UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

STUDENTS FOR JUSTICE IN PALESTINE, AT THE UNIVERSITY OF HOUSTON, ET AL., *Plaintiffs,* v. ABBOTT, ET AL., *Defendant.*	Civil Action No. 1:24-cv-00523 Hon. Judge Robert Pitman

UNOPPOSED MOTION OF THE NATIONAL JEWISH ADVOCACY CENTER AND THE ISRAELI-AMERICAN COALITION FOR ACTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURAIE* IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

The National Jewish Advocacy Center ("NJAC") and The Israeli-American Coalition for Action ("IAC for Action") respectfully move pursuant to Local Rule CV-7, for leave to file a brief as *amici curiae* in support of Defendants' pending Motion to Dismiss. The proposed amici brief is attached as Exhibit A. Both Plaintiffs and Defendants have consented to the filing of this brief.

This Court has broad discretion to permit the filing of this amici brief. *Cina v. Cemex, Inc.*, 4:23-cv-00117, 2023 WL 5493814, at 1 (S.D. Texas 2023). "The extent, if any, to which an amicus curiae should be permitted to participate in a pending action is solely within the broad discretion of the district court." *Sierra Club v. Fed. Emergency Mgmt. Agency,* 2007 WL 3472851 at *1 (S.D. Tex. Nov. 14, 2007) (quoting *Waste Mgmt. of Pa., Inc. v. City of York,* 162 F.R.D. 34, 36 (M.D. Pa. 1995)). "[N]o statute, rule or controlling case defining a federal district court's power to grant or deny leave to file an amicus brief." *Abu-Jamal v. Horn*, 2000 WL 1100784, at *3 (E.D. Pa. 2000).

"The extent to which the court permits or denies amicus briefing lies solely within the court's discretion... Factors relevant to the determination of whether amicus briefing should be allowed include whether the proffered information is "timely and useful" or otherwise necessary to the administration of justice." *United States of America ex rel. Ramesh Gudur v. Deloitte Consulting LLP*, 512 F. Supp. 2d 920, 927 (S.D. Tex. 2007) (quoting *Waste Management of Pa. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995)); *see also Does 1-7 v. Round Rock Independent School Dist.,* 540 F.Supp.2d 735, 739 n.2 (W.D. Tex. 2007) (citation omitted).

NJAC and IAC for Action's proffered *amici* brief is both timely and helpful.

TIMELINESS

In ascertaining the timeliness of a motion for leave to file a brief as amici curiae, district courts typically look to Rule 29 of the Federal Rules of Appellate Procedure. "Neither in our Rules

nor in our Internal Operating Procedures do we have any provisions pertaining to the filing of briefs of amicus curiae, though hundreds if not thousands of amici briefs have been filed over the years. The only relevant rule on the subject is Rule 29 of the Federal Rules of Appellate Procedure." *American College of Obstetricians & Gynecologists v. Thornburgh*, 699 F.2d 644, 646 (3rd Cir. 1983).

Rule 29 requires *amicus curiae* to file a brief "no later than 7 days after the principal brief of the party being supported is filed." Fed. R. App. P. 29(a)(6). In the instant case, NJAC and IAC for Action file this Motion For Leave prior to Plaintiffs filing an opposition to Defendants' Motion to Dismiss, filed August 19, 2024. Accordingly, Plaintiffs will have ample time to respond to the brief without suffering any prejudice or inconvenience thereby.

HELPFULNESS

NJAC and IAC for Action clearly have a special interest and a unique expertise in the subject matter of this suit. NJAC's President and the principal contributor to its preferred brief is a law professor and the who regularly writes and teaches about the International Holocaust Remembrance Alliance ("IHRA") definition of antisemitism and its applicability and scope. He has also provided vital assistance and guidance as an expert resource and witness for the drafting and passage of IHRA-related antisemitism legislation in over thirty states. The definitional reach of IHRA, its objectives, limitations, and its utility are central to the merits of this case in connection with GA-44's requirement that Texas institutions of higher education adopt the definition of antisemitism into their free speech policies. NJAC and IAC for Action's expert on the matter is the expert of first resort for virtually any and all legislative bodies deliberating the adoption of IHRA's definition of antisemitism and NJAC and IAC for Action is devoted to the adoption of a

uniform definition of antisemitism and the enforcement of Title VI protection on school campuses nationwide.

NJAC and IAC for Action's mission is to use its expertise and resources to engage in impactful legal work that not only vindicate the immediate advocacy needs to the Jewish community but seeks to engage in precedent-setting legal work that provides guidance to any and all denominations seeking to enforce their civil rights protections. NJAC and IAC for Action further provides litigation coordination resources for practices nationwide as well as research, guidance and advocacy to professional associations, concerned parents, teachers, professors and students and is at the forefront of challenging the efforts of designated foreign terrorist organizations infiltrating U.S. campuses as it still seeks, as here, to uphold the First Amendment of students pursuant to legal guidelines.

While NJAC and IAC for Action are certain that its brief will be of help to the Court, the tradition of erring on the side of accepting unique expert input further compels the granting of this motion. "If an amicus brief that turns out to be unhelpful is filed, the merits panel, after studying the case, will often be able to make that determination without much trouble and can then simply disregard the amicus brief." *Lefebure v. D'Aquilla*, 15 F.4th 670, 676 (5th Cir. 2021) (*quoting Neonatology Assocs., P.A. v. Commissioner,* 293 F.3d 128, 133 (3d Cir. 2002)). "On the other hand, if a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance. So we would be well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted." *Id.* With respect to the brief of the herein movants, amici seek to introduce a resource that will be of assistance.

For these reasons, NJAC and IAC for Action respectfully request that the Court grant its motion for leave to participate as *amici curiae* and accept the proposed amicus brief, which is attached as Exhibit A to this motion.

Dated: August 26, 2024

Respectfully submitted:

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CERTIFICATE OF CONFERENCE

Pursuant to Local Rule CV-7(G), the undersigned hereby declares that counsel for the proposed amici has conferred with counsel for both Plaintiffs and Defendants. Neither party opposes the filing of the amici brief attached hereto as Exhibit A.

Dated: August 26, 2024

Respectfully submitted:

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CERTIFICATE OF SERVICE

I do hereby certify that, on this 26th day of August 2024, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which gives notice of filing to all counsel of record.

/s/ Dallin B. Holt
Dallin B. Holt

Counsel for The National Jewish Advocacy and Israeli-American Coalition for Action

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

STUDENTS FOR JUSTICE IN PALESTINE, AT THE UNIVERSITY OF HOUSTON, ET AL., *Plaintiffs,* v. ABBOTT, ET AL., *Defendants.*	Civil Action No. 1:24-cv-00523 Hon. Judge Robert Pitman

BRIEF OF *AMICI CURIAE*
THE NATIONAL JEWISH ADVOCACY CENTER AND
THE ISRAELI-AMERICAN COALITION FOR ACTION
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTEREST OF AMICI CURIAE*

The **National Jewish Advocacy Center, Inc.** ("NJAC") is a nonprofit organization committed to advocating for the Jewish nation and the Jewish State as prisms through which people from all walks of life can learn about the dignity of difference, the power of coexistence, and the strength that comes from tolerance. The proper resolution of this case is a matter of utmost concern to NJAC because it involves the State of Texas fulfilling its duty to protect its Jewish citizens by implementing measures to identify and combat unlawful antisemitism. Data shows that although Jews make up less than 2% of the American population, they are the most likely minority group to be victimized by incidents of hate. Authorities must be given the definitional tools needed to stem criminal conduct and discriminatory behavior motivated by anti-Jewish hate. Valid monitoring and enforcement, informed analysis and investigation, and effective policymaking start with uniform definitions.

The **Israeli-American Coalition for Action** ("IAC for Action") is a non-partisan nonprofit organization that engages in educational and advocacy activities on behalf of Israeli-Americans.

* Counsel for *amici curiae*, the NJAC and IAC for Action, certifies that neither party has a parent corporation and that no publicly held corporation owns 10% or more of any stock in either the NJAC or IAC for Action.

