requires not only that the behavior is so "severe, pervasive, and objectively offensive" that it impedes the educational rights of a protected class of students, but also

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[75] GRABER, *supra* note 12, at 4.

[76] *Id.*

[77] *See* JARED P. COLE, CONGR. RSCH. SERV., LSB11087, TITLE VI AND PEER-TO-PEER RACIAL HARASSMENT AT SCHOOL: FEDERAL APPELLATE DECISIONS, at 2–4 (2023) ("the plaintiff had to show that the school district had actual knowledge and was deliberately indifferent to racial harassment that was so severe, pervasive, and objectively offensive that it deprived students of access to educational benefits or opportunities.").

that the school display "*deliberate indifference*."[78] The upshot of these standards is that the *strongest* cases of antisemitic civil rights violation will document repeated antisemitic behavior by the students or groups being accused of engaging in antisemitism, along with recurrent negligence and inattention (deliberate indifference) from university administrators. Cases that fizzled in the courts or OCR lacked one or both elements.

D. Speech Restrictions at Private Universities

Whereas speech on public universities is governed by the First Amendment, private universities may limit speech that would otherwise be constitutionally-protected.[79] Hence, it is worthwhile to note that Assistant Secretary Reynolds's 2003 counsel about OCR's remit applied to public and private universities alike. Most private universities tend to harmonize their policies with the established conventions of public schools, i.e., their policies reflect the spirit of the First Amendment. In 2020 the Foundation for Individual Rights in Education (FIRE) identified only six private, higher education institutions that explicitly privilege some other value before free speech.[80] Therefore students at the bulk of private universities operate in a rules framework that is broadly permissive but not set in stone. Most of the time, these students will enjoy the same latitude for expressing their ideas as their peers at public universities. Private university administrators retain discretion, however, to change speech policies at any moment.[81] These figures may be especially inclined to suppress certain brands of speech during periods of national controversy. Such measures, though, have not been called for by ED or OCR.

While private universities retain the option of restricting speech in ways that public universities cannot, federal civil rights laws recognize no material difference in the treatment of speech in the two types of schools. Assistant Secretary Reynolds counseled private university leaders against thinking that Title VI compelled or justified making policies that transgress the First Amendment:

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[78] GRABER, *supra* note 12, at 2.

[79] In California, the Leonard Law prohibits private institutions of higher education from disciplining students from speech that "is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution. CAL. EDUC. CODE § 94367(a).

[80] The schools were Baylor University, Brigham Young University, Pepperdine University, Saint Louis University, Vassar College, and Yeshiva University according to the Foundation for Individual Rights in Education. SPOTLIGHT ON SPEECH CODES 2020: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES, FOUND. FOR INDIVIDUAL RTS. IN EDUC. 4 & n.3 (2019).

[81] *See* Univ. of Pa. v. EEOC, 493 U.S. 182, 198 n.6 ("Obvious First Amendment problems would arise where government attempts to direct the content of speech at private universities.").

> OCR's regulations should not be interpreted in ways that would lead to the suppression of protected speech on public *or private campuses*. Any private post-secondary institution that chooses to limit free speech in ways that are more restrictive than at public educational institutions does so *on its own accord and not based on requirements imposed by OCR*.[82]

Private university administrators enjoy a discretion to quash contentious speech that their peers on public campuses do not have. When they take such steps, however, these private university decisionmakers are not supported, much less compelled, by ED to see such restrictions as a necessary or appropriate response to potential civil rights violations.[83]

II. DEFINING ANTI-SEMITISM AND ITS PURVEYORS

OCR has not generally found pro-Palestine campus organizations or their universities to have engaged in antisemitic discrimination or harassment. Initiators and supporters of those complaints, however, have pursued a separate vector of action outside of the Title VI statute. Lacking the ability to punish pro-Palestinian speakers, they have promoted an amorphous definition of antisemitism that can encompass conventional elements of pro-Palestine Israel-critical discourse.

A. The "Working Definition"

In March 2005, the European Monitoring Centre on Racism and Xenophobia (EUMC) responded to demands for improved data reporting on antisemitic incidents by providing a "working definition" of antisemitism.[84] In 2007, the US Department of State's Office to Monitor and Combat Anti-Semitism announced it would use "this 'working definition' as a starting point in the fight against anti-Semitism" and reproduced the working definition:

> Anti-[S]emitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of anti[-S]emitism are directed toward Jewish or non-Jewish individuals and/or their

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[82] First Amendment: Dear Colleague Letter, *supra* note 6 (emphasis added).

[83] The remainder of this essay refers to First Amendment protections generally, for ease of discussion, while recognizing that, on private campuses, these protections are *de facto* not *de jure*. Private university administrators retain the option, seldom pursued, to regulate speech content in ways that diverge from constitutional protections and OCR instructions.

[84] François Dubuisson, *The Definition of Anti-Semitism by the European Monitoring Centre on Racism and Xenophobia (EUMC): Towards a Criminalisation of Criticism of Israeli Policy?*, EUR. COORDINATION COMMS. & ASS'NS FOR PALESTINE (2005).

> property, toward Jewish community institutions and religious facilities.[85]

The definition comprises two sentences, the latter of which pivots from the underlying concept to its empirical manifestations ("Rhetorical and physical manifestations . . . ").[86] Further, the original "working definition," as quoted by the Department of State, is followed by the disclaimer that "criticism of Israel similar to that leveled against any other country cannot be regarded as anti-Semitic."[87]

In 2016, the International Holocaust Remembrance Alliance (IHRA) Plenary resolved to adopt the "non-legally binding working definition of antisemitism" crafted by the EUMC.[88] Although the IHRA resolution included the disclaimer about regular political criticism of Israel, it also noted that contemporary antisemitism could include any of eleven further examples.[89] Seven of these examples mention Israel: (1) "Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust"; (2) "[a]ccusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations"; (3) "[d]enying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor"; (4) "[a]pplying double standards by requiring of [Israel] a behavior not expected or demanded of any other democratic nation"; (5) "[u]sing the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis"; (6) "[d]rawing comparisons of contemporary Israeli policy to that of the Nazis"; (7) "[h]olding Jews collectively responsible for actions of the state of Israel."[90] In subsequent policy debates, the examples have become more salient than the definition, in large part because the underlying concept is unclear and malleable.

As a conceptual benchmark, the IHRA definition has been faulted for its vagueness. What does a "certain perception" mean? [91] In what other ways, *in addition to* "hatred," might antisemitism be expressed?[92] Further,

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[85] *"Working Definition" of Anti-Semitism*, U.S. DEP'T STATE, OFF. TO MONITOR & COMBAT ANTI-SEMITISM (Feb. 8, 2007), https://2001-2009.state.gov/g/drl/rls/56589.htm [https://perma.cc/TWL8-ZEEG].

[86] *Id.*

[87] *Id.*

[88] Working Definition of Antisemitism, INT'L HOLOCAUST REMEMBRANCE ALL. (2016), https://holocaustremembrance.com/resources/working-definition-antisemitism [https://perma.cc/6MUQ-MAY3].

[89] *Id.*

[90] *Id.*

[91] Jonathan Judaken, *The Politics of the Gesture: The Anti-Semitism Awareness Act, Antiracism, and Intersectionality*, 105 AM. JEWISH HIST. 205, 207 (2021).

[92] *Id.*

the inclusion of examples does not make the definition more intelligible. The items listed are potential ("could" include[93]) and non-exhaustive manifestations of antisemitism. They do not dispel ambiguity. Rather than offering a tool for analysis and advocacy, the definition leaves concerned parties with a subjective know-it-when-I see-it standard.[94]

B. Codification Efforts

Semantic fuzziness has been no object to Marcus and others who contend the federal government and higher education institutions have been inattentive to antisemitic discrimination and harassment on college campuses. Since the announcement of the IHRA definition, pro-Israel officeholders and lobbyists have worked to plant it and its examples in the law. In December 2016, the Senate unanimously passed the "Anti-Semitism Awareness Act of 2016."[95] The legislation called on ED to use the Working Definition of antisemitism, the forerunner to the IHRA definition, when investigating the intent of alleged perpetrators in cases of antisemitic discrimination or harassment.[96] More than a half-dozen comparable bills have circulated in Congress.[97] The most recent, the Anti-Semitism Awareness Act of 2023, was introduced in the House and the Senate on October 26, 2023.[98] To date none of the Anti-Semitism Awareness bills have passed in both branches of Congress.

