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“Antisemitism on America’s College and University Campuses:
Current Conditions and the Federal Response”

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Thank you for inviting me to testify about the Federal Government’s response to antisemitism on college campuses. More specifically, I understand that your inquiry focuses on how the Federal Government has enforced Title VI of the Civil Rights Act of 1964 amid the explosion in anti-Israel protests and related allegations of harassment over the past few years. As a bipartisan commission committed to “objective and comprehensive investigation, research, and analysis,”¹ you have a unique opportunity to elevate the standard of rigor and candor in discussions of this important issue, and I’m grateful for the chance to explain some of the legal considerations at stake.²

Although the applicable law is nuanced, the bottom line is relatively simple. In general, protests against Israel do not contribute to an actionable “hostile environment” for Jewish students or otherwise amount to prohibited discrimination under the law. And that does not change just because the anti-Israel activity at issue is highly offensive, or violates campus rules, or even has the unfortunate effect of making some Jewish students feel unwelcome. Because Title VI is an antidiscrimination statute—not a “general civility code”³ for college campuses—it is implicated only when

¹ *Our Mission*, U.S. COMMISSION ON CIVIL RIGHTS, <https://www.usccr.gov/about/mission>.

² Throughout this statement, I draw on my recent co-authored work with Deborah Hellman. See Benjamin Eidelson & Deborah Hellman, *Antisemitism, Anti-Zionism, and Title VI: A Guide for the Perplexed*, 139 HARV. L. REV. F. 1 (2025). I am speaking here in my individual capacity. I also want to add at the outset that I am deliberately engaging the legal issues here on their merits—in the belief that this will prove most useful to the Commission and most valuable in the long run—and setting aside whether, as one court recently found, the Trump Administration has “used antisemitism as a smokescreen for a targeted, ideologically-motivated assault on this country’s premier universities.” *President & Fellows of Harvard Coll. v. U.S. Dep’t of Health & Hum. Servs.*, 798 F. Supp. 3d 77, 136 (D. Mass. 2025).

³ *Faragher v. Boca Raton*, 524 U.S. 775, 788 (1998) (emphasizing the limits of analogous harassment standards under Title VII).

students are disfavored or harassed *on the basis of a protected characteristic*. And as I'll explain, in the case of Title VI, that means a person's race or ancestry, not their religion or other beliefs. Thus, even though hostility toward a person based on his holding traditional Jewish religious beliefs would be antisemitic, it is not covered by Title VI. Similarly, regardless of whether hostility to Zionism or to Israel is properly deemed antisemitic, it does not ordinarily implicate Title VI either.

The most plausible argument to the contrary depends on an unusually expansive conception of what it means to be excluded “on the ground of”⁴ a particular trait. By way of background, it is well settled that harassment can be so “severe, pervasive, and objectively offensive” that it effectively denies someone an opportunity to participate in a given program.⁵ So, if someone is severely harassed—even in non-racial terms, like with generic threats of violence—and the perpetrators mistreat them in this way *because of their race*, Title VI is implicated. Against that settled backdrop, the most aggressive interpretation of Title VI posits that the statute is *also* implicated if nobody intends to harass the victim *because of* their race, but the environment is permeated with conduct that is not just severely, but also *racially*, offensive. This theory borrows from employment discrimination cases under Title VII—where courts have held, for instance, that a Black employee forced to work in an environment permeated with racial slurs might have a viable claim even if his co-workers never directed those slurs at him or otherwise singled him out for adverse treatment.⁶

As I will also explain, however, it is doubtful that Title VI's main operative provision—as it has been interpreted by the Supreme Court—supports liability in such a situation, where the aggrieved party has not suffered intentional disparate treatment. Moreover, even rhetoric about Israel or Zionism that we might colloquially describe as “hostile,” or that many might reasonably find very offensive, would not ordinarily qualify as severely and *racially* offensive in the way that the law requires. To take one salient example, a proclamation by student groups that they hold the “Israeli regime entirely responsible for all unfolding violence” on October 7, 2023, may be severely mistaken and highly offensive, but it clearly expresses a view about world affairs—specifically, about the moral responsibility of a state or government—and not a view about people of Jewish or Israeli ancestry.⁷ All of this means that a university that tolerates various forms of anti-Israel activism—again, including offensive, reckless, and ignorant activism—is very unlikely thereby to violate Title VI.

I respectfully submit that a conscientious “report . . . that monitors Federal civil rights enforcement efforts”⁸ in this area needs to acknowledge and articulate these important limits on the lawful scope of those “enforcement efforts.” “[N]o legislation pursues its purposes at all costs,” and failing to recognize as much is especially dangerous when the costs are censoring and chilling political expression.⁹ In reviewing the Executive Branch's response to claims of campus antisemitism,

⁴ 42 U.S.C. § 2000d.

⁵ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

⁶ See *infra* notes 54–59 and accompanying text.

⁷ This student letter is cited in the Trump Administration's formal Title VI finding against Harvard, where it is characterized as an “antisemitic statement.” U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF C.R., NOTICE OF VIOLATION: HARVARD UNIVERSITY 6, 13–14 (June 30, 2025), <https://www.hhs.gov/sites/default/files/harvard-title-vi-notice-violation.pdf>.

⁸ 42 U.S.C. § 1975a.

⁹ *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (*per curiam*).

therefore, the Commission should consider whether that response has respected the internal limits on Title VI that I will describe.¹⁰ And, of course, it would be inappropriate for the Commission to recommend additional enforcement efforts—such as further measures to curb anti-Israel activities on college campuses that some deem antisemitic—if the law does not authorize those steps.

Before I turn to the substance of the legal analysis, let me say clearly that I firmly believe in the importance of fostering campuses that are genuinely inclusive and welcoming of all students—including Jewish and Israeli students. For many of these students, Israel’s right to exist as a distinctly Jewish state is not just a political thesis, but a personal and communal conviction of profound importance. My maternal grandparents, both survivors of Nazi concentration camps, felt the same way. I think that students who denounce Israel and Zionism should exhibit sensitivity to what their messages mean for many of their peers.¹¹ And I have been appalled to learn of incidents in which students have felt “pressure[d] to condemn Israel” and “faced social consequences when they refused.”¹²

But it is crucial to distinguish the question of how universities should further “their dual commitments to robust debate and a thriving, pluralist student body”¹³ from the question of what the law permits federal agencies to mandate on pain of crippling sanctions. Gaps of that kind—where moral obligations outstrip legal obligations—are the hallmark of a free society. I agree with Suzanne Goldberg and Olatunde Johnson that to “lead[] with Title VI” in our efforts to promote a robust and inclusive learning environment is “to err as a matter of law and educational strategy.”¹⁴ And because Title VI gives political actors an extraordinarily powerful tool for bending universities to their will, anyone who values free thought should take care not to stretch the law from the specific ban on race or ancestry discrimination that it is to the vague ban on hostile expression that some might like it to be.

I. Title VI prohibits discrimination on the basis of race or ancestry—heritable, immutable characteristics—but it does not prohibit discrimination on the basis of any religion, belief, or felt attachment to a project or community.