INTRODUCTION & SUMMARY OF THE ARGUMENT

As antisemitism has exploded across American campuses, Texas has introduced an important mechanism for addressing instances of discrimination and harassment in a uniform and consistent fashion. Executive Order No. GA-44 (the "Order"), issued by Texas Governor Greg Abbott, establishes a standard and widely accepted definition of antisemitism that may be consulted when determining whether certain harassing actions are motivated by discriminatory intent. The Order does not define any new protected class or enhance any punishment, nor does it regulate or restrict academic speech. In fact, the Order's relevance emerges only when a state or school authority is considering whether certain harassment or discriminatory *conduct* has been driven by ethnic animus.

The Order does not violate the First Amendment. The Order does not criminalize or inhibit speech in any fashion—it simply ensures that anti-discrimination laws, when concerning antisemitic acts, are enforced in an equal and consistent manner. Under the Order, Plaintiffs may engage in as much antisemitic expressive activity as they would like, which may include using the phrase "from the river to the sea" and other genocidal slogans.

ARGUMENT

I. WHY THE NEED FOR AN EXECUTIVE ORDER ADOPTING IHRA?

Since the Hamas-led terrorist attacks of October 7, 2023, antisemitic incidents have spiked by roughly 400% across the country.[1]

Because Jewish identity is multifaceted, without a standard definition for authorities to reference when analyzing the intent behind illegal, discriminatory actions, it is easy for antisemites to hide behind such ambiguity and to commit unlawful acts against Jews with impunity. Texas has solved that problem by requiring the relevant authorities to consider, as rebuttable evidence, the gold-standard International Holocaust Remembrance Alliance ("IHRA") definition of antisemitism when assessing the motivation behind already unlawful behavior if there is an allegation that the target was chosen because of an aspect of their Jewish identity.[2] And despite arguments made to the contrary, the IHRA definition is no doubt the correct standard: It has been embraced by President Joe Biden; former Presidents George W. Bush, Barack Obama, and Donald Trump; the majority of U.S. states; and dozens of other countries. Notably, it also enjoys support from nearly all Jews across every spectrum. Indeed, a multitude of experts conducted a

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[1] ANTI-DEFAMATION LEAGUE, *ADL Records Dramatic Increase in U.S. Antisemitic Incidents Following Oct. 7. Hamas Massacre*, (Oct. 24, 2023), https://www.adl.org/resources/press-release/adl-records-dramatic-increase-us-antisemitic-incidents-following-oct-7 (last visited Aug. 26, 2024).

[2] *Working Definition of Antisemitism,* INT'L HOLOCAUST REMEMBRANCE ALL., https://holocaustremembrance.com/resources/working-definition-antisemitism (last visited Aug. 26, 2024).

comprehensive, months- long review of the IHRA definition,[3] concluding it is the only definition with a demonstrably effective record of curbing anti-Jewish hate and bigotry.[4]

Antisemitic harassment is illegal,[5] but the constantly evolving manifestations of antisemitism have made consistent application of the law across jurisdictions

[3] The IRHA definition is based off a definition originally formulated and issued in 2005 by the European Monitoring Centre on Racism and Xenophobia. The definition then underwent intensive review from a group of scholars, who issued the final version in May 2016. *See* Rabbi Andrew Baker, Deidre Berger & Michael Whine, *The Origins of the Working Definition*, *in* IN DEFENCE OF THE IHRA WORKING DEFINITION OF ANTISEMITISM 8, 8 (2021), https://fathomjournal.org/wp-content/uploads/2021/02/Fathom-eBook-In-Defence-of-the-IHRA-Working-Definition-of-Antisemitism.pdf.

[4] Portions of this brief are adapted from Mark Goldfeder, *Defining Antisemitism*, 52 SETON HALL L. REV. 119 (2021), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1808&context=shlr.

[5] Aside from a variety of more explicit state anti-discrimination laws (*see* Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies*, CTR. FOR AM. PROGRESS (June 11, 2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf (last visited Aug. 26, 2024)), Title VII of the Civil Rights Act of 1964 protects employees against many forms of discrimination including race, gender, national origin, sex or religion, *see* 42 U.S.C. § 2000e *et seq*., while Title VI protects Jewish students from discrimination based on their race or national origin, *id*. § 2000d *et seq*.

difficult.[6] That is why numerous governors and state legislatures[7] have enacted or are considering enacting laws or orders that not only address antisemitic behavior but also adopt a standardized definition of antisemitism, to better identify and protect against discriminatory antisemitic harassment. In this vein, on March 27, 2024, Governor Greg Abbott issued the Order, which addresses acts of antisemitism in institutions of higher education.[8] The Order requires all higher education institutions within the State of Texas to review their free-speech policies to establish appropriate punishments for antisemitic rhetoric on college and university campuses, to ensure that policies addressing the sharp rise of antisemitic acts are enforced, and to include the IHRA definition of antisemitism in their free-speech policies, as they were *already* required to do under existing federal law.

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[6] Some have asked why antisemitism more than other discriminatory behaviors needs defining, and as discussed *infra,* the answer is threefold: 1) throughout generations no other hatred has been this amorphous, shifting, and defying of definition; 2) related to that, modern antisemitism is unique in that people can and do commit horrible acts of antisemitic discrimination and then claim that they were merely being "anti-Israel;" and 3) notwithstanding the above, the importance of clarity in such definitions is not entirely unique to antisemitism, and to the extent that any other group feels it is being routinely and systemically discriminated against, and that there is a need for a definition to clarify what is and is not hate speech, that group's concerns should likewise be addressed. In a somewhat similar vein, while there does not seem to be any real confusion on what constitutes racist speech, the Black Lives Matter movement *has* argued that many states and universities do not in fact understand structural racism, and students at dozens of schools have published their lists of demands for change.

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

[8] ECF No. 21-1.

There are two main reasons why the IHRA definition is the appropriate one to use when assessing motivation behind discriminatory acts. The first has to do with the practical difficulty of defining antisemitism, and the second relates to the legal standard of objectivity required when assessing discriminatory intent.

In terms of its focus, antisemitism often looks at Jews as a collective,[9] the idea being that while individual Jews might be acceptable, Jews as a separate collective identity should not be allowed to exist with the same rights as other groups.[10] Because of this tendency, the majority of antisemitism in any given era tends to focus on the primary form of collective Jewish identity at the time.[11] Throughout the Middle Ages, Jews for the most part were a religious community, and so they were hated for their religion—even if the particular Jews that were being oppressed were

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[9] When Wilhelm Marr, inventor of the term antisemitism, founded the League of Antisemites, for example, he wrote, "Not individual Jews, but the Jewish spirit and Jewish consciousness have overpowered the world." WILHELM MARR, *Der Sieg des Judenthums ueber das Germanenthum vom nicht confessionellen Standpunkt ausbetrachtet*, (Paul Mendes-Flohr & Jehuda Reinharz trans., 1879) *in* THE JEW IN THE MODERN WORLD: A DOCUMENTARY HISTORY 331, 332 (Paul Mendes-Flohr & Jehuda Reinharz eds., 1995).

[10] Videos and Audio, *Rabbi Sacks on the connection between Judaism and Israel*, OFFICE OF RABBI SACKS (Apr. 29, 2019), https://rabbisacks.org/rabbi-sacks-on-the-connection-between-judaism-and-israel/. *See also* Per Ahlmark, former leader of the Swedish Liberal Party and Deputy Prime Minister of Sweden, remarking that while antisemitism may begin by primarily attacking the collective Jews… "such attacks start a chain reaction of assaults on individual Jews and Jewish institutions." Per Ahlmark, Combating Old/New Antisemitism, Address at the International Conference on the Legacy of Holocaust Survivors, Yad Vashem, *in* Vidal Sassoon International Center for the Study of Antisemitism, *Annual Report* (2002).