Efforts to incorporate the IHRA wording into public policy have gone further in the executive branch and in the states. In 2018, President Donald Trump brought Marcus back to ED as Assistant Secretary of Education for Civil Rights. Positioned at the helm of OCR, Marcus promptly invoked the IHRA definition as his office reopened an investigation of alleged antisemitism at Rutgers University that President Barack Obama's ED had previously dismissed.[99] According to a press release from the original complainant, the Zionist Organization of

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[93] *Id.*

[94] James Schamus, *The 'Blurred Lines' of Columbia's Task Force on Anti-Semitism*, MONDOWEISS (May 28, 2024), https://mondoweiss.net/2024/05/the-blurred-lines-of-columbias-task-force-on-anti-semitism [https://perma.cc/4KKF-UEWP]. More straightforward definitions exist. For example, the Jerusalem Declaration on Antisemitism, issued in 2020, states antisemitism is "discrimination, prejudice, hostility or violence against Jews as Jews (or Jewish institutions as Jewish)." Seth Anziska, et al., *The Jerusalem Declaration on Antisemitism*, JDA (2021), https://jerusalemdeclaration.org [https://perma.cc/S7UV-T2JP].

[95] STERN, *supra* note 57, at 163.

[96] S. 10, 114th Cong. (2016).

[97] GRABER, *supra* note 12, at 4–5.

[98] H.R. 6090, 118th Cong. (2024) (as passed by House, May 1, 2024); S. 3141, 118th Cong. (2023).

[99] Erica L. Green, *Education Dept. Reopens Rutgers Case Charging Discrimination Against Jewish Students*, N.Y. TIMES (Sept. 11, 2018), https://www.nytimes.com/2018/09/11/us/politics/rutgers-jewish-education-civil-rights.html [https://perma.cc/DW8B-ZLLT].

America, Marcus had communicated, in a letter to the ZOA, that: "OCR will—for the first time—use the International Holocaust Remembrance Alliance (IHRA) working definition of anti-Semitism."[100] The next year, President Trump issued an "Executive Order on Combating Anti-Semitism," instructing all executive agencies to employ the IHRA definition and "the 'Contemporary Examples of Anti-Semitism' identified by the IHRA, to the extent that any examples might be useful as evidence of discriminatory intent."[101] The executive order ushered in three new complaints against Columbia University, Columbia's Middle East Institute, and Georgia Tech.[102] After taking office, President Joe Biden let Trump's EO stand. Meanwhile governors and state legislators further legitimated the IHRA language. By mid-2023, six states had codified the IHRA definition into law, while another thirty had endorsed the definition.[103]

C. The IHRA Definition and the First Amendment

The IHRA definition is at the center of ongoing policy and legal struggles over the speech climate on college campuses. Before turning to the problems the definition poses for robust debate on Israel-Palestine, it is worth noting how defenders of the definition square its usage with constitutional guarantees for free speech.

Supporters of codifying the IHRA language claim that it provides a touchstone for fighting discrimination without curtailing First Amendment rights. For example, attorney Mark Goldfeder argues that "the definition and the accompanying examples can help an official assess whether the conduct in question was motivated by illegally discriminatory intent, which is exactly the assessment they are supposed to make when applying anti-discrimination laws."[104] Goldfeder also contends that codifying the IHRA definition, including in national law, would not curb what speakers, such as proponents of Palestinian rights, can publicly say:

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[100] *ZOA's Title VI Case Against Rutgers Reopened by US Civil Rights Office*, ZIONIST ORG. AM. (Sept. 5, 2018), https://zoa.org/2018/09/10378469-zoas-title-vi-case-against-rutgers-reopened-by-us-civil-rights-office [https://perma.cc/XE2Z-G6BW].

[101] Exec. Order No. 13899, 3 C.F.R. 395 (2020).

[102] Natasha Roth-Rowland, *Waging Lawfare*, JEWISH CURRENTS (June 8, 2020), https://jewishcurrents.org/waging-lawfare [https://perma.cc/FY95-2LSS]. The Georgia Tech case ended with a statement recognizing OCR's use of definition of the IHRA definition antisemitism "when evaluating the intent in cases of discriminatory harassment." Fried, *supra* note 30, at 191.

[103] *CAM Information Hub Database of IHRA Antisemitism Definition Adoptions by US States*, COMBAT ANTISEMITISM MOVEMENT (June 23, 2023), https://combatantisemitism.org/government-and-policy/cam-information-hub-database-of-ihra-antisemitism-definition-adoptions-by-us-states-2 [https://perma.cc/2LYN-CVV9].

[104] Mark Goldfeder, *Codifying Antisemitism*, 127 PENN ST. L. REV. 405, 429 (2023).

> Using the IHRA Definition to determine whether a given statement or position is antisemitic does not change the fact that anyone anywhere can say whatever they want, whenever they want, and however abhorrent they want, about Judaism, the Jewish people, or the Jewish State. Freedom of speech, even offensive hateful speech, is an important cornerstone of a free society. . . .[105]

Here, though, Goldfeder elides a critical distinction. It is one thing to acknowledge that free societies let people say abhorrent things. But Goldfeder binds onto this premise the normative judgment that pro-Palestinian advocacy which crosses certain lines in criticizing Israel ranks among those abhorrent things. In this regard, a seeming concession to Goldfeder's interlocutors in the Israel-Palestine debate is no favor. It is an encumbrance.

By referring to "offensive hateful speech," Goldfeder's defense of the IHRA definition overlaps with the problem identified by Palestine Legal and other *critics* of the definition.[106] To the extent that states and educational institutions interpret the IHRA definition so broadly that they see rallies for a free Palestine and popular political slogans as antisemitic, then pro-Palestine advocates enter the public square carrying that stigma, no matter their Bill of Rights freedoms to appear and speak.

III. DETERRING PRO-PALESTINE SPEECH

Since 2004, Marcus and like-minded colleagues have failed to establish that universities permitting pro-Palestine activities violated Title VI and allowed a discriminatory or harassing educational environment. Palestine Legal reported that, as of 2020:

> Despite investigating multiple [roughly eighteen] complaints against Palestine advocacy, to date the Office for Civil Rights (OCR) has not found a single instance of a university violating Title VI due to campus Palestine advocacy. Every investigation has either been dismissed or closed as a result of the university signing a resolution to voluntarily comply with certain requirements.[107]

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[105] *Id.* at 430.

[106] *Id.*

[107] *Federal Crackdown on Campus Palestine Activism: Title VI Attacks*, PALESTINE LEGAL (Aug. 12, 2020), https://palestinelegal.org/news/2020/8/12/title-vi [https://perma.cc/7TCF-X59U].