When Congress adopted the Civil Rights Act of 1964, it prohibited job discrimination on the basis of “race, color, religion, sex, or national origin,”¹⁵ but it omitted two of these characteristics—religion and sex—from Title VI’s ban on discrimination by recipients of federal funds.¹⁶ For

¹⁰ For an illustrative example of overreach, see *infra* notes 60–63 and accompanying text.

¹¹ See Eidelson & Hellman, *supra* note 2, at 16–17. I also examined some of the challenges that we all face in communicating respect amid diversity, and the role that sensitivity plays in meeting those challenges, in Benjamin Eidelson, *The Etiquette of Equality*, 51 PHIL. & PUB. AFFS. 97 (2023).

¹² HARVARD UNIV., FINAL REPORT: PRESENTIAL TASK FORCE ON COMBATING ANTISEMITISM AND ANTI-ISRAELI BIAS 18 (2025). I mention these incidents here because your inquiry focuses on antisemitism; I do not mean to elevate them above others, involving other groups, that are appalling as well. See generally HARVARD UNIV., FINAL REPORT: PRESENTIAL TASK FORCE ON COMBATING ANTI-MUSLIM, ANTI-ARAB, AND ANTI-PALESTINIAN BIAS (2025).

¹³ Suzanne B. Goldberg and Olatunde C.A. Johnson, *Campus Crises and the Limits of Title VI*, 126 COLUM. L. REV. F. 1, 3 (2026).

¹⁴ *Id.* at 6.

¹⁵ 42 U.S.C. § 2000e-2(a)(1).

¹⁶ When he was asked why religion was omitted, the Chairman of the House Judiciary Committee explained that religious discrimination posed more complicated questions and that “rather than risk getting into [that] thicket[,] . . . it was left out.” 110 CONG. REC. 1528 (1964) (statement of Rep. Celler).

a time, the relevant federal agencies seemingly interpreted that choice as placing anti-Jewish discrimination wholly outside Title VI. Since the mid-2000s, however, the Government’s position has shifted to recognize that anti-Jewish discrimination *can* fall within the statute’s terms.¹⁷

This revised position is correct, but it is easily misunderstood. The reason that anti-Jewish discrimination *can* fall within the statute—whereas anti-Mormon or anti-Catholic discrimination cannot—is that the word “Jewish” can characterize a person either in terms of religion or in terms of a heritable, race-like characteristic (or, of course, both). Thus, as Judge Posner put it, “[t]here is religious anti-Semitism, typified by the attitude of the medieval Roman Catholic Church, and racial anti-Semitism, typified by Hitler.”¹⁸ Acts of discrimination against Jews fall within the statute’s coverage when, but only when, they involve what Posner called “racial anti-Semitism.” Thus, articles of Jewish faith receive no more protection under the law than articles of Catholic faith—which is to say, none.

This feature of the legal status quo is sometimes misunderstood because, when bans on race discrimination are applied to Jews, courts and commentators tend to describe the protected attribute as a matter of “ethnicity” or “ancestry” rather than “race.”¹⁹ That is an understandable euphemism because even speaking of “the Jewish race” has an antisemitic ring today, but it does not mark any legal distinction.²⁰ A further wrinkle is that some have sought to root the statute’s application to anti-Jewish discrimination in the category of “national origin”—with the Jewish people as the relevant “nation[.]”—rather than “race.” Although that theory rests on weaker authority, it might also be valid, especially because the Supreme Court has suggested that “national origin” was itself a synonym for “ancestry.”²¹ Assuming that Jews are covered as a group defined by shared ancestry in this way, however, the basic point remains the same: Title VI protects against discrimination based on certain of a person’s immutable, heritable characteristics—i.e., the person’s “race,” “ancestry,” or “origin”—and this protection extends to Jews no more and no less than to anyone else. By contrast, discrimination that a person faces on account of their *beliefs* or *practices* is beyond the statute’s scope—and again, Jews are treated no differently in this regard than anyone else.

In light of this Commission’s special concern for bipartisanship, let me emphasize that, at least until very recently, the basic distinction that I’ve just drawn has been a matter of bipartisan consensus. The Department of Education’s Office of Civil Rights (OCR) first affirmed that it would investigate claims of “*race or ethnic* harassment against Arab Muslim, Sikh, and Jewish students” during the George W. Bush Administration.²² In announcing that policy, the agency correctly

¹⁷ Some credit the Commission’s 2006 report with helping to effect this shift. See Kenneth L. Marcus, *The Landmark Case of Shaare Tefila v. Cobb*, 25 FED. SOC’Y REV. 17, 27 (2004).

¹⁸ *Bachman v. St. Monica’s Congregation*, 902 F.2d 1259, 1260 (7th Cir. 1990).

¹⁹ See, e.g., *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987); Eidelson & Hellman, *supra* note 2, at 4–6. The same terms are also often applied to claims of other groups where the word “race” seems awkward or inapt today, including Latinos and Arabs.

²⁰ See Eidelson & Hellman, *supra* note 2, at 2–6.

²¹ *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973). There is no question that the State of Israel constitutes a “nation[.]” in the statute’s sense, and the characteristic of being of Israeli birth or ancestry is thus protected in its own right. See *id.*

²² Letter from Kenneth L. Marcus, Deputy Assistant Sec’y for Enforcement for the Off. of C.R., U.S. Dep’t of Educ., to Colleagues 2 (Sep. 13, 2004) (emphasis added), <https://perma.cc/AD3H-9HQZ>.

explained both that Title VI applies to these covered forms of discrimination (even if “the groups targeted for discrimination also exhibit religious characteristics”) and also that the statute “does not extend to religious discrimination.”²³ When the Justice Department was asked to assess Title VI’s application to “discrete religious groups” during the Obama Administration, it “agree[d] with” the Bush-era analysis and reaffirmed the same central distinction: “Although Title VI does not prohibit discrimination on the basis of religion, discrimination against Jews, Muslims, Sikhs, and members of other religious groups violates Title VI *when that discrimination is based on the group’s actual or perceived shared ancestry or ethnic characteristics*, rather than its members’ religious practice.”²⁴

Perhaps most significantly, President Trump’s 2019 executive order on combating antisemitism adopted the same interpretation. “While Title VI does not cover discrimination based on religion,” the President explained, “individuals *who face discrimination on the basis of race, color, or national origin* do not *lose* protection under Title VI for *also* being a member of a group that shares common religious practices.”²⁵ Accordingly, “[d]iscrimination against Jews *may* give rise to a Title VI violation *when the discrimination is based on an individual’s race, color, or national origin*.”²⁶ Closely paraphrasing the Justice Department’s 2010 letter, President Trump thus reaffirmed that “whether a particular act constitutes discrimination prohibited by Title VI will require a detailed analysis of the allegations.”²⁷

* * *

For your purposes, this legal framework has three important implications.