[11] JAMES WALD, *The New Replacement Theory: Anti-Zionism, Antisemitism, and the Denial of History,* in ANTI-ZIONISM AND ANTISEMITISM: THE DYNAMICS OF DELEGITIMIZATION 2–3 (2019).

not religious.[12] In the nineteenth and twentieth centuries, when many Jews became secularized, ethnicity became the primary unifying collective identity of Jews, and so the hatred mutated to focus on race, even when the assimilated Jews had only a trace amount of Jewish blood in them and were largely indistinguishable from their fellow countrymen.[13] Today, when the primary collective embodiment of Jewish people globally is the people of Israel in their nation state, Jews around the world are hated and held accountable for "their" state—even if they are not Israeli or even Zionist.[14]

Every time, the essence of antisemitism remains the same, even if the focus somewhat shifts. Antisemitism, or anti-Jewishness, is "anchored in the denial of the very legitimacy of the Jews as a people . . . .[It is] an assault upon whatever is the core of Jewish self-definition at any given moment in time—be it the Jewish religion, or Israel as the 'civil religion' or juridical expression of the Jewish people."[15]

While antisemitism's focus can shift over time, in every generation those manifesting such bigotry use some variant of the same refrain: "We don't hate Jews,

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[12] THOMAS F. MADDEN, THE TRUTH ABOUT THE SPANISH INQUISITION 24–30 (2003), *available at* https://www.catholicculture.org/culture/library/view.cfm?recnum=5236 (last visited Aug. 26, 2024).

[13] JEWISH VIRTUAL LIBRARY, *The Nuremberg Laws: Background & Overview*, https://www.jewishvirtuallibrary.org/background-and-overview-of-the-nuremberg-laws (last visited Aug. 26, 2024).

[14] Videos and Audio, *The Mutating Virus: Understanding Antisemitism*, THE OFFICE OF RABBI SACKS (Sept. 27, 2016), https://rabbisacks.org/mutating-virus-understanding-antisemitism/.

[15] Irwin Cotler, *Global Antisemitism: Assault on Human Rights*, (Yale Univ. Initiative for the Interdisciplinary Study of Antisemitism Working Paper No. 3, 2009), https://isgap.org/wp-content/uploads/2011/10/irwin-cotler-online-final1.pdf.

we just can't stand ____." To justify their hatred in a socially acceptable way, antisemites need a rationale that can plausibly pass muster in polite society, ideally one that appeals directly to the highest source of authority that is currently *en vogue*. As Rabbi Lord Jonathan Sacks noted, sometimes the justification maps directly onto the target. In the Middle Ages, for example, the highest source of authority was religion;[16] in post-Enlightenment Europe, it was science;[17] and today, it involves using (or abusing) the language of human rights with selective claims of social justice that see only Jews,[18] or the Jewish State,[19] as worthy of condemnation.[20]

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[16] During the medieval crusades and the pogroms of the 19th and 20th centuries, in which Jews were massacred and maimed, the persecutors focused more on Christian themes for their religious justifications, including charges of deicide and blood libels. *See* MARVIN PERRY & FREDERICK M. SCHWEITZER, *The Diabolization of Jews*, in ANTISEMITISM 73–117 (2002).

[17] Hence the reliance on pseudoscientific studies about racial eugenics. *See* U.S. HOLOCAUST MEM'L MUSEUM, *Antisemitism in History: Racial Antisemitism, 1875–1945*, https://encyclopedia.ushmm.org/content/en/article/antisemitism-in-history-racial-antisemitism-18751945 (last visited Aug. 26, 2024).

[18] *See, e.g.*, Channa Newman, *Pursuit of 'social justice' gives strength to anti-Semitism*, THE JEWISH CHRONICLE (Dec. 2, 2018, 7:26 PM), https://jewishchronicle.timesofisrael.com/pursuit-of-social-justice-gives-strength-to-anti-semitism/.

[19] Sina Arnold & Blair Taylor, *Antisemitism and the Left: Confronting an Invisible Racism*, 9 J. OF SOC. JUST. 2, 20 (2019).

[20] OFFICE OF RABBI SACKS, *supra* note 14. As Rabbi Sacks explains,

> Today the highest source of authority worldwide is human rights. That is why Israel—the only fully functioning democracy in the Middle East with a free press and independent judiciary—is regularly accused of the five cardinal sins against human rights: racism, apartheid, crimes against humanity, ethnic cleansing and attempted genocide. The new antisemitism has mutated so that any practitioner of it can deny that he or she is an antisemite. After all, they'll say, I'm not a racist. I have no problem with Jews or Judaism. I only have a problem with the State of Israel. But in a world of 56 Muslim nations and 103 Christian ones,

Finally, in terms of its insidious process, one of the rare unifying themes that emerges from the history of antisemitism is the consistent attempt at dehumanization of the Jewish people. Whether they are portraying Jews as malevolently superhuman, as in the Protocols of the Elders of Zion, or as worthlessly subhuman, as in the Nazi ideology, antisemites throughout history have found that it is easier to despise and eventually kill those whom they do not consider human. Jews have also been otherized in more subtle ways; for example, in America, they have been considered non-white at times when whites were privileged,[21] but then told that they are privileged whites when they demand recognition of their struggles.[22] "In the past Jews were rendered alien to the West by being orientalized. Today, Jews are rendered alien to the Middle East by being redefined as European . . . ."[23]

The practical problem with defining antisemitism is that antisemitism resembles a mutating virus: Jews are criticized for being whatever a society—or a particular part of a society—hates at that moment. The right will call them radicals,

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> there is only one Jewish state, Israel, which constitutes one-quarter of one per cent of the land mass of the Middle East. Israel is the only one of the 193 member nations of the United Nations that has its right to exist regularly challenged, with one state, Iran, and many, many other groups, committed to its destruction.

That is why, as he explains, "[w]henever you hear human rights invoked to deny Israel's right to exist, you are hearing the new antisemitism."

[21] *See generally* KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA (1998).

[22] *See generally* ERIC L. GOLDSTEIN, THE PRICE OF WHITENESS: JEWS, RACE, AND AMERICAN IDENTITY (2006).

[23] WALD, *supra* note 11, at 19.

while the left will label them fundamentalists. Jews are simultaneously too liberal and too conservative; both too rich and too much of a drain on society. They are both too strong and too weak and, at once, too influential and too parasitical. It does not matter if the reasons are contradictory. Indeed, within one generation, the primary theory of antisemitism has transformed from Jews being an inferior race worthy of destruction—by the Nazis in the Holocaust—to Jews being a powerful race that tries to destroy others—like the Nazis, in a form of Holocaust-inversion.[24]

A definition of antisemitism that can encompass all these iterations, as well as any future ones, must be able to cut through the various timely rationales given for a hatred of and hostility toward Jews. In turn, such a definition must focus on the actions taken by those expressing or harboring the hate—in other words, a praxeological definition.[25] The IHRA definition is the most appropriate definition for states to adopt both to better understand antisemitic intent in the context of discriminatory-conduct claims and to better educate their constituencies about all the forms of antisemitism. Indeed, the examples provided by the IHRA definition center on the *manifestations* of antisemitism; *i.e.*, what antisemites *do rather than why* they do it.

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[24] BAKAZS BERKOVITS, *Social Criticism and the "Jewish Problem," in* ANTI-ZIONISM AND ANTISEMITISM: THE DYNAMICS OF DELEGITIMIZATION 53 (2019).

[25] For a masterful work on the history and complexity of defining antisemitism, see Kenneth Marcus's book, *The Definition of Antisemitism*. KENNETH L. MARCUS, THE DEFINITION OF ANTI-SEMITISM (2015).

Over the last decade and a half, the IHRA definition has become the internationally accepted standard definition of antisemitism.[26] While there can be no exclusive or exhaustive definition of antisemitism (as it can and does take many forms), the IHRA definition provides an objective baseline standard for what is and is not acceptable. The IHRA definition is as close to a global consensus as is likely possible and is therefore the obvious choice for an objective standard. Per the recently published European Commission Handbook for the practical use of the IHRA Working Definition of Antisemitism, "[e]ntities that have adopted, endorsed, applied or taken note of the IHRA Working Definition of Antisemitism include parliaments, governments, federal and state ministries, municipalities, city councils, law enforcement agencies, the judiciary, educational institutions, universities, civil society organisations and Jewish community security organisations." [27] The Handbook also notes that the IHRA definition has been used:

> to train police officers, prosecutors, judges, educators, state employees and human rights monitoring bodies to identify and track various manifestations of antisemitism; to categorize antisemitic incidents, as collected by police officers, interior and justice ministries, civil society organisations, hate crime monitoring bodies and academics; to support decision-making processes by states, human rights monitoring organisations, law enforcement agencies, the judiciary, municipal governments, educators, civil society organisations and Jewish

[26] Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *The Elimination of all forms of Religious Intolerance*, U.N. DOC. A/74/358 (Sept. 23, 2019).
[27] European Commission: Directorate-General for Justice and Consumers, Steinitz, B., Stoller, K., Poensgen, D. and Whine, M., *Handbook for the practical use of the IHRA working definition of antisemitism* (2021), https://op.europa.eu/en/publication-detail/-/publication/d3006107-519b-11eb-b59f-01aa75ed71a1/language-en.