Opponents of pro-Palestine campus events have claimed greater success, however, in the court of public opinion.[108] When it comes to the discourse about Israel and Palestine, organizations such as SJP can be stigmatized, ostracized, and otherwise impeded without necessarily coming under unconstitutional censorship. This prejudicial framing may not silence pro-Palestine advocates outright, but it burdens their work.[109] Further, it opens the door for risk-averse or politically biased university officials to exaggerate the risk of Title VI violations and adopt a highly restrictive stance on pro-Palestine campus events. [110]

A. Burdens of a Repugnant Label

In 1927, Justice Louis Brandeis prescribed the solution to objectionable words: "more speech, not enforced silence."[111] For Goldfeder, the IHRA definition upholds this tradition. It empowers its users to denounce antisemitism when they see it, through "more speech" of their own.[112] He regards such condemnation as a part of conventional civil rights discourse, not censorship: "Normally, anyone is free to call out racist or sexist or homophobic speech without being accused of silencing racists or being criticized for creating norms in which sexism or homophobia is unacceptable. In this sense antisemitism is, or at least should be, no different than any other bigotry."[113] By making this comparison to sexists, homophobes, and other purveyors of bigotry, Goldfeder is arguing that pro-Palestine activists ought to be willing to pay a discursive and political price for their constitutionally protected language when it includes criticisms of Israel spotlighted by IHRA as antisemitic. The problem with Goldfeder's analogy is that it presumes that

[108] Marcus, *supra* note 17.

[109] *See* PALESTINE LEGAL, *supra* note 67, at 5 ("Institution[s] . . . erect bureaucratic barriers that thwart efforts to discuss abuses of Palestinian rights and occasionally even cancel events or programs altogether. Sometimes the consequences are more severe: universities suspend student groups, deny tenure to faculty, or fire them outright in response to their criticism of Israel.").

[110] Minouche Shafik, *Statement from Columbia University President Minouche Shafik*, COLUM. U. (Apr. 29, 2024), https://president.columbia.edu/news/statement-columbia-university-president-minouche-shafik-4-29 [https://perma.cc/89SX-JU28] (citing the University's "duties under civil rights laws"). The surge in university regulation of Palestine-related student activity after October 7, 2023 can be understood in this context. The veritable crackdown on speech through seemingly content-neutral rules, they have claimed, shields their institutions against potential (but historically unlikely) OCR sanctions and keeps them in compliance with (constitutionally dubious) state-level policies applying the IHRA definition. *Id.*; *see also* Josh Moody, *Why Did Shafik Step Down Now?*, INSIDE HIGHER ED. (Aug. 16, 2024), https://www.insidehighered.com/news/governance/executive-leadership/2024/08/16/why-did-shafik-step-down-now [https://perma.cc/5LWF-BNYN].

[111] Whitney v. California, 274 U.S. 372, 380 (1927) (Brandeis, J., concurring).

[112] Goldfeder, *supra* note 104, at 408.

[113] *Id.* at 430.

the IHRA's loose definition is analytically equivalent to an animus against historically and currently marginalized groups such as women, Black people, the LGBTQIA+ community, among others. Such specificity, however, is exactly what the IHRA language avoids.[114] From this flawed premise, Goldfeder then allows that pro-Palestine speakers enjoy the same First Amendment rights as other (allegedly) prejudiced individuals, the kind of people defended by "the ACLU . . . [with its] well-earned reputation for fostering and protecting antisemitism and antisemites."[115] In this manner, Goldfeder implies that the power of the IHRA definition comes not from censoring activists and organizations, but from maligning them by branding their speech as bigoted, perhaps so much so that they will curb their own Constitutionally-protected advocacy for a free Palestine.

Thanks to the American constitutional tradition, users of the IHRA definition are ill-equipped to legally censor pro-Palestine speech. What they can do, however, is stigmatize such speech such that proponents of Palestinian independence enter the discourse at a reputational disadvantage irrespective of the actual antisemitic content of their advocacy. In this respect, a seemingly unrestricted battle of competing statements and rival political claims conceals a skewed normative fight. Defenders of Israel, unblemished with historically resonant epithets, deploy reasoned arguments and receive a respectful hearing. By contrast, a speaker associated with a vaguely-defined antisemitism is assumed to be peddling bigotry and will face a dubious, if not adversarial, audience.

As a result, Marcus and others can snatch a political victory from the jaws of legal defeat; they can compel SJP chapters and other targets to spend time and resources rebutting spurious claims. Before the complaints against them were dismissed, the accused spent years fighting to ensure there was no lingering damage to their standing and activities. According to some of the most prominent figures conflating pro-Palestinian activism with malignant antisemitism, this energy-drain and reputational damage has been an important accomplishment—even though OCR found no Title VI violation.[116]

Marcus has been one of the most active individuals attempting to deploy the "antisemitism" label to kneecap Palestinian solidarity organizations in what is essentially an extralegal strategy to raise the costs of pro-Palestine activities that remain shielded by the Constitution and

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[114] *See supra* Subpart II(A).

[115] Goldfeder, *supra* note 104, at 449.

[116] Marcus, *supra* note 17 ("we are, in fact, comforted by knowing that we are having the effect we had set out to achieve . . . . These cases—even when rejected—expose administrators to bad publicity.").

outside the purview of Title VI. In a 2013 op-ed in the *Jerusalem Post* he touted the fruits of such efforts:

> Just last week, I heard from a university chancellor who is eager to work with the Schusterman Center for Israel studies at Brandeis University to avert the possibility of a civil rights complaint. At many campuses, the prospect of litigation has made a difference. If a university shows a failure to treat initial complaints seriously, it hurts them with donors, faculty, political leaders and prospective students. No university wants to be accused of creating an abusive environment. Federal officials have noted the abusive habits of some faculty and students, and those findings have bruised the reputation of these campuses. This is important.[117]

In Marcus's view, any opprobrium leveled at universities facing Title VI investigations partly compensates for OCR's supposedly tepid (mis)handling of Israel-critical and anti-Zionist activities.[118]

Even without involving OCR, the accusation of antisemitism associates the target with some of the most abhorrent figures and events in world history, deterring even good-faith political activists from joining movements critiquing Israeli policies. In 2002, Harvard University President and former Treasury Secretary Lawrence Summers took aim at the incipient Boycott, Divest, Sanction (BDS) movement. Summers expressed concern about "an upturn in anti-Semitism globally, and . . . some developments closer to home."[119] "Serious and thoughtful people," he continued, "are advocating and taking actions that are anti-Semitic in their effect if not their intent."[120] These actions included the nascent efforts of what would become BDS. He chastised those at Harvard and other universities who sought "to single out Israel among all nations as the lone country where it is inappropriate for any part of the university's endowment to be invested."[121]

Thirteen years later, Summers circled back and doubled down. Stopping short of slandering pro-Palestine organizers, he reflected that his "suggestion that the divestiture and boycott movements were "anti-Semitic in effect if not intent" seems to . . . have stood up rather well. [He]

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[117] *Id.*

[118] Marcus, *supra* note 30, at 362–63.

[119] Lawrence H. Summers, President, Harvard Univ., Address at Morning Prayers (Sept. 17, 2002), https://www.harvard.edu/president/news-speeches-summers/2002/address-at-morning-prayers [https://perma.cc/3KMA-AZQK].

[120] *Id.*

[121] *Id.*

said . . . the effect of the actions [divestors] favored— singling out Israel for economic pressure . . . would be anti-Semitic—in other words, in opposition to the Jewish people."[122] He went on to celebrate the chill his words likely carried, "confident that [his] speech did cause some, perhaps many, people to be much more hesitant about supporting divestiture and the like . . . [principally] because they did not want to be embroiled in controversy. . . . [T]his was a feature [, his] intent and effect."[123] Summers concluded that, "[a]cademic freedom does not include freedom from criticism."[124] Summers left listeners to decide whether accusations of antisemitism at divestment supporters amounted to substantive criticism or *ad hominem*.