First, “antisemitism” is not a relevant analytical category for purposes of Title VI enforcement—and regardless of how your report is titled, structuring your substantive analysis around that contested concept is likely to prove confusing, misleading, and needlessly divisive. As will now be clear, some blatant acts of antisemitism—such as violence motivated by hostility to the Jewish religion as such—would not implicate Title VI at all. Or in the words of OCR guidance issued under President Trump, “[a]n anti-Semitic incident does not violate Title VI merely because it is anti-Semitic.”²⁸ Debates about the best definition of “antisemitism” are thus irrelevant to your inquiry. And that is a good thing, because the definition of that word has “become a lightning rod and litmus test used by some to raise fears, engender animosity, and create

²³ *Id.*

²⁴ Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Just., to Russlynn H. Ali, Assistant Sec’y for the Off. Of C.R., U.S. Dep’t of Educ. 1 (Sep. 8, 2010) [hereinafter DOJ Letter] (emphasis added), <https://perma.cc/PU8R-P3K2>.

²⁵ Exec. Order No. 13,899, 84 Fed. Reg. 68779, 68779 (Dec. 16, 2019) (emphasis added).

²⁶ *Id.* (emphasis added).

²⁷ *Id.*; cf. DOJ Letter, *supra* note 24, at 2 (“The inquiry into whether a particular act of alleged discrimination falls within the purview of Title VI’s prohibitions will, in every case, involve a detailed analysis of the allegations . . .”). Although much was made of the Executive Order’s invocation of the International Holocaust Remembrance Alliance’s (IHRA) definition of antisemitism, the order was careful to say only that the IHRA’s “Contemporary Examples of Anti-Semitism” should be considered “to the extent that any examples might be useful as evidence of discriminatory intent,” meaning intent to “discriminat[e] based on race, color, or national origin.” *Id.*; see also Eidelson & Hellman, *supra* note 2, at 5–6, 6 n.33.

²⁸ *Questions and Answers on Executive Order 13899 (Combating Anti-Semitism) and OCR’s Enforcement of Title VI of the Civil Rights Act of 1964*, OFF. FOR C.R., U.S. DEP’T OF EDUC. (Jan. 19, 2021), <https://perma.cc/Q76V-MK73>.

division.”²⁹ Your report can steer clear of those semantic issues by focusing on what Title VI actually prohibits—discrimination on the basis of Jewish or Israeli ancestry—and not on what falls under the best definition of “antisemitic.”

Second, an important corollary of this point is that data purporting to track the incidence of antisemitism are highly misleading for purposes of monitoring discrimination covered by Title VI. As noted above, both the Trump Administration and the Obama Administration explained that a “detailed analysis of the allegations” is required to determine whether a particular act of anti-Jewish discrimination falls within the purview of Title VI.³⁰ When organizations such as the Anti-Defamation League (ADL) compile reports of antisemitic incidents, however, they do not undertake any such analysis. In light of its statutory responsibilities, therefore, the Commission could not responsibly opine on the incidence of relevant discrimination based on generalized assessments of a rise in antisemitism or counts of reported antisemitic incidents. Relying on these figures would be especially problematic if (as in the case of the ADL) the counts appear to incorporate bare expressions of hostility to Zionism or the State of Israel, including numerous expressions of dissent by Jews themselves.³¹

Third, insofar as a Title VI claim must be based on intentional discrimination, a sincere intention to disfavor or exclude people who hold some view about Israel (or any other nation-state) does not suffice.³² Hostility toward the State of Israel, rejection of its right to exist as a distinctly Jewish state, or hostility toward all who support it might each fall within some advocacy groups’ understanding of “antisemitism.”³³ But as a matter of law, these motivations do not by themselves qualify as an intent to discriminate against anyone on account of their race or ancestry.³⁴ Indeed, the Supreme Court has held that the Constitution forbids the Government from acting on the premise that “minority students always (or even consistently) express some characteristic minority viewpoint on any issue.”³⁵ The Government thus could not presume that people of Jewish ancestry hold any particular view or attitude toward Israel even if that were generally true—which, notably, it is not.³⁶ Even apart from these obstacles, moreover, courts have long rejected efforts to

²⁹ MASSACHUSETTS SPECIAL COMMISSION ON COMBATING ANTISEMITISM, FINAL REPORT 10 (2025), <https://perma.cc/LD4Q-CPBA> (noting how the choice of definition question has become a “lightning rod and litmus test”).

³⁰ See *supra* note 27 and accompanying text.

³¹ See, e.g., Shane Burley and Naomi Bennett, *Examining the ADL’s Antisemitism Audit*, JEWISH CURRENTS (June 17, 2024), <https://perma.cc/9WP7-2TCF>; see also Jonathan Guyer and Tom Perkins, *Anti-Defamation League Staff Decry ‘Dishonest’ Campaign Against Israel Critics*, THE GUARDIAN (Jan. 5, 2024), <https://perma.cc/8A5S-D7ES> (noting that “[the ADL’s] data is difficult to make sense of, precisely because of questions around how the ADL defines antisemitism”).

³² I will turn shortly to how Title VI might apply to conduct that unintentionally creates a hostile environment for students of Jewish ancestry.

³³ Cf. *StandWithUs Center for Legal Justice v. Massachusetts Institute of Technology*, 158 F.4th 1, 17 (1st Cir. 2025) (noting “ongoing debate as to the relationship between anti-Zionism and antisemitism”).

³⁴ See *Eidelson & Hellman*, *supra* note 2, at 9–11.

³⁵ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141, 2169 (2023).

³⁶ For one thing, non-religious Jews count equally for Title VI purposes, and fully a third of them report not feeling any emotional attachment to Israel. See PEW RESEARCH CENTER, *Jewish Americans in 2020: U.S. Jews’ Connections with and Attitudes Toward Israel* (May 11, 2021), <https://perma.cc/DQ26-87R3>. More broadly, many Jewish communities and families are deeply divided—often along generational lines—concerning the most fundamental questions about Israel. See, e.g., Ezra Klein, *Why American Jews No Longer Understand One Another*, N.Y. TIMES (July 20, 2025), <https://perma.cc/ZS5U-4R73>; see also *infra* note 41.

treat race-associated cultural practices—most often, wearing braids, locks, or cornrows—as facets of “race” for purposes of statutory bans on disparate treatment. As one leading case observed, a “conception of what ‘race’ means” that would extend to “cultural practices,” as opposed to “immutable characteristics,” “runs headlong into a wall of contrary caselaw.”³⁷ To treat a person’s viewpoints on just and unjust geopolitical arrangements as a facet of her race or ancestry would be an especially extreme departure from that norm.