> communities; to identify aspects of antisemitism in court hearings, prosecutor actions, police recording, investigations and hate crime statistics; and to help direct funding to civil society organisations and human rights organisations.

In short, the definition has been an essential tool for identifying contemporary manifestations of antisemitism in many different contexts.

Critics have challenged the use of the IHRA definition in policymaking on two main grounds. First, they claim that the safe-harbor provision excluding "criticism of Israel similar to that leveled against any other country" is insufficient.[28] For example, a person may hold Israel to a higher standard than other countries because he is more invested in that state for any number of reasons but *not* because he is antisemitic. Or he may criticize Israel simply because the context of what he is discussing at the time is related exclusively to Israel and not to any other country. Critics, like Plaintiffs here, falsely claim that, under the IHRA definition, all such criticism would be considered antisemitic. Such an argument is a red herring, however, for the definition includes the *explicit* caveat that the examples given "*could, taking into account the*

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[28] *See e.g.*, Zach Greenberg, *OCR's use of overly broad anti-Semitism definition threatens student and faculty speech*, FIRE (Sept. 14, 2018), https://www.thefire.org/ocrs-use-of-overly-broad-anti-semitism-definition-threatens-student-and-faculty-speech/; Letter from Dima Khalidi, Director, Palestine Legal, et al., to Rep. Bob Goodlatte and Rep. John Conyers, Jr., (Dec. 5, 2016), https://ccrjustice.org/sites/default/files/attach/2017/02/AntiSemitism%20Awareness%20Act%20Opposition%20Letter%20final.pdf ; and British Columbia Civil Liberties Ass'n, *The BCCLA Opposes the International Campaign to Adopt the International Holocaust Remembrance Association (IHRA) Definition of Antisemitism*, (June 18, 2019), https://bccla.org/our_work/the-bccla-opposes-the-international-campaign-to-adopt-the-international-holocaust-remembrance-association-ihra-definition-of-antisemitism/.

overall context," be antisemitic. In other words, the IHRA definition accounts for context when assessing whether an incident is antisemitic.

Indisputably, context is crucial here, as in all instances of alleged discrimination. For example, in employment discrimination cases, the Supreme Court has made clear that:

> [T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' In same-sex (as in all) harassment cases, that inquiry requires *careful consideration of the social context* in which particular behavior occurs and is experienced by its target.[29]

When assessing harassment claims, antisemitism is no different from racism or sexism insofar as context is an element of the analysis, and no two cases are ever exactly the same.[30] The reason the examples are provided is explicitly not that all forms of criticism about Israel are antisemitic—as the definition takes pains to point out—but precisely because there are those who claim that *no* criticism of Israel can *ever* cross the line.[31] As the last ten months have shown, this position is patently false.

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[29] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (emphasis added)).

[30] Of course, it is also true that context can belie pretext in these situations, as well. "Pretext can be shown by such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Gomez-Gonzalez v. Rural Opportunities, Inc.*, 626 F.3d 654, 662–63 (1st Cir. 2010) (citing *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir.1997)).

[31] The same is true of the other examples—*i.e.*, they may not be antisemitic in any given circumstance, but they certainly *can* be, contextually. For instance, while it may be true that any particular Jewish person is loyal to the State of Israel, the

Of course, this kind of policymaking needs to be done carefully because free speech is a core aspect of democracy, and there is no general hate-speech exception for antisemitism or any other kind of hatred (nor should there be). That is *precisely* why the Order and all similar orders and bills *cannot* and *do not* take the form of any kind of speech code.[32] Instead, such orders provide officials with the tools to objectively assess the nature and motivation of harassment and other forms of discriminatory conduct when such conduct includes words (discriminatory harassment and criminal conduct are not just speech, even if words are sometimes used).[33] Unlike mere speech, such conduct is absolutely subject to government

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charge that *Jews* have dual loyalty is an old antisemitic canard straight out of the Protocols of the Elders of Zion and tied to the even older (at least Middle Ages, arguably even Biblical) antisemitic canard that Jews are incapable of real loyalty and are part of a worldwide conspiracy that threatens their home countries, thus justifying acts of discrimination or violence against them. *See* Julie Hirschfield Davis, *The Toxic Back Story to the Charge That Jews Have a Dual Loyalty*, N.Y. TIMES (Aug. 21, 2019), https://www.nytimes.com/2019/08/21/us/politics/jews-disloyal-trump.html.

[32] *See, e.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995); *College Republicans v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003).

[33] Discriminatory conduct, for example, can include "verbal acts and name-calling; graphic and written statements," or other conduct if that behavior "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," according to the Office of Civil Rights within the U.S. Department of Education. Russlyn Ali, Assistant Sec'y of Civil Rights, Office of Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Harassment and Bullying (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010_pg2.html. The following provides an example of such an instance: If a student is *told* she cannot serve on a leadership board because she is Jewish, that includes a *verbal act* which will be treated as discriminatory conduct. The question really is not about the form the behavior takes but, rather, whether it "creates a pervasively hostile environment

regulation.[34] To paraphrase the Jewish Supreme Court Justice Louis D. Brandeis,[35] the proper response to "hate speech" is more speech—also known as counter speech—so that bad ideas may be publicly confronted and constructively dealt with in broad daylight. There can be no counter speech, however, when one side is intimidated into silence. At its core, the main purpose of this Order's definition is to provide for equality in the free-speech arena by removing illegal, harassing conduct that is motivated by definitional antisemitism.[36] The Order seeks not to establish a form of Jewish exceptionalism but to ensure equality. Adopting the IHRA definition is not a major revision of anti-discrimination policy; instead, it is a simple clarification of a term.

Well-established Supreme Court precedent requires behavior to be "objectively offensive" to fall under the category of discriminatory harassment,[37] a type of

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for vulnerable students." ACLU, *Speech on Campus* (Dec. 18, 2023), https://www.aclu.org/other/speech-campus (last visited Aug. 26, 2024).

[34] Brett A. Sokolow, et al., *The Intersection of Free Speech and Harassment Rules*, AMERICAN BAR ASS'N (Oct. 1, 2011), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/fall2011/the_intersection_of_free_speech_and_harassment_rules/#:~:text=Speech%20that%20rises%20to%20the,harassment%20is%20not%20protected%20speech.&text=In%20harassment%20cases%2C%20the%20stringent,on%20a%20public%20college%20campus.

[35] *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion, the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence").

[36] *See* Harry G. Hutchison, *Campus Free Speech in the Mirror of Rising Anti-Semitism*, 52 ST. MARY'S L.J. 419 (2021) (noting that "[s]peech rights are subordinate to the judgement that the ultimate liberty is not speech but the right to live in peace").

[37] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999).

behavior that can and should be regulated.[38] In order to meet this "objectively offensive" standard, the definition used in the discriminatory-antisemitism-motivational analysis must be an *objectively* well-accepted one. To that end, it is once again clear that the definition that should be used *is* the IHRA definition. As noted above, the IHRA definition is used by the U.S. federal government; the dozens of member countries of the International Holocaust Remembrance Alliance; all fifty countries (except Russia) that comprise the Organization for Security and Cooperation in Europe ("OSCE"); the European Commission and the European Parliament; and all EU Member states, as well as Serbia, Bahrain, and Albania. It has been endorsed by a growing number of world leaders (including UN Secretary-General António Guterres[39]), as well as by a variety of intergovernmental agencies (including the European Commission against Racism and Intolerance)[40] and non-governmental agencies (including the Iraq-based Global Imams Council).[41] Perhaps

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[38] Erwin Chemerinsky & Howard Gillman, *A Bill to Police Campus Speech*, WALL ST. J. (Dec. 15, 2016, 7:31 PM), https://www.wsj.com/articles/a-bill-to-police-campus-speech-1481846338.