The experience of Pro-Palestine advocates validates Marcus's and Summers's conclusions. Legally untenable charges of antisemitic discrimination can inflict a heavy toll. Palestine Legal found that that top administrators at Barnard College, CUNY, Northeastern University and UCLA brought the weight of their office down on SJP chapters and similar groups after they received complaints about what the courts have upheld as constitutionally-protected speech.[125] Even when universities, including in the University of California system, resisted pressure, the investigation process subjected students to uncertainty and pressure. As Yaman Salahi and Nasrina Bargzie wrote in 2015:

> Although OCR' s conclusions in the UC investigations suggest it recognizes political speech about Israel is protected under the First Amendment, not a form of racially motivated harassment, the manner of the investigations nevertheless harmed students, faculty, and university administrators by chilling protected expression. During the long duration of the investigations, in some cases lasting several years, students and administrators at the target universities and elsewhere were unsure how OCR would decide the cases, and as such, were unsure what kind of expression could give rise to a Title VI violation. Furthermore . . . many individuals were concerned with the stigma of being associated with such

[122] Lawrence H. Summers, President, Harvard Univ., Remarks at Columbia Center for Law and Liberty: Academic Freedom and Anti-Semitism (Jan. 29, 2015), https://larrysummers.com/wp-content/uploads/2015/01/AcademicFreedomAndAntiSemitism_FINAL1-2.pdf [https://perma.cc/E745-6SW9].

[123] *Id.*

[124] *Id.*

[125] PALESTINE LEGAL, *supra* note 67, 37–38.

> an investigation, even if they were ultimately vindicated.[126]

Looking back at over a decade of cases, attorney Radhika Sainath of Palestine Legal concluded: "These complaints are having the impact that they were designed to achieve . . . Not to win on the merit, but to force universities to investigate, condemn and suppress speech supporting Palestinian rights, because they are so fearful of bad press and donor backlash."[127]

In summary, the framing of pro-Palestine expression as protected-but-racist content besmirches speakers before they utter a word. By including criticisms of Israel, the capacious IHRA definition pulls pro-Palestine political speech toward the legal but noxious zone of what is popularly understood as hate speech. It places a global movement for liberating the occupied Palestinian territories alongside fringe ethno-centrists, like the Ku Klux Klan and the Aryan Nations, that scored First Amendment legal, but socially pyrrhic, victories.[128]

Finally, the definition also associates pro-Palestine advocates with recent acts of lethal antisemitism that sprang from a distinct nexus of white supremacy. The shooter who killed eleven Jewish worshipers at the Tree of Life Synagogue in Pittsburgh on October 27, 2018 and the murderer of Lori Gilbert Kaye at a San Diego synagogue on April 27, 2019 believed that a Jewish conspiracy was encouraging nonwhite migration to wipe out whites.[129] Anti-Defamation League (ADL) chief Jonathan Greenblatt

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[126] Yaman Salahi & Nasrina Bargzie, *Talking Israel and Palestine on Campus: How the U.S. Department of Education can Uphold the Civil Rights Act and the First Amendment*, 12 HASTINGS RACE & POVERTY L.J. 155, 169 (2015).

[127] Patel, *supra* note 32.

[128] Emanuella Grinberg, *KKK Wins 'Adopt-A-Highway' Ruling in Georgia High Court*, CNN (July 6, 2016), https://www.cnn.com/2016/07/05/us/georgia-kkk-adopt-a-highway-lawsuit/index.html [https://perma.cc/X4EE-HP6E]*; see also Upholding Free Speech Rights of the Unpopular, Idaho Court Allows Aryan Nations to March*, ACLU IDAHO (July 9, 1999), https://www.aclu.org/press-releases/upholding-free-speech-rights-unpopular-idaho-court-allows-aryan-nations-march [https://perma.cc/RYC8-HXT3] ("The ACLU believes that the right to utter unpopular political speech—on terms equal to the right to utter popular political speech—is as fundamental to our American freedoms as any right"); *see also* David Goldberger, *The Skokie Case: How I Came To Represent The Free Speech Rights Of Nazis*, ACLU IDAHO (Jan. 3, 2020), https://www.aclu.org/news/free-speech/the-skokie-case-how-i-came-to-represent-the-free-speech-rights-of-nazis [https://perma.cc/3X73-DFMM] ("the case still brings up difficult feelings about representing a client whose constitutional rights were being violated but who represented the hatred and bigotry that continues to erupt into America's consciousness.").

[129] Avi Selk et al., *'I Just Want to Kill Jews:' Documents Detail the Pittsburgh Synagogue Massacre and Name the Dead*, WASH. POST (Oct. 28, 2018), https://www.washingtonpost.com/nation/2018/10/28/victims-expected-be-named-after-killed-deadliest-attack-jews-us-history [https://perma.cc/U732-YNW3]; Zack Beauchamp, *Poway and Pittsburgh: the Rise in Murderous*

remarked the Tree of Life massacre "was the single most lethal and violent attack on the Jewish community in the history of the country . . . We've never had an attack of such depravity where so many people were killed."[130] The assailants subscribed to a "white genocide" theory, which was also the source of the infamous "Jews will not replace us" chant on August 15, 2017 in Charlottesville.[131] Adherents to this violent xenophobia were linked to a 50 percent rise in antisemitic attacks after Trump took office in January 2017.[132] Researchers for the ADL "found that 49 of the 50 extremist [antisemitic] murders . . . were committed by far-right extremists (rather than, for example, far-leftists or jihadists)" in 2018.[133]

B. Pressure on Universities

The white-supremacist origins of the deadliest threats to Jewish communities in the United States did not stop lawmakers from treating pro-Palestine advocates on American campuses as venomous antisemites. Heated discourse in Washington, D.C. after the Hamas-led October 7 attack and the start of the Israel-Gaza War demonstrated the ease with which critics of pro-Palestine organizing could deploy a loose definition of antisemitism to paint university administrators as indifferent to mass murder.

While the attempts to suppress pro-Palestine ideas by labeling them as antisemitic did not constitute censorship outright, it has always carried second-order implications for university administrators concerned about political pressure and public relations.[134] In prior years, they had sought to avoid negative press coverage from OCR investigations over alleged antisemitic discrimination.[135] The stakes rose in fall 2023 when the arena

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Anti-Semitism, Explained, VOX (May 1, 2019), https://www.vox.com/policy-and-politics/2019/5/1/18524103/poway-synagogue-shooting-anti-semitism [https://perma.cc/VNF9-AUVF].

[130] Kellie B. Gormly et al., *Suspect in Pittsburgh Synagogue Shooting Charged With 29 Counts in Deaths of 11 People*, WASH. POST (Oct. 27, 2018), https://www.washingtonpost.com/nation/2018/10/27/pittsburgh-police-responding-active-shooting-squirrel-hill-area [https://perma.cc/Y33X-DPDK].

[131] Beauchamp, *supra* note 129.

[132] *Id.*

[133] *Id.*

[134] Fried, *supra* note 30, at 194 ("already cash-strapped universities are incentivized to make concessions that seem symbolic but, in actuality, have material ramifications on student activism and free speech protections on campus."); *see also* Rowland, *supra* note 102 ("University administrations who want to reduce risks to the university might start to make adjustments—they might be less inclined to hire Palestinian scholars, or to admit Palestinian students, because they don't want the headache . . . ").

[135] Fried, *supra* note 30, at 194 ("Faced with the possibility of negative media attention . . . university campuses tend to have a 'ripple chilling effect,' possibly influence the decisions of administrators and students elsewhere."); *see also* Rowland, *supra* note 102

of debate shifted from ED to Congress. Once representatives in the House called the leaders of the country's most prestigious universities to testify, they quickly demonstrated that highly coached administrators could be ill-equipped to defend student speech that was presumptively treated as malicious antisemitism.

The highest profile spectacle in the year's hearings on "campus antisemitism" was Congresswoman Elise Stefanik's (R-NY) December 5, 2023 questioning of three university presidents, including Harvard University president Claudine Gay.[136] At the start of her time, Stefanik pressed Gay, unsuccessfully, to go beyond personally repudiating vile speech at Harvard and commit to suppressing it (outside of any Title VI mandate and likely in violation of Harvard policies and the Constitution):

> [STEFANIK]: Dr. Gay, a Harvard student calling for the mass murder of African Americans is not protected free speech at Harvard, correct?
>
> [GAY]: Our commitment to free speech—
>
> [STEFANIK]: That's a yes or no question. Is that correct? Is that Ok for students to call for the mass murder of African Americans at Harvard? Is that protected free speech?
>
> [GAY]: Our commitment to free speech—
>
> [STEFANIK]: It's a yes or no question. Let me ask you this. You are president of Harvard, so I assume you're familiar with the term intifada, correct?
>
> [GAY]: I've heard that term, yes.
>
> [STEFANIK]: And you understand that the use of the term intifada in the context of the Israeli Arab conflict is indeed a call for violent armed resistance against the state of Israel, including violence against civilians and the genocide of Jews. Are you aware of that?