Notwithstanding all of this, some argue that Zionism is different—that it is so fundamental to the identity of the Jewish people or the concept of Jewishness that to be anti-Zionist just *is* to be anti-Jewish. According to my co-panelist Mark Goldfeder, for example, “Zionism is a core part of [many Jews’] actual physical identity,” because “Zion is not an idea” but rather “a hill . . . where Jews are from.”³⁸ “Zion” can certainly refer to a hill. But, respectfully, I take it there is no real dispute that “Zionism” refers either to a proposition (something one can believe) or to the movement devoted to that proposition.³⁹ And while different users of the word often seem to have different propositions in mind, the dominant understandings at least encompass a claim about how or by whom certain territory in the Middle East should be governed.⁴⁰ No belief about any such question is or possibly could be inherent in anyone’s Jewish ancestry. (And if there were any doubt about that, the robust and longstanding debates on all such questions within the Jewish community ought to put it to rest.⁴¹)

Although hostility to Zionism thus cannot simply be defined as a species of racial or ancestry-based hostility to Jews, it is surely true that *some* instances of hostility to Israel or Zionism do manifest those forms of group-based animus. Yet there are also many other reasons why a person might—rightly or wrongly—harbor hostility toward Israel, Zionism, or supporters of any particular geopolitical arrangement in the Middle East.⁴² Given that diversity of motivations, there is no lawful way to establish that anti-Israel conduct was actually motivated by racial or ancestry-based animus without individualized evidence to that effect.⁴³ As the First Circuit recently explained in rejecting a Title VI claim against MIT, “the possibility that antisemitism motivates one speaker’s

³⁷ EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1031–34 (11th Cir. 2016).

³⁸ Mark Goldfeder, X (June 4, 2025), <https://perma.cc/98M7-3UCV?type=image>.

³⁹ See, e.g., Theodor Herzl, *The Zionist Congress*, 72 CONTEMP. REV. 587, 588 (1897) (positing that “Zionism has for its object the creation of a home, secured by public rights, for those Jews who either cannot or will not be assimilated in the country of their adoption”); see also *id.* (noting “the bitter struggles which it has given rise to within the ranks of the Jews themselves”).

⁴⁰ See, e.g., *id.*; MICHAEL J. REIMER, *THE FIRST ZIONIST CONGRESS: AN ANNOTATED TRANSLATION OF THE PROCEEDINGS* 215 (2019) (“Zionism strives to create a homeland in Palestine for the Jewish people, secured by public law.”); Zachary Braiterman, *Zionism*, in 2 *THE CAMBRIDGE HISTORY OF JEWISH PHILOSOPHY* 606, 608 (M. Kavka et al. eds., 2012) (“From the very start, three practical questions drove the Zionist movement. Where to establish a Jewish home? How much territory does such a construct require? What type of political form should stamp this space?”).

⁴¹ See, e.g., Arno Rosenfeld, *As Young Jews Move Away from Israel, Jewish Leaders are Reluctant to Change their Approach*, THE FORWARD (Nov. 21, 2025), <https://perma.cc/5N48-D46N> (reporting on alarm among large Jewish institutions at the fact that “younger Jews are more than twice as likely to identify as anti-Zionist”); JEWISH VOICE FOR PEACE, *Our Approach to Zionism*, <https://perma.cc/88V3-AF6X>; Braiterman, *supra* note 40.

⁴² See Eidelson & Hellman, *supra* note 2, at 10–11 & n.66; see also NEXUS PROJECT, UNDERSTANDING ANTISEMITISM AT ITS NEXUS WITH ISRAEL AND ZIONISM: WHAT IS NOT ANTISEMITIC? ¶¶ 4–5 (2024), <https://perma.cc/JPU5-CRWD>.

⁴³ Again, there is nothing distinctive to anti-Israel or anti-Jewish bias here. For example, some opposition to affirmative action is motivated by racism, but much of it is not, and it would be inappropriate to pronounce that opposition to affirmative action should be treated as “veiled” or “cloaked” racism until proven otherwise.

anti-Israel speech” does not “justify assuming that all criticism of Israel or advocacy for Palestinian sovereignty is motivated by antisemitism.”⁴⁴

In sum: Title VI is concerned with Jewishness only as a matter of a person’s race or ancestry—not as a religion, culture, or belief system—and it follows that, at least insofar as the statute is concerned with intentional disparate treatment, discrimination on the basis of viewpoint (including a stance toward Israel) is not covered.

II. Offensive expression about Israel or Zionism also does not create a legally cognizable “hostile environment” for college students of Jewish ancestry.

As I noted earlier, the most plausible argument for a more expansive understanding of Title VI relies on the idea that—contrary to my assumption thus far—the statute is *not* solely concerned with intentional disparate treatment on the basis of a protected characteristic. In that event, the analysis is more complicated, but the bottom line—at least in the mine run of cases—is much the same.

At the outset, it is doubtful that Title VI, as interpreted by the Supreme Court, ever does subject a university to legal consequences for countenancing a “hostile environment” that does not itself comprise acts of intentional discrimination—meaning, in this context, instances in which one person treats another differently on the basis of their Jewish ancestry.⁴⁵ For one thing, the Court has held that Title VI’s main operative provision (unlike Title VII’s) “reach[es] only . . . intentional discrimination.”⁴⁶ And while the Court has also held that a school that shows “deliberate indifference” to peer harassment may thereby “intentionally violate” the statute’s bar on “‘subject[ing]’ students to discrimination,”⁴⁷ that does not answer the question of whether the underlying “discrimination” to which students are being “subject[ed]”—that is, the peer harassment to which the school was deliberately indifferent—must itself be intentional. The Court’s characterization of the statute as reaching only “intentional discrimination” seems to suggest that the answer is yes: *someone* must treat the victim differently than others because of the victim’s protected characteristic. And it would be surprising if the current majority interpreted the statute’s “on the ground of” language to impose no such requirement—although, to be sure, the Court has not directly answered the question.⁴⁸

Meanwhile, the Court has also recognized—albeit with reservations in recent years—that federal agencies may “effectuate”⁴⁹ Title VI through prohibitions that go beyond the operative provision’s own requirements. That authority is the traditional basis for federal regulations that require

⁴⁴ *StandWithUs Center for Legal Justice v. Massachusetts Institute of Technology*, 158 F.4th 1, 17–18 (1st Cir. 2025).

⁴⁵ *See* Eidelson & Hellman, *supra* note 2, at 6–9 (discussing “uncertainty about the legitimate scope of the hostile environment theory”).

⁴⁶ *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001) (first alteration in original) (quoting *Alexander v. Choate*, 469 U.S. 287, 293 (1985)).

⁴⁷ *Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629, 643 (1999).

⁴⁸ *Cf. Bostock v. Clayton County*, 140 S. Ct. 1731, 1740 (2020) (“In so-called ‘disparate treatment’ cases like today’s, this Court has also held that the difference in treatment based on sex must be intentional.”); *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 78–81 (1998) (describing the allegations that could support a “‘hostile environment’ sexual harassment claim” in terms that seem limited to conventional disparate treatment).