[39] Press Release, U.N. Secretary General, *Anti-Semitism Rising Even in Countries with No Jews at All, Secretary-General Tells Event on Power of Education to Counter Racism, Discrimination*, U.N. Press Release SG/SM/19252-RD/1022 (Sept. 26, 2018), https://www.un.org/press/en/2018/sgsm19252.doc.htm.

[40] EUROPEAN COMM'N AGAINST RACISM AND INTOLERANCE, *ECRI's Opinion on the IHRA Working Definition of Antisemitism*, (Dec. 2, 2020), https://rm.coe.int/opinion-ecri-on-ihra-wd-on-antisemitism-2755-7610-7522-1/1680a091dd.

[41] *Largest NGO of Imams Worldwide Adopts Universal Definition of Anti-Semitism*, JEWISH NEWS SYNDICATE (Oct. 29, 2020), https://www.jns.org/largest-ngo-of-imams-worldwide-adopts-universal-definition-of-anti-semitism/.

most importantly, hundreds of major Jewish organizations across the world[42] and across the political and religious spectrums, representing people of all ages and backgrounds that are affected by antisemitism (including several major student organizations),[43] have banded together to adopt the IHRA definition and urged others to adopt it, as well.[44] They do so because they all agree that the definition best reflects

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[42] *See e.g.*, *Jewish students are protected by the IHRA definition of antisemitism*, THE GUARDIAN (Jan. 22, 2021, 12:28 PM), https://amp.theguardian.com/news/2021/jan/22/jewish-students-are-protected-by-the-ihra-definition-of-antisemitism?fbclid=IwAR2yQDm5Oaj3eqm5JG0zMeyVZm8gIxh4gUmUQbBkT1w6rlfJ5wETEuQGZEs.

[43] In America, such organizations include the following: Alpha Epsilon Pi; Ameinu; American Friends of Likud; America-Israel Friendship League; American Israel Public Affairs Committee; American Jewish Committee; American Jewish Congress; American Jewish Joint Distribution Committee; American Sephardi Federation; American Zionist Movement; AMIT; Anti-Defamation League; ARZA; B'nai B'rith International; Bnai Zion; CAMERA; Central Conference of American Rabbis; Emunah of America; Friends of the Israel Defense Forces; Greater Miami Jewish Federation; Hadassah, Women's Zionist Organization of America; HIAS; Hillel International; Israel Bonds/Development Corporation for Israel; JCC Association of North America; Jewish Council for Public Affairs; Jewish Federations of North America; Jewish Institute for National Security of America; Jewish Labor Committee; Jewish National Fund; Jewish United Fund of Metropolitan Chicago; Jewish Women International; Mercaz USA, Zionist Organization of the Conservative Movement; NA'AMAT USA; NCSEJ: National Coalition Supporting Eurasian Jewry; National Council of Jewish Women; National Council of Young Israel; ORT America, Inc.; Rabbinical Assembly; Rabbinical Council of America; Religious Zionists of America; UJA-Federation of New York; Union for Reform Judaism; Union of Orthodox Jewish Congregations of America; United Synagogue of Conservative Judaism; WIZO; Women's League for Conservative Judaism; Women of Reform Judaism; World ORT USA; World Zionist Executive USA; and the Zionist Organization of America

[44] Aaron Bandler, *More Than 120 Jewish and Pro-Israel Organizations Call on Facebook to Adopt IHRA Definition of Antisemitism*, JEWISH JOURNAL (Aug. 10, 2020), https://jewishjournal.com/featured/320140/more-than-120-jewish-and-pro-israel-organizations-call-on-facebook-to-adopt-ihra-definition-of-anti-semitism/.

their shared, lived experience and the realities of how antisemitism manifests today. This conduct-based, consensus-driven international definition of what constitutes problematic and offensive antisemitism is the only internationally recognized definition of antisemitism that exists or has ever existed.

Perhaps most importantly, the IHRA definition is the definition against which educational institutions are *already* evaluated by the federal government when it investigates claims of discriminatory conduct, and it has been since the federal government adopted it for use in Title VI cases by Executive Order in 2019.[45] And, as such, it is the definition that schools are *already* affirmatively required to *proactively* consider when formulating policies to create a safe environment on campus.[46] All the Order does is underscore existing responsibilities.

II. PLAINTIFFS' COMPLAINT MISCONSTRUES BOTH FACTS AND LAW.

Executive Order GA 44 was passed for one simple reason: To protect Jewish students from acts of antisemitism in institutions of higher education. The IHRA definition (along with the Order that adopts it) simply does *not* label as antisemitic any "common and typical criticisms people make about foreign countries when those

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[45] Exec. Order No. 13899, 84 Fed. Reg. 68779 (Dec. 11, 2019), *available at* https://www.govinfo.gov/content/pkg/DCPD-201900859/pdf/DCPD-201900859.pdf (last visited Aug. 26, 2024).

[46] "As a condition of receiving federal financial assistance, a school corporation gives the DOE 'an assurance that the program will be conducted . . . in compliance with all requirements imposed by or pursuant to this part.' This imposes an affirmative obligation to provide an equal opportunity." Ivan E. Bodensteiner, *Peer Harassment—Interference with an Equal Educational Opportunity in Elementary and Secondary Schools*, 79 NEB. L. REV. 1, 24 (2000) (citing 34 C.F.R. § 100.4(a)(l999)).

criticisms are made against Israel."[47] Contrary to the unfounded allegations in the Complaint, the IHRA definition does *not* "transform normal and typical criticism of a foreign country into antisemitism when the foreign country criticized is Israel."[48] In fact, the definition *explicitly* states that "criticism of Israel similar to that leveled against any other country *cannot* be regarded as antisemitic." (emphasis added). [49]

Nor, contrary to what Plaintiffs assert, does the IHRA definition mandate that all the examples provided unequivocally constitute antisemitism. Instead, the IHRA definition states the following:

> Contemporary examples of antisemitism in public life, the media, schools, the workplace, and in the religious *sphere could, taking into account the overall context, include,* but are not limited to:
>
> - Calling for, aiding, or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion.
> - Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as collective — such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.
> - Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.
> - Denying the fact, scope, mechanisms (e.g. gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust).

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[47] ECF 1 at 9.
[48] *Id.* at 10.
[49] *IHRA Definition, supra* note 1.

- Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.
- Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.
- Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.
- Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.
- Using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.
- Drawing comparisons of contemporary Israeli policy to that of the Nazis.
- Holding Jews collectively responsible for actions of the state of Israel.[50]

Again, specious claims about what the IHRA definition seeks to do, like the ones alleged by Plaintiffs, are precisely why the definition includes the explicit caveat that the examples given, "*could, taking into account the overall context*," be antisemitic. And yes, it is abundantly clear why some examples reference the Jewish connection to the State of Israel—because often, and especially every time a conflict erupts in the Middle East, the thin veneer of anti-Zionism is shattered by open acts of antisemitism.

[50] *Id.* (emphasis added).

In May 2021, while Israel was defending itself against the terrorist group Hamas, antisemitic attacks spiked by over 141% over the same period in 2020.[51] Across the United States, hundreds of random synagogues, Jewish community centers, kosher restaurants, Jewish-owned businesses, and individual Jews were targeted and attacked, beaten and bullied, for the sole reason that all were Jewish. Many of those who were targeted were not religious, and some were not even Zionists. Their only "crime" was being visibly Jewish at a time when antisemites were angry with Israel. And unfortunately, none of this was surprising. During the 2014 Gaza War, there was a similar increase in antisemitic incidents.[52]

And in the wake of the deadliest day for the Jewish people since the Holocaust, antisemitic incidents have risen once again—in Texas, as well as across the country.