("complaints triggered by [EO 13899] passage are unlikely to pass muster in court, but they have already succeeded at a different goal: garnering press coverage."); Conor Friedersdorf, *The Wrong Way to Fight Antisemitism*, ATLANTIC (May 11, 2024), https://www.theatlantic.com/ideas/archive/2024/05/wrong-way-fight-anti-semitism-campus-free-speech/678358 [https://perma.cc/7KMU-BYTU] ("Suddenly, college administrators intent on minimizing exposure to Title VI investigations had a new incentive to crack down on even protected speech that the state dened as anti-Semitic[, the IHRA definition.]").

[136] *See* CQ Roll Call Staff, *Transcript: What Harvard, MIT and Penn Presidents Said at Antisemitism Hearing*, ROLLCALL (Dec. 13, 2023), https://rollcall.com/2023/12/13/transcript-what-harvard-mit-and-penn-presidents-said-at-antisemitism-hearing [https://perma.cc/JKT3-JXC4].

> [GAY]: That type of hateful speech is personally abhorrent to me.[137]

Gay and her peers offered answers in accordance with the Bill of Rights, their Title VI obligations, and their institution's policies.

While Stefanik portrayed these law-abiding responses as dangerous complacency about the vitriol being lobbed at Jewish students, one speaker unequivocally explained the speech in question was constitutionally safeguarded.[138] The only academic expert on antisemitism at the hearing, American University professor Pamela S. Nadell, offered a simple answer to the congresswoman's line of attack: "While I deplore all hateful speech, antisemitic speech remains, in America, protected."[139] As noted above, hate speech is not a legal term. Whatever the term's understood meaning, the First Amendment protects statements that many people may find offensive.[140] This protection extends to speakers on college campuses that may demean people belonging to protected ethnic, racial, or gender categories.[141]

Nadell's position was consistent with policies on university campuses not represented in the hearings and ED policy. For example. on October 15, 2023, Amanda Cochran-McCall. general counsel for the University of Texas at Austin, had clarified the space for hate speech on her (public university) campus: "Hate speech is not a category of speech the government can restrict, so if someone wanted to set up a table on our campus outside and share racist or sexist views, the Constitution still protects it."[142] The congressional backlash to pro-Palestine activities challenged the marker she had laid down. However, the public record showed no radical departure in ED policies. Contrary to Chemerinsky and Gilman's impression, OCR was not calling for universities to "act in ways that have already been ruled unconstitutional."[143]

Hostility in the Capitol toward colleges and universities did *not* elicit different instructions from the office tasked with enforcing Title VI. "Dear Colleague" letters from OCR in early November 2023 and May 2024 underlined existing policies and offered scenarios of hypothetical

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[137] *Id.*

[138] *Id.* ("STEFANIK: That's correct. [The number one hate crime] is anti-Jewish hate crimes. And Harvard ranks the lowest when it comes to protecting Jewish students. This is why I've called for your resignation.")

[139] *Id.*

[140] Fried, *supra* note 30, at 180.

[141] On the discretion of private universities in this area, see *supra* Subpart I(D).

[142] *Celebrating Free Speech Week*, *supra* note 60. Cochran-McCall then described the public good of free speech: "Imagine if the government, at the whim of a political party, could just decide at any time what constitutes hate speech and then just start arresting people for engaging in it . . . I don't think that's a place we want to be." *Id.*

[143] Chemerinsky & Gillman, *supra* note 1.

Title VI violations that were consistent with prior examples.[144] University administrators were instructed to be "vigilant" and active in preventing the creation of a hostile or discriminatory educational environment.[145] OCR continued to proscribe deliberate indifference, but it did not require educational institutions to suppress speech. To the extent that university leaders considered restricting pro-Palestine student activities that had been permitted in the past, they were bending not to OCR's directives but to political winds.[146]

Those pressures could be just as strong at the state level as in the Beltway. On March 27, 2024, Texas Governor Greg Abbott signed Executive Order GA-44 "Relating to addressing acts of antisemitism in institutions of higher education."[147] Texas had already adopted the IHRA definition of antisemitism in 2021.[148] Abbott's new order weaponized it, calling "from the river to the sea, Palestine will be free" "antisemitic phrases" and directing universities to discipline groups, "such as the Palestine Solidarity Committee and Students for Justice in Palestine" for violating campus speech policies.[149] GA-44 compelled "all Texas higher education institutions" to "update free speech policies to address the sharp rise in antisemitic speech and acts on university campuses" (including by applying the IHRA definition) and to discipline PSC, SJP, and other violators of these policies (with penalties including expulsion).[150] Legal professionals slammed Abbott's attempt to proscribe a specific political phrase and censure specific student organizations as blatantly unconstitutional.[151] Even as GA-44 was challenged in court, universities

[144] U.S. Dep't of Educ., Off. Of Civ. Rts., Dear Colleague Letter: Discrimination, Including Harassment, Based on Shared Ancestry or Ethnic Characteristics (Nov 7, 2023); U.S. Dep't of Educ., Off. Of Civ. Rts., Dear Colleague Letter: Protecting Students from Discrimination, such as Harassment, Based on Race, Color, or National Origin, Including Shared Ancestry or Ethnic Characteristics (May 7, 2024).

[145] Dear Colleague Letter: Discrimination, Including Harassment, Based on Shared Ancestry or Ethnic Characteristics, *supra* note 144.

[146] Alex Kane, *The Civil Rights Law Shutting Down Pro-Palestine Speech*, JEWISH CURRENTS (Nov. 15, 2024), https://jewishcurrents.org/civil-rights-law-pro-palestine-speech-israel-trump [https://perma.cc/K38R-8YF8].

[147] Exec. Order GA-44, Relating to Addressing Acts of Antisemitism in Institutions of Higher Education, 49 Tex. Reg. 2237, 2337–38 (2024).

[148] Jeremy Sharon, *Texas Adopts IHRA Definition in Establishing Antisemitism Commission*, JERUSALEM POST (June 17, 2021), https://www.jpost.com/diaspora/antisemitism/texas-adopts-ihra-definition-in-establishing-antisemitism-commission-671349 [https://perma.cc/V9ZN-UCR7].

[149] Exec. Order GA-44, *supra* note 147.

[150] *Id.*

[151] Ismail Allison, *CAIR-Texas Condemns Gov. Abbott's Anti-Palestinian Executive Order as 'Blatantly Unconstitutional' Attack on Free Speech*, CAIR (Mar. 27, 2024), https://www.cair.com/press_releases/cair-texas-condemns-gov-abbotts-anti-palestinian-executive-order-as-blatantly-unconstitutional-attack-on-free-speech [https://perma.cc/S8B9-KFBD]; *FIRE Statement on Gov. Abbott's Campus Anti-Semitism Executive Order*, FIRE (Mar. 27, 2024), https://www.

acted under its aegis.[152] Early in the summer 2024 session, the University of Texas at Austin, where Cochran-McCall provided legal counsel, changed its Institutional Rules to include the IHRA definition of antisemitism.[153]

C. Repression of Demonstrators

In 2015, Palestine Legal and the Center for Constitutional Rights documented a "widespread and growing suppression of Palestinian human rights advocacy."[154] Over a recent eighteen-month period students and professors at more than sixty-five colleges and universities had experienced, in total, some 250 "incidents of suppression."[155] Title VI complaints were one of nine components in this trend that challenged freedom of expression and academic freedom.[156] This phenomenon, which the organizations dubbed the Palestine Exception to Free Speech, grew in scale after October 7, 2023. Events featuring defenders of Palestinian human rights were cancelled or sidelined, often for an allegedly content-neutral reason such as a potential threat to public safety or the failure of the organizers to follow bureaucratic procedure.[157]

Student mobilization drawing attention to the plight of Palestinians in Gaza and the Israeli hostages represented the largest incident of contentious collective action on campuses since the 1980s anti-apartheid

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thefire.org/news/fire-statement-gov-abbotts-campus-anti-semitism-executive-order [https://perma.cc/MRA8-AT76].