⁴⁹ 42 U.S.C. § 2000d–1.

funding recipients to address disparate impact as well as disparate treatment. In theory, at least, the Federal Government could rely on this regulatory authority to require that schools justify any choice to countenance student conduct that has the incidental or collateral effect of disproportionately excluding members of a race- or ancestry-defined group. Indeed, it is possible—though, again, not clear—that the Department of Education’s guidance on “racial harassment,” dating to the 1990s, is best understood as: (1) charging schools with curbing certain unintentionally exclusionary conduct of that kind; and (2) relying on the Department’s longstanding disparate-impact regulation to justify that step.⁵⁰ If that is so, however, any such obligation will not survive the Justice Department’s recent determination that “any version of imposing liability for unintentional discrimination is inconsistent with Title VI[]”⁵¹ or President Trump’s directive for all agencies to rescind their disparate-impact regulations.⁵²

In the present context, all of this raises serious doubts about whether the Federal Government has any authority to enforce Title VI on the basis of anything other than traditional disparate treatment based on Jewish or Israeli ancestry. Again, a conscientious report on Title VI enforcement in this area will need to acknowledge as much.⁵³

If Title VI does extend beyond conventional disparate treatment, then applying the prevailing definition of actionable harassment means asking when anti-Israel or anti-Zionist activity, although not targeted at particular students on the basis of their ancestry, might be so “objectively offensive” to a “reasonable person in [their] position” that it “effectively bars the victim’s access to an educational opportunity or benefit.”⁵⁴

This formulation has its origin in workplace harassment cases brought under Title VII—and because Title VI cases are so rarely litigated, Title VII cases remain the main source of guidance about what the test requires. In truth, the question is still somewhat unsettled even there.⁵⁵ Generally speaking, however, the leading cases focus on what the challenged activity expresses about the protected group and whether that expression, viewed objectively and in context, rises to the level of altering someone’s conditions of employment. For example, one common fact pattern involves a woman whose male-dominated workplace is permeated with sexual remarks, obscene graffiti, and pornography.⁵⁶ Even if none of this activity is directed at the plaintiff on the basis of sex (or even directed at her at all), courts have reasoned that it can create a sexually hostile

⁵⁰ Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448, 11448 (Mar. 10, 1994).

⁵¹ Rescinding Portions of the Department of Justice Title VI Regulations, 90 Fed. Reg. 57141, 57145 (Dec. 10, 2025) (to be codified at 28 C.F.R. pt. 42).

⁵² Exec. Order No. 14,281, 90 Fed. Reg. 17537, 17538 (Apr. 28, 2025); *see also* Eidelson & Hellman, *supra* note 2, at 8–9.

⁵³ Some agency guidance documents can certainly be read as claiming broader enforcement authority, although whether they are best read in that way is unclear. *See* Eidelson & Hellman, *supra* note 2, at 8–9 & nn.47–48; *see also* Goldberg & Johnson, *supra* note 13, at 4 (noting that “deploying Title VI’s hostile environment doctrine against colleges’ and universities’ responses to large-scale protests rather than individualized discrimination claims [is] new”). Regardless, it is important to appreciate that these positions are generally untested in court, are in some tension with recent Supreme Court decisions, and predate the Executive Branch’s reversal on disparate impact liability.

⁵⁴ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999); *see* Eidelson & Hellman, *supra* note 2, at 12.

⁵⁵ *See, e.g., Brennan v. Metro. Opera Ass’n*, 192 F.3d 310, 321 (2d Cir. 1999) (Newman, J., concurring in part and dissenting in part) (surveying approaches); *see also* Eidelson & Hellman, *supra* note 2, at 18 & n.108.

⁵⁶ *See, e.g., Petrosino v. Bell Atlantic*, 385 F.3d 210, 214–15 (2d Cir. 2004).

environment for her if it was “sexually demeaning” and “conveyed a profound disrespect for women.”⁵⁷ Likewise, a Black worker may face a racially hostile environment if his workplace is adorned with “photos of Blacks being lynched” and “permeated by racial slurs.”⁵⁸ **The crucial through-line in these cases is an alignment between the class that is severely demeaned, the class that is protected by the statute, and the class to which the plaintiff belongs.**⁵⁹

In its recent enforcement actions, the Government seems to have lost sight of this requirement entirely. In its formal Title VI finding against Harvard, for instance, the Trump Administration asserted that a “hostile environment [was] created for Jewish and Israeli students” in part because they “were repeatedly denied access to . . . libraries.”⁶⁰ But in most of the cited instances, the only support for this claim consisted of reports in the student newspaper that some students had “silently studied in the [library]” with political slogans taped to the backs of their laptops—messages such as “No normalcy during genocide,” “Justice for Palestine,” and “Israel Bombs Harvard Pays.”⁶¹ Now, in this part of the analysis, I am assuming (for the sake of argument) that the lack of any evidence of intent to offend Jewish students does not preclude these acts from contributing to a “hostile environment” under Title VI. But even under that assumption, the Government would still need to explain why the objective meaning of these slogans is a severely offensive message *about Israeli people* or *about people of Jewish ancestry*. And here that is impossible to do, because the slogans are not reasonably read as saying anything about either of those classes of people at all, let alone anything of a highly demeaning nature. Put another way: When a woman’s co-workers express “profound disrespect for women,” they necessarily express profound disrespect for *her*.⁶² Here, by contrast, the protesters’ messages may have *offended* their peers, but they were not *about* their peers—not even as generic members of any racial or ancestral group. Rather, they were about the undeniably legitimate topics of “genocide,” “Harvard,” “Palestine,” and “Israel.”⁶³

Of course, it is probably true that students of Jewish or Israeli ancestry are more likely, on average, to be offended by caustic rhetoric about the State of Israel—or by demands of “Justice

⁵⁷ *Id.* at 222.

⁵⁸ *Id.* at 223 (quoting *Brennan*, 192 F.3d at 320)); *see also* *Ocheltree v. Scollon Prods., Inc.*, 308 F.3d 351, 376 (4th Cir. 2002) (Michael, J., dissenting in part and concurring in the judgment in part), *rev’d en banc*, 335 F.3d 325.

⁵⁹ *See* *Yuknis v. First Student*, 481 F.3d 552, 554 (7th Cir. 2007) (“The point is elementary: the creation of a hostile working environment is actionable under Title VII only when the hostility is to a group (or specific members of a group), such as women, whom the statute protects.”).

⁶⁰ U.S. DEP’T OF HEALTH & HUM. SERVS., OFF. OF C.R., *Notice of Violation: Harvard University* 6, 13–14 (June 30, 2025), <https://www.hhs.gov/sites/default/files/harvard-title-vi-notice-violation.pdf>.

⁶¹ *See id.* at 6–7, 13 (citing Joyce E. Kim, *Harvard Students Hold Silent ‘Study-In’ at Widener Library, Rally at Mass. Hall to Call for End of War in Gaza*, HARV. CRIMSON (Dec. 12, 2023), <https://perma.cc/HF6F-XLNM>; Michelle N. Amponsah and Samuel A. Church, *Harvard Warns of Consequences After Pro-Palestine ‘Study-In’ in Widener Library*, HARV. CRIMSON (Sep. 23, 2024), <https://perma.cc/4GQZ-K4KW>).

⁶² *Petrosino*, 385 F.3d at 222; *see also* *Yuknis*, 481 F.3d at 554 (“Had the manager said that all women are bitches, any woman who heard the remark would wince, because the blanket charge would encompass her.” (citations omitted)).