On campuses throughout America, between hiding from mobs in the library, avoiding dining halls because of death threats, and removing Nazi symbols from Chabad houses, Jewish students have been subjected to campaigns that employ classic antisemitic tropes (ranging from claims of dual loyalty to outright blood libel) and calls for them to be removed from campus if they dare to identify as Zionists—which the vast majority of Jewish people do.[53] The last ten months provide

[51] Anti-Defamation League, *Audit of Antisemitic Incidents 2021,* (Apr. 21, 2022), available at: https://www.adl.org/resources/report/audit-antisemitic-incidents-2021 (last visited Aug. 26, 2022).
[52] Anti-Defamation League, *Audit: In 2014 Anti-Semitic Incidents Rose 21 Percent Across the U.S. in a "Particularly Violent Year for Jews",* (Mar. 30, 2015), available at: https://www.adl.org/resources/report/audit-antisemitic-incidents-2021 (last visited Aug. 26, 2022).
[53] It is worth noting that a California district court recently determined that a Jewish person's belief in the existence of a Jewish homeland—also known as "Zionism"—is a sincerely held religious belief for the purposes of the First Amendment. *See* Order re:

unequivocal evidence as to why the IHRA definition includes—and must include—certain examples of anti-Zionism (such as holding Jews "collectively responsible for actions of the state of Israel") among modern manifestations of anti-Jewish hate. Indeed, this is the form of antisemitism most readily practiced now. Just like it is racial or ethnic bias to attack a Chinese person over China's trade policies and national-origin discrimination to fire a Russian because Vladimir Putin ordered the invasion of Ukraine, it is antisemitic to target Jewish people with discriminatory actions because of a real or perceived connection they have to the Jewish State.

This idea should not be controversial, and it is certainly not partisan; as the White House's National Strategy to Counter Antisemitism recently stated, "Jewish students and educators are targeted for derision and exclusion on college campuses, often because of their real or perceived views about the State of Israel. When Jews are targeted because of their beliefs or their identity, when Israel is singled out because of anti-Jewish hatred, that is antisemitism. And that is unacceptable."[54]

Besides misquoting and misconstruing the IHRA definition, the Complaint also misquotes and misconstrues the Executive Order in question. Governor Abbott did *not* label groups that are "critical of Israel" as radical, nor did he call their "peaceful activism" antisemitic. He directly stated: "[S]ome radical organizations

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Mot. For Prelim. Inj. at 4, *Frankel et al. v. Regents of the University of California*, No. 2:24-cv-04702 (C.D. Cal. Aug. 13, 2024).

[54] White House, *The U.S. National Strategy to Counter Antisemitism* (May 2023), https://www.whitehouse.gov/wp-content/uploads/2023/05/U.S.-National-Strategy-to-Counter-Antisemitism.pdf.

have engaged in unacceptable actions on university campuses."[55] This statement is undeniably true. The Order does *not* target Plaintiffs for any viewpoint or protected speech; it specifically calls for them to be disciplined for *violating* free-speech policies. And the determination contained in the Findings section of the Order—namely, that the phrase "from the river to the sea" is antisemitic—is the stated belief of the State of Texas, as well as of a massive bipartisan majority of Congress,[56] and is a belief that the State of Texas is *certainly* entitled to express. Whether Plaintiffs agree or disagree with the State of Texas is irrelevant. The phrase is clearly and indisputably understood by millions of people, including those in both the state and federal government, to be a coded call for Jewish genocide.

While Plaintiffs either do not understand the IHRA definition or are misleading the Court, it is equally apparent that they do not understand or are mischaracterizing the content of the Order. Nowhere does the Order ask Plaintiffs to refrain from communicating their views through education, programming, advocacy, or direct action—unless, of course, the direct action they are referring to includes unlawful conduct, such as harassment. Under the Order, Plaintiffs are entirely free

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[55] Press Release, Greg Abbott, Governor of Texas, *Governor Abbott Fights Antisemitic Acts At Texas Colleges, Universities* (Mar. 27, 2024), https://gov.texas.gov/news/post/governor-abbott-fights-antisemitic-acts-at-texas-colleges-universities.

[56] Press Release, Office of Rep. Josh Gottheimer, *House Passes Gottheimer-led Bipartisan Resolution Condemning Antisemitic "From the River to the Sea" Chants* (Apr. 16, 2024), https://gottheimer.house.gov/posts/release-house-passes-gottheimer-led-bipartisan-resolution-condemning-antisemitic-from-the-river-to-the-sea-chants.

to organize "protests, teach-ins, meetings, and other events to communicate a viewpoint that is critical of Israel."[57] They can arrange "sit-ins, film screenings, strikes"[58]; they can coordinate summer-training programs; and they can engage in any other expressive activity that abides by relevant time, place, and manner restrictions. They can even do so using the patently antisemitic language that they demonstrably relish using—and the Order does not stop them from doing so.

The Order simply does not restrict or prohibit *any* speech.

First, as is clear on the face of the Order, every person and every organization remain perfectly free to say whatever they would like to, however abhorrent, about Jews and/or the Jewish State. As the Supreme Court explained in *Tinker v. Des Moines*, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[59] Hate speech is protected, obviously.[60] If that speech crosses the line and reaches the level of discriminatory harassment—thereby becoming conduct—[61] "then and only then is regulation appropriate. Speech

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[57] ECF No. 1 at 12.
[58] *Id.* at 15, 17.
[59] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969).
[60] Phil Ciciora, *How should universities handle controversial speech?*, ILLINOIS NEWS BUREAU: CAMPUS NEWS (Aug. 30, 2017, 8:30 AM), https://news.illinois.edu/view/6367/549565.
[61] "Harassing conduct may take many forms, including *verbal acts* . . . 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." Russlyn Ali, *supra* note 33.

codes are constitutionally problematic; regulating discriminatory *conduct* is not."[62] The Order directs schools to punish only *violations* of speech policies, including "expression that is unlawful or disrupts the operations of the institution."[63] For those who would argue that it is hard to distinguish acts from speech, the Order does not establish any new gray areas regarding the distinction between speech and acts. It simply uses the long-standing State of Texas definitions of free speech versus disruptive activity and bullying enshrined in the Texas Education Code. *See, e.g.*, Tex. Educ. Code §§ 51.9315(f), 37.0832.

Nor is the State's mere adoption of a definition of antisemitism problematic. For there to be a free speech violation, the Order would have to regulate private speech, rather than government speech.[64] All the Order does is explain how the *government* defines antisemitism when it decides where to allocate its money. In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the Supreme Court held that "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."[65] Without this exemption, the Court explained, government "would [simply] not work."[66] For those who would complain

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[62] *See* Mark Goldfeder, *Why We Should Applaud Trump's Executive Order on Anti-semitism*, HILL, (Dec. 16, 2019, 2:00 PM), https://thehill.com/opinion/civil-rights/474271-why-we-should-applaud-trumps-executive-order-on-anti-semitism (emphasis added).
[63] ECF No. 21-1 at 4.
[64] *Id.*
[65] 576 U.S. 200, 207 (2015).
[66] *Id.*

that the government is somehow taking sides by adopting a well-accepted definition of antisemitism, thereby raising the specter of viewpoint discrimination, the answer is once again present in *Walker*: "We have . . . refused [t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals."[67] The government may advance its own permissible goals, including opposing antisemitic discrimination as defined by a well-accepted standard, and doing so is not impermissible viewpoint discrimination.[68]

Hence, the Order clearly does not—in any way—restrict protected speech. That said, critics may argue that the use of a definition in this limited context will somehow "chill" protected speech in a different context. That argument is simply too broad and, frankly, unworkable; if such an argument were to be regarded as salient, state officials and university administrators would not be allowed to publicly denounce racism out of fear of "chilling" racist speech. Obviously, this scenario is ludicrous.

The more technical version of the argument, however, *is* worth addressing. As the Supreme Court has asserted, in the First Amendment context, courts must "look

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[67] *Id.* at 208.