[152] Importantly, the legality of GA-44 is far from apparent. While litigation is ongoing, a federal District Court has found that "Plaintiffs are likely to succeed in proving the GA-44-compliant university policies chill speech in violation of the First Amendment." Students for Just. in Palestine v. Abbott, 1:24-CV-523-RP, 2024 WL 4631301, at *9 (Oct. 28, 2024).

[153] Univ. of Tex. at Austin, *Sec. 13–206 Antisemitic and Other Discriminatory Conduct*, INSTITUTIONAL RULES ON STUDENT SERVICES AND ACTIVITIES**,** https://web.archive.org/web/20240623195916/https://catalog.utexas.edu/general-information/appendices/appendix-c/speech-expression-and-assembly; Lily Kepner, *UT Increases Limits on Free Speech After Pro-Palestinian Protests, Abbott Order*, AUSTIN AM. STATESMAN (July 8, 2024), https://www.statesman.com/story/news/education/2024/07/08/ut-austin-texas-tightens-free-speech-rules-after-pro-palestinian-protests-college/74271404007 [https://perma.cc/8Y45-DJPT].

[154] *The Palestine Exception to Free Speech: A Movement Under Attack in The U.S.*, CTR. FOR CONST. RTS. (Sept. 30, 2015), https://ccrjustice.org/the-palestine-exception [https://perma.cc/W9P9-P8SW].

[155] *Id.*

[156] PALESTINE LEGAL & CTR. FOR CONST. RTS., THE PALESTINE EXCEPTION TO FREE SPEECH: A MOVEMENT UNDER ATTACK IN THE U.S. 36–38 (2015). The nine major tactics were: "False and Inflammatory Accusations of Antisemitism and Support for Terrorism," "Official Denunciation," "Bureaucratic Barriers," "Cancellations and Alterations of Academic and Cultural Events," "Administrative Sanctions," "Threats to Academic Freedom," "Lawsuits and Legal Threats" (including Title VI investigations), Legislation, and "Criminal Investigations and Prosecutions." *Id.* at 3.

[157] Tracy, *supra* note 7.

movement.[158] The activism comprised "nearly 12,400 [pro-Palestine] events and at least 1.5 million participants in the eight months from 7 October 2023 to 7 June 2024."[159] This wave peaked in spring 2024, as tens of thousands of college students across over 130 campuses held Palestine solidarity sit-ins or encampments calling for demand divestment and a permanent ceasefire.[160] Most university administrators permitted the activities without involving law enforcement.[161] Some even adopted protesters' proposals.[162] However, across 73 campuses police made over 3,000 arrests.[163] The scope of this response represented the largest crackdown on student activism since Vietnam War-era protests more than a half-century ago.[164]

During the first three weeks of protests (beginning April 17 at Columbia University), more than 2,950 people, including non-student participants such as alumni and community members, were arrested.[165] Many of the people zip-tied and jailed were later released without further legal sanction. For example, in Austin, Travis County Attorney Delia Garza dropped criminal trespass charges against 136 protesters arrested during demonstrations at the University of Texas on April 24 and April

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[158] Nicole Narea, *How Today's Antiwar Protests Stack up Against Major Student Movements in History*, VOX (May 1, 2024), https://www.vox.com/politics/24141636/campus-protest-columbia-israel-kent-state-history [https://perma.cc/9S6U-SFA8].

[159] Erica Chenoweth et al., *Protests in the United States on Palestine and Israel, 2023–2024*, SOC. MOVEMENT STUD., Oct. 2024, at 1, 3.

[160] Ivana Saric, *What Pro-Palestinian Protesters On College Campuses Want*, AXIOS (Apr. 26, 2024), https://www.axios.com/2024/04/26/palestine-columbia-usc-yale-protest [https://perma.cc/8ZZJ-K5M2]; Narea, *supra* note 158.

[161] *See* Bianca Ho & Kieran Doyle, *US Student Pro-Palestine Demonstrations Remain Overwhelmingly Peaceful: ACLED Insight*, ACLED (May 10, 2024), https://acleddata.com/2024/05/10/us-student-pro-palestine-demonstrations-remain-overwhelmingly-peaceful-acled-brief [https://perma.cc/BCZ8-FTPZ] (showing an overall low proportion of police responses to protests).

[162] Aparna Gopalan, *After the Encampments*, JEWISH CURRENTS (Sept. 26, 2024), https://jewishcurrents.org/after-the-encampments-gaza-university-divestment [https://perma.cc/XLX9-X9TY] ("According to data gathered by *Jewish Currents*, students at at least 40 schools—including Northwestern University, Brown University, and Rutgers University's New Brunswick campus—took one path, using negotiations to secure pro-Palestine concessions that fell short of divestment in exchange for voluntarily clearing the lawns.")

[163] N.Y. TIMES, *supra* note 16.

[164] Bernd Debusman, Jr. & Emma Vardy, *Gaza: Police On Columbia Protest Ignited Campus Movement*, BBC (Apr. 27, 2024), https://www.bbc.com/news/world-us-canada-68906215 [https://perma.cc/V65G-BHY8].

[165] April Rubin et al., *Mapped: Where Pro-Palestinian Student Protesters Have Been Arrested*, AXIOS (May 10, 2024), https://www.axios.com/2024/04/27/palestinian-college-protest-arrest-encampment [https://perma.cc/MTM3-YUXK]; *Timeline of the Nationwide Protest Movement that Began at Columbia University*, AP NEWS (May 6, 2024), https://apnews.com/article/israel-palestinian-campus-protests-timeline-f7cd3abe635f8afa4532b7bed9212b56 [https://perma.cc/7Y3A-C424]; Narea, *supra* note 158.

29.[166] The arrests on April 24 lacked probable cause, Garza said, while the April 29 charges did not meet "the legal burden to prove [them] beyond a reasonable doubt."[167] Even though the legal case against most demonstrators proved insubstantial, the University continued to punish student participants, for alleged "rules violations."[168] Penalties included withholding students' diplomas or transcripts and threatening suspension unless the students went through a disciplinary hearing and pledged in writing to follow a revised set of "Speech, Expression and Assembly rules . . . that seem[ed] to codify the university's response."[169]

This approach fit a broader pattern in university responses to pro-Palestine organizing: the use of time, place, and manner (TPM) restrictions on speech to effectively silence expression while ostensibly upholding the law and the Constitution. As law professor Mohamed Fadel has summarized the matter, university administrators have made "pretextual use of formally lawful means to restrict the ability of advocates of Palestinian freedom to press their cause."[170] In fact, even these means exceed what the law traditionally allows. TPM restrictions are permissible so long as they protect "an important and legitimate administrative or pedagogical interest; []minimize, where practicable, intrusion into the speaker's opportunity to express content; []are evenly applied to all speakers;" and impede expression only to the extent "essential to furtherance of the governmental interest." [171] Anything more aggressive smacks of "content–based regulations [which] are presumptively invalid, and the college bears the burden of rebutting that presumption."[172] That presumption looks even more credible when an institution, such as the

[166] Pooja Salhotra, *Travis County Rejects all Criminal Trespass Charges Against 57 People Arrested at UT-Austin Protest*, TEX. TRIB. (Apr. 26, 2024), https://www.texastribune.org/2024/04/25/ut-austin-palestinian-arrests-criminal-cases [https://perma.cc/2YJV-AANZ]; Asad Jung, *Travis County Attorney Drops Charges Against 79 More UT-Austin Protesters*, KSAT (June 26, 2024), https://www.ksat.com/news/texas/2024/06/26/travis-county-attorney-drops-charges-against-79-more-ut-austin-protesters [https://perma.cc/UNF9-95GE].