⁶³ This isn’t to say that *no* message using these words could possibly cross into a statement about Jews or Israelis as a group. Saying something about “the people of Israel,” for instance, is different than saying something about “Israel.” More broadly, “[c]ontext may be critical to determining the object of hostility,” *Yuknis*, 481 F.3d at 555, and that determination may require an element of judgment. *See infra* notes 71–72 and accompanying text; *cf.* *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (noting that in the Title VII context, the operative standard “filter[s] out complaints attacking ‘the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing’”).

for Palestine”—because of the political or religious convictions that they are more likely, in the aggregate, to have. But even if a “hostile environment” need not comprise intentional disparate treatment, the concept could not reasonably be extended to that kind of bare disparate impact claim. **In other words, the concept cannot extend to conduct that disproportionately offends members of a protected class not because it demeans that class, but because of attitudes or attachments that members of that class are more likely to share.** Any such expansion would drastically exacerbate the tension between “hostile environment” liability and the First Amendment, because it would vastly expand the set of messages that universities would be obliged to censor (or, perhaps, attempt to counter). Accordingly, the fact that some Jewish or Israeli students were offended by the “study-ins” at Harvard could not reasonably be treated as contributing to a “hostile environment” under Title VI.⁶⁴

Finally, while that is not a close case, the relevant case law suggests that even cases involving more provocative or ambiguous speech should also be resolved against Title VI liability, especially in the university context.⁶⁵ Although the Supreme Court has not squarely addressed the First Amendment limits on “hostile environment” liability, I agree with my late colleague Richard Fallon that the “objective” standard for such claims “seems designed to play a crucial, mediating role in the effort to accommodate equality and dignitary interests without trampling on free speech values.”⁶⁶ And that standard, the Court has stressed, takes account of the full “social context in which particular behavior occurs and is experienced by its target.”⁶⁷ The Court has noted, for instance, that some amount of “gender-specific conduct that is upsetting to the students subjected to it” is an “understandable” feature of a K-12 school; indeed, it seems inevitable in light of the nature of the enterprise.⁶⁸ In like fashion, some amount of warranted offense at potential implications of others’ ambiguous political rhetoric, directed at the campus at large, is an inevitable consequence of “the unfettered exchange of ideas” concerning a wide range of controversial topics⁶⁹ that characterizes a healthy university.⁷⁰

I do not mean to say that there are no hard cases or no limits.⁷¹ Even in the context of untargeted speech in a university setting, an environment *might* be actionably hostile under Title VI when it is pervaded by rhetoric that can *only* plausibly be interpreted as expressing a pejorative attitude

⁶⁴ The fact that these protests might have violated campus use rules is no answer because it cannot supply the missing nexus to a protected characteristic. (The possibility that the required nexus could be established more indirectly in limited circumstances is tentatively explored in Eidelson & Hellman, *supra* note 2, at 18–19.)

⁶⁵ See Eidelson & Hellman, *supra* note 2, at 13–15.

⁶⁶ Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn’t Bark*, 1994 SUP. CT. REV. 1, 44 (1994).

⁶⁷ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

⁶⁸ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651–52 (1999).

⁶⁹ *Gartenberg v. Cooper Union for the Advancement of Sci. & Art*, No. 24-cv-2669, 2025 WL 401109, at *11 (S.D.N.Y. Feb. 5, 2025) (quoting Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J. COLL. & UNIV. L. 385, 386 (2009)).

⁷⁰ Offensive “one-to-one” speech is arguably entitled to less solicitude here for some of the same reasons that it plausibly deserves lesser First Amendment protection in some contexts (although not necessarily universities). See Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1863–67 (1992).

⁷¹ See Eidelson & Hellman, *supra* note 2, at 14–19.

toward people who share a protected characteristic.⁷² In context, some symbols and messages—think of swastikas and “Jews will not replace us” banners—really do lend themselves to only one interpretation. But the practical reality is that much of the unsettling rhetoric in this area is genuinely ambiguous: The same slogans that some see as “calls for genocide” are seen by others (including many Jews) as expressing an attitude toward the State of Israel, not toward people of Jewish ancestry or Israeli nationality.⁷³ For that reason, too, only a small fraction of the anti-Israel or anti-Zionist activity that has unfolded on college campuses in recent years could be deemed to contribute to an actionable hostile environment, even under the various assumptions that I’ve granted for the sake of argument here.⁷⁴

* * *

Let me close with a word about how the Commission should view the legal limits that I have described. I have detailed those limits because understanding existing law is crucial to assessing the prevalence of unlawful discrimination and the appropriateness of the Federal Government’s response. But it would be natural to ask whether those same limits might also be bugs to be fixed.

Although the point deserves more explanation than I can offer here—and I don’t mean to claim that current law is ideal in all respects—I **would urge the Commission not to recommend any amendment to the statute with the aim of extending it to the fact patterns that I have described.** For one thing, there would be serious First Amendment obstacles to broadening “hostile environment” liability in that way.⁷⁵ And more fundamentally, even if the Constitution permitted Congress to make universities indirectly liable for offensive anti-Zionist or anti-Israel activities, that change would cross an important (if imprecise) line. Roughly speaking, it would transform the statute from a shield for people to a shield for certain ideas and institutions in which they are invested.⁷⁶

For similar reasons, the Congress that enacted Title VI was not wrong that claims of religious discrimination pose special and complicated issues.⁷⁷ At a minimum, any amendment to the statute that would extend it to religion would require careful consideration to ensure that particular ideas or institutions are not afforded special insulation from criticism just because some embrace those ideas or institutions on religious grounds.⁷⁸ As a result, I doubt that an appropriately careful

⁷² See *id.* Of course, what it takes to pervade a sprawling college campus is different than what it takes to pervade an office suite or an elementary school, and this poses another major obstacle to Title VI “hostile environment” liability in the university context. See *id.* at 19.

⁷³ Cf. Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 WM. & MARY BILL RTS. J. 837, 888 (2007) (noting “the frequency with which anti-Semitism has recently been intertwined with political speech”).

⁷⁴ There are additional hurdles to Title VI liability that I have not addressed here, including the requirement of a legally inadequate response on the part of the university. See Eidelson & Hellman, *supra* note 2, at 19–22.

⁷⁵ I have only mentioned the First Amendment in passing, but I expect that Professors Dorf, Lakier, and Volokh will all address it more fully.

⁷⁶ Cf. *L.M. ex rel. Morrison v. Town of Middleborough*, 103 F.4th 854, 878 (1st Cir. 2024) (drawing a related distinction, with respect to a middle school’s authority to restrict student expression, between “speech demeaning other students’ ‘unalterable or otherwise deeply rooted personal characteristics’” and “demeaning comments about political topics”).

⁷⁷ See *supra* note 16 (referencing legislative history).

⁷⁸ Cf. 42 U.S.C. § 2000e(j) (defining “religion” for purposes of Title VII).

amendment to Title VI would materially alter the bottom line with respect to the main issues that I have addressed here. And more fundamentally, I doubt that efforts to police campus activism (in contrast to conventional harassment) through federal civil rights law will ever yield the open and respectful campus environments that Jewish students, like all students, deserve.