[68] *See generally* Mark Goldfeder, *Stop Defending Discrimination: Anti-Boycott, Divestment, Sanctions Statutes Are Fully Constitutional*, 50 TEX. TECH. L. REV. 207 (2018).

through forms to the substance" of government conduct.[69] And as the Ninth Circuit has aptly described it, "[i]nformal measures, such as 'the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation,' can violate the First Amendment."[70] Generally speaking, "government officials violate [the First Amendment] when their acts 'would chill or silence a person of ordinary firmness from future First Amendment activities.'"[71]

In general, courts have applied that standard to mean that lengthy investigations into permissible conduct could chill speech.[72] Here, however, there is no threat whatsoever that the government will ever investigate, let alone bar, permissible speech *of any kind*. The Order addresses only violations of speech policies that are already impermissible. It is worth emphasizing again that, under the Order, whether any specific speech or conduct constitutes harassment is an entirely *separate inquiry* from the antisemitism inquiry. The IHRA definition becomes relevant only *after* the speech or conduct has been determined to constitute harassment and is therefore not protected by the First Amendment. The IHRA definition and the Order do not affect what constitutes a violation of a speech policy or change the standard

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[69] *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)).
[70] *Id.*
[71] *Id.* (quoting *Mendocino Environmental Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999)).
[72] *Id.*; *see also Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012); *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992); *Rakovich v. Wade,* 850 F.2d 1180 (7th Cir. 1988), *abrogated by Spiegla v. Hull*, 371 F.3d 928 (7th Cir. 2004); *Am. Civil Liberties Union v. City of Pittsburgh,* 586 F. Supp. 417 (W.D. Pa. 1984).

for which behavior constitutes harassment. The IHRA definition is important in such contexts because some forms of harassment (*i.e.* typical bullying behavior) do not breach Title VI and similar state policies. But if the discriminatory behavior is motivated by the victim's race or national origin, then it *is* illegal and can be regulated.

The idea that a permissible regulation of impermissible discriminatory conduct would be unacceptable because it theoretically could lead to the regulation of permissible speech turns law enforcement on its head by treating actual perpetrators as potential future victims. This is not a valid legal argument.[73] Courts have held that in terms of the chilling of First Amendment speech, "self-censorship alone is insufficient to show injury."[74]

Even an inquiry by a university into student complaints *involving* speech would not be enough to argue for a chilling effect.[75] In *Morrison v. Board of Education*, the Sixth Circuit ruled *en banc* in favor of a local board of education, when

[73] *See Laird v. Tatum,* 408 U.S. 1, 11–2 (1972).
[74] *Lopez v. Candaele*, 630 F.3d 775, 792 (9th Cir. 2010).
[75] *Abbott v. Pastides*, 900 F.3d 160 (4th Cir. 2018). Even if there *were* a chilling effect, which there is not, as Harry Hutchison notes in his article *Campus Free Speech in the Mirror of Rising Anti-Semitism*, "[t]he Supreme Court has established that 'a university's mission is education' depriving the First Amendment of power to preclude a university from imposing 'reasonable regulations compatible with that mission upon the use of its campus and facilities.'" Hutchison, *supra* note 36 at 488 (quoting *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981)). Hence, a university has the "right to exclude . . . First Amendment activities that . . . substantially interfere with the opportunity of students to obtain an education." *Widmar*, 454 U.S. at 277 (citing *Healy v. James*, 408 U.S. 169, 189 (1972)).

a student claimed that the district policy prohibiting stigmatizing or insulting comments regarding another student's sexual orientation chilled his religious requirement to tell others that their conduct violated his understanding of Christian morality.[76] Procedural meetings held in response to a complaint have also been found not to qualify as chilling speech.[77] And finally, advising a student via letter that his or her classmates were offended by the student's language and that at least one student had identified the language as "hateful propaganda" did not constitute a threat of enforcement under the college's sexual-harassment policy and was not a sufficient injury-in-fact.[78] But again, our case is even easier because we are dealing not with censuring but with *assessing the motive behind impermissible acts*.

In general, no one who refers to sexist speech as sexist, racist speech as racist, or homophobic speech as homophobic, is accused of chilling speech.[79] Indeed, and especially in the university context,[80] officials often are praised for condemning this type of speech without crossing the line into censorship.[81] As the American Civil

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[76] *Morrison v. Bord of Educ.*, 521 F.3d 602, 610 (6th Cir. 2008).
[77] *Abbott v. Pastides*, 263 F.Supp.3d 565, 577–78 (D.S.C. 2017), *aff'd*, 900 F.3d 160 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1291 (2019).
[78] *Lopez*, 630 F.3d at 777–78.
[79] Cynthia Miller-Idriss & Jonathan Friedman, *When Hate Speech and Free Speech Collide,* DIVERSE (Dec. 5, 2018), https://diverseeducation.com/article/133611/ (last visited Aug. 26, 2024).
[80] AMERICAN COUNCIL ON EDUC., *To the Point: Campus Inclusion and Freedom of Expression – Hateful Incidents on Campus*, https://www.acenet.edu/Documents/To-The-Point-Hateful-Incidents.pdf (last visited Aug. 26, 2024).
[81] Nadine Strossen, *Counterspeech in Response to Changing Notions of Free Speech,* AMERICAN BAR ASS'N, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_ho

Liberties Union ("ACLU") has recognized, consistent with First Amendment protections, it is still the case that "campus administrators should [] speak out loudly and clearly against expressions of racist, sexist, homophobic and other bias," and "react promptly and firmly to counter acts of discriminatory harassment."[82] All the Order does is define antisemitism and ask that it be treated the same way as other forms of discrimination are already treated. Hate speech is protected speech, but such protection does not mean that we cannot identify it as hateful.[83] Why then, should it be any different when it comes to antisemitism? If speech is at all affected by the adoption of a well-accepted definition, it is only to help clarify the motivation behind acts that are considered discriminatory toward Jewish people and within those contexts in which the law has already declared discriminatory acts (*not discriminatory speech alone*) unacceptable. The actions themselves are already impermissible; identifying the motivation behind such actions does not chill speech.

None of this should be controversial. The Supreme Court has firmly ruled in *Wisconsin v. Mitchell*[84] that "[t]he First Amendment . . . does not prohibit the evidentiary use of speech . . . to prove motive or intent." That case asked whether enhanced penalties for racially motivated crimes violate a defendant's First

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me/the-ongoing-challenge-to-define-free-speech/counterspeech-in-response-to-free-speech/ (last visited Aug. 25, 2024).

[82] *Speech on Campus*, *supra* note 33.

[83] *See* Miller-Idriss & Friedman, *supra* note 79.

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

Amendment rights. In their unanimous opinion in favor of the state, the Court also dealt with the "chilling" argument:

> Finally, there remains to be considered Mitchell's argument that the Wisconsin statute is unconstitutionally overbroad because of its "chilling effect" on free speech. Mitchell argues . . . that the statute is "overbroad" because evidence of the defendant's prior speech or associations may be used to prove that the defendant intentionally selected his victim on account of the victim's protected status. Consequently, the argument goes, the statute impermissibly chills free expression with respect to such matters by those concerned about the possibility of enhanced sentences if they should in the future commit a criminal offense covered by the statute. We find no merit in this contention. The sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional "overbreadth" cases. We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status, thus qualifying him for penalty enhancement. . . . We are left, then, with the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property. This is simply too speculative a hypothesis to support Mitchell's overbreadth claim.[85]

Even if the Order even implicates speech at all (*i.e.*, addressing "the sharp rise in antisemitic speech *and acts*"), it is clearly only in the context of assessing intent behind already unlawful conduct, consistent with both the First Amendment and Texas law. Thus, the Order is plainly not overbroad or vague. As for claims of overbreadth, the Supreme Court emphasized in *Broadrick v. Oklahoma* that declaring a regulation overbroad is, "manifestly, strong medicine," to be employed "sparingly and only as a last resort," and not if "a limiting construction has been or

[85] *Id.* at 488–89.

could be placed on the challenged statute."[86] The Order (like all similar policies) is limited to assessing intent for discriminatory conduct, not speech, and is to be construed in a limited fashion, consistent with constitutional law. As for claims of vagueness, as the Court explained in *Kolender v. Lawson*,[87] "the void-for-vagueness doctrine requires . . . sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." A policy adding the IHRA definition to existing lawful speech policies actually enhances, rather than detracts from, the sought-after definiteness and clarity cited above, providing an objective and clear definition of what antisemitism is, specifically to discourage the possibility of subjective enforcement.