[167] Salhotra, *supra* note 166; Jung, *supra* note 166.

[168] *Doxxed, Disciplined: US Students Tally Price of Gaza Protests*, MIDDLE EAST MONITOR (July 9, 2024), https://www.middleeastmonitor.com/20240709-doxxed-disciplined-us-students-tally-price-of-gaza-protests [https://perma.cc/R9XU-HN72].

[169] Lily Kepner, *UT Offers Deferred Suspension to Some Pro-Palestinian Student Protesters, One Suspension*, AUSTIN AM.-STATESMAN (July 10, 2024), https://www.statesman.com/story/news/education/2024/07/10/ut-austin-pro-palestinian-student-protesters-punishments-deferred-suspension/74326259007 [https://perma.cc/D694-6BFM].

[170] Mohammad Fadel, Opinion, *The Palestine Exception to Academic Freedom Must Go*, CHRON. HIGHER EDUC. (Apr. 24, 2024), https://www.chronicle.com/article/the-palestine-exception-to-academic-freedom-must-go [https://perma.cc/T46P-M9XJ].

[171] Langhauser, *supra* note 4, at 354.

[172] *Id.* at 354–355.

University of Texas, is operating under a policy directive aimed at squelching specific speech acts and whose constitutionality is contested.[173]

While TPM restrictions became the weapon of choice for suppressing pro-Palestine activism in 2024, Title VI concerns remained a background pretext. In November 2023, Columbia University had suspended the campus chapters of Jewish Voices for Peace and Students for Justice in Palestine over alleged violations of university policies, including holding "an unauthorized event . . . that . . . included threatening rhetoric and intimidation." [174] Three months later, the university faced a Title VI complaint for failing to "prohibit discrimination and retaliation against Jewish persons," and thus allowing a hostile learning environment.[175] Throughout this period, the university aggressively policed pro-Palestine events and launched disciplinary proceedings at more than 90 students through mid-April.[176] Rather than the university being complacent, the New York Civil Liberties Union and Palestine Legal argued in a lawsuit that Columbia administrators had "gone too far, violating the [pro-Palestine] demonstrators' legal rights."[177] Hence, while some complainants saw the university doing too little, others thought it was doing too much. On balance, though, the considerable attention Columbia University leaders gave to the matter made it unlikely that a future OCR investigation would find evidence of

[173] *See* Press Release, Ismail Alison, the Council on American-Islamic Relations, CAIR Files Lawsuit Against Texas Governor on Behalf of DSA, Students for Justice in Palestine at University of Houston and University of Texas Dallas to Defend Free Speech of Anti-Genocide Protesters (May 16, 2024), https://www.cair.com/press_releases/cair-files-lawsuit-against-texas-governor-greg-abbott-on-behalf-of-dsa-sjp-uh-and-sjp-utd-to-defend-free-speech-of-anti-genocide-protesters-on-texas-campuses [https://perma.cc/J4QQ-9WWU]. In their request for injunctive relief, plaintiffs in Texas chapters of SJP contend that GA-44 amounts to viewpoint discrimination by calling out SJP, adopting the IHRA definition of antisemitism, and proscribing a slogan ("from the river . . .) that "reflect[s] an aspiration for peace and dignity for all people—Palestinians, Israelis, Arabs, Muslims, Jews, Christians, and everyone else." Students for Justice in Palestine v. Greg Abbott, No. 1:24-cv-523, 10 (W.D. Tex. filed May 16, 2024).

[174] Gerald Rosenberg, *Statement From Gerald Rosberg, Chair of the Special Committee on Campus Safety*, COLUM. NEWS (Nov. 10, 2023), https://news.columbia.edu/news/statement-gerald-rosberg-chair-special-committee-campus-safety [https://perma.cc/5RP9-PYEV].

[175] Andrew Marantz, Opinion, *How Columbia's Campus was Torn Apart Over Gaza*, NEW YORKER (Apr. 25, 2024), https://www.newyorker.com/news/daily-comment/how-columbias-campus-was-torn-apart-over-gaza [https://perma.cc/DHH9-HM9W]; Verified Complaint at 3, Mackenzie Forrest v. Trustees of Columbia Univ., 24-CV-01034 (S.D.N.Y 2024).

[176] *See* Jameel Jaffer, *Knight Institute Calls for Urgent "Course Correction" on Response to Student Protests at Columbia University*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (Apr. 22, 2024), https://knightcolumbia.org/blog/knight-institute-calls-for-urgent-course-correction-on-response-to-student-protests-at-columbia-university [https://perma.cc/P7GY-V6YG] (describing Columbia's crackdown).

[177] Marantz, *supra* note 175.

"deliberate indifference," an essential element in the scenarios depicting Title VI infractions.[178]

In late April, with the Gaza solidarity encampments in their second week, Columbia University Minouche Shafik invoked Title VI as she gestured toward new options (that would include bringing in New York police): "The encampment has created an unwelcoming environment for many of our Jewish students and faculty. External actors have contributed to creating a hostile environment in violation of Title VI, especially around our gates, that is unsafe for everyone . . . ."[179] But the Civil Rights Act of 1964 regulates educational institutions; external actors cannot be saddled with a Title VI violation.[180] Further, an unwelcoming environment for many Jewish students did not necessarily present a severe and pervasive infringement on students' access to an education based on their shared ancestry. In addition, if the environment was unsafe for everyone, it was unlikely to qualify as harassment or discrimination targeted against a specific shared ancestry group. Despite its legal incoherence, Shafik's message offered shield and sword for her actions as university president. She had not admitted to any concrete Title VI violations, yet she would use the authority of Title VI to justify pitting cops against demonstrators.

It was a shaky strategy. The latest allegations of harassment and discrimination were no more likely to draw material sanctions from ED than the prior twenty years of cases surrounding charges of antisemitism against pro-Palestine solidarity. To the extent that Shafik and her peers sought to wrap their suppression of pro-Palestine advocacy in the mantle of America's civil rights traditions, they substantially overstated the threat of OCR complaints and categorically denied pro-Palestine groups' claim to civil rights of their own. To find cases where ED terminated funds to a college or university, one would need to go back to segregationist holdouts in the South. By contrast, complaints in the twenty-first century, including allegations of pervasive antisemitism, have typically been dropped or resolved without any change in federal funding.[181]

D. An Evolving Challenge

As students returned to campus for the fall semester of 2024, there were fresh indications that pro-Palestine student organizers and faculty members at American higher education institutions would continue to face an array of impediments and penalties that expressors of other ideas did

[178] *See supra* note 78 and accompanying text.
[179] Shafik, *supra* note 110.
[180] *Supra* note 5 and accompanying text.
[181] Gutkin, *supra* note 9.

not have to contend with.[182] However, in most cases, these burdens were not derived from strict adherence to OCR policy. In the first year after October 7, 2023, OCR opened "more than 100 investigations involving" the mix of "national origin discrimination and religion."[183] Notably, the precipitating incidents involve not only alleged antisemitism but also alleged anti-Muslim and anti-Palestinian deeds and statements.[184]

At the time of this writing, the outcomes of most of these investigations remain to be determined. However, publicly available information about three resolved investigations—at Brown University, the University of Michigan, and Muhlenberg College—suggest that OCR's response is largely consistent with precedent.[185] While OCR officials have called on universities to be more thorough in investigating complaints of a hostile environment, they have not advocated that universities exercise prior restraint and shut down student events, nor have they threatened to withhold funding.[186]

Whereas OCR has been measured in its approach to the campus protests of 2023–2024, university practices reflected a tendency to go beyond their statutory obligations under Title VI and to suppress a specific viewpoint that was disfavored among lawmakers and donors.[187] President Shafik resigned in mid-August, and the policies of her successor remained

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[182] Radhika Sainath, *New Policies Suppress Pro-Palestinian Speech*, INSIDE HIGHER ED (Sept. 16, 2024), https://www.insidehighered.com/opinion/views/2024/09/16/new-policies-suppress-pro-palestinian-speech-opinion [https://perma.cc/5PSF-M5AL].