Supplemental Statement on the IHRA Definition

Submitted by Benjamin Eidelson on March 15, 2026

I appreciated the opportunity to testify last month at the public briefing on “Antisemitism on America’s College and University Campuses: Current Conditions and the Federal Response.”¹ At that hearing, Commissioner Jones asked those of us who oppose codifying the IHRA definition of antisemitism to explain why. Because the panel had gone beyond the allotted time, I limited myself to explaining why (in my view) any endeavor to “define” prohibited discrimination on a group-by-group basis would be a mistake, setting aside the defects of the IHRA definition in particular. During the final panel of the day, Kenneth Marcus then sought to address the concerns that I had raised about codifying group-specific criteria, citing what he saw as relevant precedents for that approach.

In this brief supplemental submission, I will (1) explain why Mr. Marcus’s reply is not responsive to the concerns that I had raised, and (2) answer the IHRA-specific question that I did not address at the hearing.

1. Against Group-Specific Definitions

At the hearing, I expressed concerns about adopting a definition, like the IHRA’s, that would specify how Title VI’s bar on race or national origin discrimination should be applied to discrimination against Jews in particular. I explained that this way of proceeding would be out of step with longstanding practice in civil rights law and would depart from important norms of fairness between groups defined in terms of the same characteristic (such as race). As Justice Jackson put it in a justly famous opinion about the Equal Protection Clause, “there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority *must be imposed generally*.”²

Here, adopting an IHRA-style “definition” of antisemitism would raise serious questions about whether discriminatory intent is being defined more broadly in the context of anti-Jewish discrimination than it is in the context of anti-Palestinian or anti-Arab discrimination (or, for that matter, anti-Black, anti-Asian, or anti-white discrimination). And shifting to this group-specific approach to defining discriminatory intent would eliminate the vital check on bias that, as Justice Jackson emphasized, comes from linking together the treatment of different groups that are otherwise apt to receive different degrees of indifference or concern from any given decision-maker.

In his testimony, Mr. Marcus seemed to recognize the potential problem here but suggested that the differential treatment is justified because “antisemitism is sometimes hard to recognize in the way others aren’t” (6:04:38).³ He then pointed to two examples of kinds of discrimination for which, he said, tailored definitions are already accepted: “sexual harassment” and “reasonable ac-

¹ My written testimony for that hearing is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6278018.

² *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (emphasis added).

³ All timecodes are for the hearing video at https://youtu.be/uJ_k0v_jmZ8.

commodations for disability.” And he concluded that “it is common to define those aspects of either identity or discrimination that need to be defined for practical purposes in order to identify forms of discrimination that would otherwise avoid notice.”

With respect, the premise that antisemitism is singularly “hard to recognize” is very implausible—and neither of Mr. Marcus’s two examples is responsive to the concerns that I raised about the importance of symmetry and evenhandedness in this area.

First, as long as prohibited race discrimination is defined in terms of discriminatory intent, *all* forms of racial hostility will often be “hard to recognize”—for essentially the same reasons that racial antisemitism often is. Consider a few examples: When someone attacks affirmative action as a departure from meritocracy, are they motivated by anti-Black racism? When someone says immigrants are taking American jobs, are they motivated by bias against people of non-American ancestry? When someone touts the lab-escape origin theory for COVID-19, are they motivated by anti-Chinese stereotypes? When someone says that a Palestinian state poses an unacceptable security risk to Israel, are they holding Palestinians (or Arabs) to a racist double standard? The answer to all of these questions is “maybe.”

Now, when someone denounces Zionism—which they understand to hold that certain territory should be governed by a distinctly Jewish state—are they motivated by antisemitic attitudes? The answer to that question is “maybe” as well. And so it is difficult to see why the antisemitism that might be latent in anti-Zionist expression would be thought “harder to recognize” than the racism that might be latent in countless other forms of expression. If anything, the frequency with which *Jews* engage in anti-Zionist conduct and expression probably makes the conjecture that an improper motive is at work *weaker*, holding all else equal, in this case than in many others.⁴

So race or ancestry discrimination against Jews should be treated the same as race or ancestry discrimination against others—with IHRA-style provisions for all or for none. As between those options, I think “none” is the far better choice: Listing various assertions that people sometimes make out of assorted bigoted motives would not be helpful in “defining” discrimination against each group for purposes of federal law. All that this would do is put a thumb on the scale in favor of a conclusion that the ambiguous expression was in fact motivated by some kind of racism, whether or not that was true—thereby chilling plenty of expression that was never motivated in that way in the first place. Still, if that step were somehow appropriate with respect to antisemitism, I think it would be indefensible (and perhaps unconstitutional) not to make parallel lists for anti-Palestinian bias, anti-Black bias, anti-Asian bias, and so on.⁵

Finally, Mr. Marcus’s sexual harassment and reasonable accommodation examples are not responsive to any of the concerns that I raised: Neither one singles out a subcategory of persons defined in terms of the relevant protected characteristic. Indeed, the fact that these are the best

⁴ See, e.g., 2025 Greater Boston Jewish Community Study: Israel (2026), at 11, https://ma.cjp.org/hubfs/Boston_2025_Study_Report_Israel.pdf; JFNA 2025 Survey of Jewish Life Since October 7th, <https://www.jewishdata-bank.org/databank/search-results/study/1277>.

⁵ Ironically, this is more or less the direction that some campus “DEI” offices went years ago in their wide-ranging efforts to catalog “microaggressions”—though even those controversial efforts generally did not have legal force. See, e.g., U.C. Santa Cruz, “Tool: Recognizing Microaggressions and the Messages They Send” (2014), <https://perma.cc/D74C-VNLB>.

counterexamples he could find tends to confirm the original point—that we do not have a meaningful practice in the United States of defining special grounds for inferring discriminatory intent on a group-by-group basis. Instead, we define *forms* of discrimination in symmetric, group-neutral terms. Both men *and* women are subject to sexual harassment, for instance, and the Supreme Court has held that the legal analysis is the same either way.⁶ Similarly, the reasonable accommodation requirement cuts across all qualifying disabilities—and, in any event, it does not speak to discriminatory intent.

2. The Merits of the IHRA Definition

As for the IHRA definition itself, it brings to mind a cliché about bad academic papers: “what’s true in it isn’t new, and what’s new in it isn’t true.” Here, the core of the definition (the “true” part) is obvious to the point of being useless: Antisemitism is defined essentially as hatred of Jews. But the very fact that so many pro-Israel organizations have mobilized in favor of the definition shows that they see it as standing for much more than that. (At the hearing, Mark Goldfeder said that the reason “why . . . IHRA [is] important” is that “more than half of American adults do not know what the word ‘antisemitism’ means” (1:43:33). But as far as that concern goes, the IHRA definition has no advantage over a dictionary.)

Specifically, pro-Israel organizations evidently favor the IHRA definition because they see its incorporated examples as putting a thumb on the scale in favor of deeming various forms of anti-Zionism or hostility to Israel to be antisemitic. Kenneth Stern, the lead drafter of the IHRA definition, has thus warned that “right-wing Jews are weaponizing it” to suppress criticism of Israel,⁷ and journalists have collected numerous examples to that effect.⁸ In fact, the Brandeis Center (run by Mr. Marcus) and the Anti-Defamation League have demanded that schools revise their policies “to clarify that conduct falling within the IHRA Definition and examples will be considered discriminatory.”⁹ For reasons that I and others explained at the hearing, this “new” part of the IHRA definition isn’t “true”: Presuming that anti-Zionist speech expresses racial antisemitism isn’t legally sound or even factually well-founded. The effect of adopting the definition is therefore to chill a great deal of protected and nondiscriminatory expression, while also breaking with the commitment to equality in the formulation of anti-discrimination law that I emphasized above.

* * *

For both of these reasons, it would be a serious mistake for the Commission to endorse the IHRA definition for purposes of Title VI enforcement (or to recommend that Congress do so). Moreover, the Commission could meaningfully contribute to the public discussion of this question by highlighting the forceful reasons, sounding in both equality and free speech values, for resisting calls to “define” antisemitism in terms that go beyond the universal protection of Title VI.

⁶ See *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 79 (1998).

⁷ <https://www.theguardian.com/commentisfree/2019/dec/13/antisemitism-executive-order-trump-chilling-effect>

⁸ <https://www.thenation.com/article/society/ihra-definition-antisemitism/>

⁹ <https://perma.cc/8XEV-2SEL>

Supplemental Response to Questions
Submitted by Benjamin Eidelson on April 19, 2026

Thank you for your questions. Rather than further delaying this response in the interest of responding more fully, I will focus on certain discrete issues that seem important to clarify, and I'll otherwise refer you to my written testimony and my prior supplemental submission regarding the IHRA definition (dated March 15, 2026). Regarding your question about "what . . . universities should be doing," I recommend the discussion in Suzanne B. Goldberg & Olatunde C.A. Johnson, *Campus Crises and the Limits of Title VI*, 126 COLUM. L. REV. F. 1 (2026).

1. Hostile Environment Analysis Regarding Anti-Israel Rhetoric and People of Israeli National Origin

During the hearing, Professor Volokh offered this observation:

[W]hether speech that, for example, sharply condemns Zionists and in particular Israelis, is seen as antisemitic[or not,] I do think it is anti-Israeli. . . . [S]ometimes there have been condemnations[to the effect that] anybody who is an Israeli citizen is responsible for the actions of Israel, or even if it's just anti-Zionist, essentially telling Israeli citizens, ["you are citizens of an illegitimate nation.["]

My sense is that national origin discrimination, and Professor Eidelson can correct me if I'm mistaken, but that it would extend to discrimination against people who are of at least Israeli extraction, which includes of course the many dual citizens, many people whose parents are Israeli citizens and such. I do think that there may be, therefore, speech that creates a hostile environment for people because of their connection to Israel, national connection to Israel.

I did not see a good opportunity to reply at the time—despite Professor Volokh's gracious invitation!—so I want to clarify an important issue about the scope of the reasoning that Professor Volokh outlined. (This also speaks to an aspect of your question about the nature of hostile environment liability.)

First, courts in recent Title VI cases have held that "to make out a hostile environment claim, a plaintiff must plead (and then prove) not only that they suffered objectively severe or pervasive harassment, but that the harassment was *motivated*, at least in part, by a protected characteristic."¹ I recognize that some who testified before you (at least Ms. Gammill and perhaps others) think the courts are wrong to read the statute in this way. But, assuming that the courts are correct, the kind of speech that Professor Volokh described would not necessarily constitute actionable harassment. Someone who proclaims to the world at large that a nation-state is

¹ *Gartenberg v. Cooper Union*, 765 F. Supp. 3d 245, 267 (S.D.N.Y. 2025) (emphasis added); *see id.* at 259; *StandWithUs Center for Legal Justice v. MIT*, 158 F.4th 1, 18 (1st Cir. 2025); *see also StandWithUs Center for Legal Justice v. MIT*, 165 F.4th 97, 102 (1st Cir. 2026) (Dunlap, J., concurring in denial of rehearing en banc) ("Oncale does not suggest that a plaintiff need not demonstrate that a harasser is motivated by hostility to a protected class."); *Segev v. Pres. & Fellows of Harvard College*, Case No. 1:25-cv-12020 (D. Mass. Dec. 4, 2025), Doc. 35 ("The relevant question is whether the protestors chanting these slogans viewed them as antisemitic.").

“illegitimate” is not necessarily motivated by any attitude toward fellow students whose “origin” lies in that state or intending to affect those students in any way at all.

Now, as I said a moment ago, there is some disagreement about whether—contrary to the recent Title VI cases—harassment liability may attach under Title VI absent intentional disparate treatment. Assuming for the moment that it may, the relevant framework for identifying actionable harassment is described in my written testimony, where I summarized the logic of potentially analogous cases decided under Title VII (pp. 9–10). As I explained there, that framework would still require asking whether the expression, understood objectively, expresses severe disrespect for people of Israeli ancestry as such—as opposed to merely expressing a viewpoint that many Israelis find offensive.

Demeaning generalizations *about Israelis* could satisfy that test—just as comparable generalizations about women, Jews, or Palestinians could. Even vitriolic and offensive criticism of *Israel*, however, would not. Put another way, in protecting people from discrimination based on their “national origin” (or “ancestry”) as well as their “race” or “color,” Congress essentially put anti-Italian slurs on a par with anti-Black slurs. Setting aside possible disparate-impact claims, it did not plausibly protect anyone from being exposed to offensive rhetoric about world affairs. (Were there any doubt on this point, moreover, the First Amendment concerns about censoring such political speech would further weigh in favor of the narrower interpretation that focuses on conveying profound disrespect for the class protected by the statute.)

2. Whether Anti-Zionist or Anti-Israel Hostility Can Qualify as Anti-Jewish as a Matter of Law

As I explained at length in my written testimony, Title VI covers Jewishness as a racial or ancestral category (pp. 3–5). By contrast, “the dominant understandings [of ‘Zionism’] at least encompass a claim about how or by whom certain territory in the Middle East should be governed” (p. 7). (In addition to the sources that I cited there, I would note that my colleague Stephen Sachs also describes “Zionism” as “the movement for the nation of Israel to have a national homeland . . . in some portion of the traditional land of Israel” and says that “*anti-Zionism*, in the sense in which the current movement uses the term, requires the rejection of any specifically Jewish state in any part of Israel.”²) It follows from these definitions that disparate treatment of Zionists or supporters of Israel is at least not inherently a species of disparate treatment of Jews. Under ordinary principles of antidiscrimination law, *being of a certain ancestry* is legally distinct from *believing that some territory should be governed by a state of a certain kind*—even if the belief in question is that the relevant territory should be governed by a state that has some special connection to people of that same ancestry. This is the logical implication of the body of case-law, discussed in my written testimony, concerning disparate-treatment claims on the basis of racialized characteristics (p. 7). As I noted there, “To treat a person’s viewpoints on just and unjust geopolitical arrangements as a facet of her race or ancestry would be an especially extreme departure from that norm.”

² Stephen Sachs, *Zionism and Title VI*, 139 HARV. L. REV. F. 50, 57–58 (2025).