[183] GRABER, *supra* note 12, at 3.

[184] Univ. of Mich., OCR Complaint Number 15-24-2066 & No. 15-24-2128, at 4–8 (2024) (describing examples from 75 incidents reported to OCR of alleged harassment and discrimination based on national origin at the University of Michigan); Brown Univ., OCR Complaint Number 01-24-2116, at 8–11 (2024) (describing examples of reports received by OCR of Brown University students alleging antisemitic or anti-Palestinian harassment or discrimination); Muhlenberg Coll., OCR Complaint Number 03-24-2071, at 7–15 (2024) (detailing incidents of alleged antisemitism by a professor at Muhlenberg College and its response).

[185] *See* Brittany Begley et al., *OCR Update: Shared Ancestry and Ethnicity Discrimination Guidance*, JD SUPRA (July 12, 2024), https://www.jdsupra.com/legalnews/ocr-update-shared-ancestry-and-4867811 [https://perma.cc/2PFH-TJ6J] (describing OCR's "resolution agreements" with Brown University, University of Michigan, and Muhlenberg College).

[186] *See* Univ. of Mich., OCR Complaint Number 15-24-2066 & No. 15-24-2128, at 10-11 (2024) (analyzing the University of Michigan's response to harassment and discrimination allegations); Brown Univ., OCR Complaint Number 01-24-2116, at 13–14 (analyzing Brown University's response to harassment and discrimination allegations).

[187] *See* Zakiriya H. Gladney, Opinion, *The Palestine Exception Hurts Us All*, HARV. CRIMSON (Oct. 11, 2024), https://www.thecrimson.com/article/2024/10/11/gladney-palestine-exception-hurts-us-all [https://perma.cc/3F2R-CLMZ] ("Powerful political interests—Congressional investigations, donor pressure, and lawsuits—compel Harvard to silence protesters, panels, and Palestinians alike.").

to be determined.[188] At New York University, administrators announced that the school's antidiscrimination policies would encompass statements and behaviors directed at the adherents of the political ideology of Zionism, i.e., Zionists. The campus rule change suggested a dubious extension of Title VI shared ancestry protections into the realm of political belief.[189] At the University of Texas, an unreported number of students, likely dozens, resumed their studies under the cloud of threatened suspension if they again participated in collective actions that crossed the university's tightened parameters on assembly and speech.[190] One student who had been suspended, Ammer Qaddumi, a steering-committee member of the university's Palestine Solidarity Committee, sued the university president and provost in federal court for violating his First Amendment rights.[191] Finally, back at Muhlenberg College, university administrators took the unprecedented step of firing a tenured faculty member, Maura Finkelstein, who had been at the center of an OCR investigation, despite OCR having documented how Professor Finkelstein had cooperated fully in the successful resolution of the original complaint.[192]

Such punishments meted out or threatened against students and faculty expressing pro-Palestine stances after October 7, 2023 have scant statutory support in the Civil Rights Act of 1964 as it had been enforced by ED for six decades.[193] On the contrary, the documentary evidence from OCR regarding Title VI compliance at Brown University, the University of Michigan, and even Muhlenberg College indicates that university administrators ought to undertake due diligence regarding any prospect of

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[188] Josh Moody, *Why Did Shafik Step Down Now?*, INSIDE HIGHER ED (Aug. 16, 2024), https://www.insidehighered.com/news/governance/executive-leadership/2024/08/16/why-did-shafik-step-down-now [https://perma.cc/5LWF-BNYN].

[189] *Guidance and Expectations on Student Conduct*, N.Y. UNIV., https://www.nyu.edu/students/student-information-and-resources/student-community-standards/nyu-guidance-expectations-student-conduct.html [https://perma.cc/C32Y-EMHE] ("Using code words, like 'Zionist,' does not eliminate the possibility that your speech violates the NDAH Policy."); *see also* Natasha Lennard, *College Administrators Spent Summer Break Dreaming Up Ways to Squash Gaza Protests*, INTERCEPT (Aug. 27, 2024), https://theintercept.com/2024/08/27/zionist-nyu-gaza-campus-protests [https://perma.cc/4N82-84G3].

[190] Lily Kepner, *'I Don't Want to be Here Anymore': UT Students Arrested at Protests Fear Return to Campus*, AUSTIN AM.-STATESMAN (Sept. 3, 2024), https://www.statesman.com/story/news/education/2024/09/03/university-of-texas-students-arrested-pro-palestinian-protest-fear-campus/74969729007 [https://perma.cc/WD2P-TAQ4].

[191] Kate McGee, *UT-Austin Student Sues Over Arrest During Pro-Palestinian Demonstrations*, TEX. TRIB. (Aug. 29, 2024), https://www.texastribune.org/2024/08/29/ut-austin-student-sues [https://perma.cc/3XN4-NZLN].

[192] Natasha Lennard, *Meet the First Tenured Professor to be Fired for Pro-Palestine Speech*, INTERCEPT (Sept. 26, 2024), https://theintercept.com/2024/09/26/tenured-professor-fired-palestine-israel-zionism [https://perma.cc/9NPG-9CEX]; Muhlenberg Coll., OCR Complaint Number 03-24-2071, at 8–9 (2024) (detailing Finkelstein's cooperation).

[193] *See supra* Subpart II(B)–(C).

a hostile environment, but that this duty does not extend into suppressing a viewpoint (support for a free Palestine) that happens to contest the policy preferences of lawmakers and influential pressure groups. It follows that leaders in higher education can best uphold their pedagogical mission and the constitutional rights of their campus community by safeguarding a broad, inclusive arena for competing ideas while at the same time investigating any incidents of suspected discrimination and harassment.

CONCLUSION

Title VI's historic purpose and scope is intended to protect, not weaken, constitutional rights of free expression and equal protection. Consistent with the letter and spirit of the statute, Title VI complaints against pro-Palestine student organizations have chronically failed to persuade officials at OCR. Yet these cases have often succeeded at burdening the accused groups and schools with onerous investigations and negative press. Promoters of these actions have welcomed these consequences, which allow them to snatch a PR and political win from the jaws of legal defeat. For the health of intellectual life at American colleges and universities, it is important that future handling of Title VI complaints continue to deliver pro-Palestine activists formal vindication, but without the informal penalties incurred in the university setting or the court of public opinion by actors giving their speech codes a veneer of legal legitimacy. Such processes lack a legal foundation and reflect a biased enforcement strategy that neither the Department of Education's mission nor the Bill of Rights support.

Going forward, the Department of Education should clarify its view on how universities can best fulfill their Title VI obligations while honoring their community members' constitutionally-protected speech and their own educational missions.[194] OCR should also disavow its adoption of the IHRA definition of antisemitism, instead adopting a definition that reflects the legitimate distinction between criticism of Israel's policies and hatred of Jews. Finally, nongovernmental institutional actors, especially university administrators, should vindicate the First Amendment and Title VI rights of all students, recognizing that educational and legal prerogatives alike demand the inclusion of Palestinian voices, not a Palestinian Exception.

[194] *Cf.* Chemerinsky and Gillman *supra* note 1; *cf.* Evelyn Douek & Genevieve Lakier, *Title VI as a Jawbone*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (Sept. 26, 2024), https://knightcolumbia.org/blog/title-vi-as-a-jawbone [https://perma.cc/6E93-HVRH] ("how the DOE has recently communicated to universities about their responsibilities under Title VI raises all sorts of First Amendment questions . . . ").