In truth, this very lack of a definition—which allows antisemites to engage in destructive behavior and to intimidate Jewish students free from consequence—is actually what damages the free exchange of ideas at universities. To quote two leading scholars of antisemitism (Professors Dave Rich and Phillip Spencer), to be concerned that the definition will have a "'chilling effect' . . . is to turn things entirely on their head. It is antisemitic speech which has a chilling effect on Jewish students,

[86] 413 U.S. 601, 613 (1973); *see also* Richard Parker, *Overbreadth*, THE FIRST AMENDMENT ENCYCLOPEDIA https://www.mtsu.edu/first-amendment/article/1005/overbreadth#:~:text=The%20Supreme%20Court%20implicitly%20recognized,In%20Cantwell%20v (last updated July 10, 2024).

[87] *Kolender v. Lawson*, 461 U. S. 352, 357 (1983).

academic and professional staff."[88] As lawyer Sandra Hagee Parker, appointed by Governor Abbott to the Texas Holocaust, Genocide, and Anti-Semitism Advisory Commission, once told Congress when discussing the discriminatory harassment of Jewish students on campus:

> It is harassment aimed to silence and shut down the perspective of Jewish students and those who support them. Allowing this behavior to shut down free speech is at odds with the free thinking and safe environment our Nation's colleges strive to create . . . . Providing a standard by which to judge these acts no more chills free speech than the presence of a thermometer prevents the temperature from rising. Both sides of the argument deserve to be heard, but at present, one side is using the First Amendment as both a sword with which to inflict harm and a shield with which to protect itself from the consequences of its action . . . the exercise of free speech is not an affirmative defense for harassment . . . .[89]

III. PLAINTIFFS FAIL TO PROVIDE CONTEXT FOR ENFORCEMENT ACTIONS.

After the issuance of the Order, several Texas campuses responded with the enactment and enforcement of certain policies to bring the university in compliance with the Order. Plaintiffs' Complaint references several instances of enforcement actions—for example, one against SJP-University of Texas-San Antonio ("SJP-UTSA"), another against SJP-University of Houston ("SJP-UH") via the removal of its encampment, another against SJP-University of Texas-Dallas ("SJP-UTD") via

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[88] Dave Rich & Phillip Spencer, *David Feldman should not be encouraging those who denigrate Jews*, THE JEWISH CHRONICLE (Dec. 14, 2020, 5:45 PM), https://www.thejc.com/comment/opinion/david-feldman-should-not-be-encouraging-those-who-denigrate-jews-1.509689.

[89] Anti-Semitism on College Campuses: Hearing Before the Comm. on the Judiciary House of Representatives, 115th Cong. 45 (2017) (Statement of Sandra Hagee Parker), *available at* https://www.govinfo.gov/content/pkg/CHRG-115hhrg32325/html/CHRG-115hhrg32325.htm.

the removal of its encampment, and another against SJP-University of Texas-Austin ("SJP-UTA"). But before analyzing these incidents, it is worth examining the context in which each occurred, as Plaintiffs' portrayal conveniently ignores the histories of the Texas groups involved—including recent histories—of blatant antisemitism and calls for violence.

In their discussion, Plaintiffs conveniently neglect to mention how SJP marches across Texas campuses often devolve into cries for "martyrdom." For instance, at Texas Tech University, the local SJP chapter includes a chant in Arabic for students to "sacrifice their blood" for Palestine,[90] while SJP-UTSA posts a song whose lyrics are about "honoring the martyrs" (*i.e.*, genocidal antisemitic terrorists), declaring their blood a "sacrifice for you, my homeland," and identifying "the stones in their hands are our weapons," *etc.*[91] These are not peaceful demands for coexistence; these are statements and songs that openly glorify and call for violence. Meanwhile, SJP-UTD regularly posts about honoring convicted terrorists, even hosting an event in support of Walid Daqqah, a commander of the Popular Front for the Liberation of Palestine, a U.S. designated terrorist group that worked with Hamas to perpetrate the October 7 terror attacks;[92] Georges Abdallah, a convicted

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[90] Texas Tech Students for Justice in Palestine (@ttu.sjp), INSTAGRAM, https://www.instagram.com/stories/highlights/18015420932074088/ (last visited Aug. 26, 2024).

[91] Students for Justice in Palestine at UTSA (@sjputsa), INSTAGRAM, https://www.instagram.com/p/CzkSnoZpgj3/ (last visited Aug. 26, 2024).

[92] SJP at UT Dallas (@sjputd), INSTAGRAM, https://www.instagram.com/p/CufF6rUNcgs/ (last visited Aug. 26, 2024).

murderer and a member of the Lebanese Armed Revolutionary Faction;[93] and the Holy Land Foundation founders, who were convicted of supporting terror.[94] The group also raises money for an organization—Baitulmaal—that has been linked to terrorist groups.[95] Lest anyone believe that these SJP chapters somehow meant all of these statements "peacefully," these Texas groups also hold and promote signs explaining that "Peace is the White Man's Word—Liberation is Ours," and justifying "resistance," *i.e.* terrorism.[96] Based upon a collaborative post with Palestinian Youth Movement, they have also been arrested for engaging in unlawful activity; therefore, Texas officials have the right to take them at their word when they threaten violence.[97]

These Texas SJP chapters are not unusual; they are representative of the violent ethos that pervades most SJP chapters in Texas. For instance, eleven days

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[93] SJP at UT Dallas (@sjputd), INSTAGRAM, https://www.instagram.com/p/CVL-8HnJimc/ (last visited Aug. 26, 2024).

[94] SJP at UT Dallas (@sjputd), INSTAGRAM, https://www.instagram.com/p/ClUi7W0JPZB/?img_index=1 (last visited Aug. 26, 2024);
SJP at UT Dallas (@sjputd), INSTAGRAM, https://www.instagram.com/p/Cly5QGmJp6H/ (last visited Aug. 22, 2024).

[95] SJP at UT Dallas (@sjputd), INSTAGRAM, https://www.instagram.com/p/CqR2YusufWX (last visited Aug. 26, 2024); Alma Research, *"Baitulmaal" (Dallas, Texas) – an innocent Islamic charity?*, ALMA (Aug. 30, 2021), https://israel-alma.org/2021/08/30/baitulmaal-dallas-texas-an-innocent-islamic-charity/.

[96] SJP at UT Dallas (@sjputd), INSTAGRAM, https://www.instagram.com/p/C1F3MtipMpx/?img_index=3 (last visited Aug. 26, 2024).

[97] SJP at UT Dallas (@sjputd), INSTAGRAM, https://www.instagram.com/p/C13BdstARYj/ (last visited Aug. 26, 2024).

after the October 7 terror attacks, the Palestine Solidarity Committee ("PSC") (another moniker for SJP) at University of North Texas issued a statement of solidarity with the terrorists, declaring "The citizens of Palestine are well within their rights to defend themselves as an oppressed population through any resistance deemed necessary.[98] Their members have also interrupted lectures.[99] At Rice University, according to videos posted on its Instagram via collaborative posts, the local SJP chapter promoted an event for a convicted murderer,[100] disrupted a Pride Parade[101] and a Planned Parenthood luncheon,[102] and declared themselves to be "attacking the empire itself and hitting where it hurts the most [and] . . . striking from the belly of the beast.[103] Meanwhile, SJP-UH promoted a protest that involved vandalizing public property[104] and showcased a film promoting acts of violence by

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[98] *See, e.g.*, Palestine Solidarity Committee UNT (@psc.unt), INSTAGRAM, https://www.instagram.com/p/CyjBt89Lvwt/?img_index=2 (last visited Aug. 26, 2024); Palestine Solidarity Committee UNT (@psc.unt), INSTAGRAM, https://www.instagram.com/p/C9i-rZJsAdS/?img_index=9 (last visited Aug. 26, 2024).

[99] Palestine Solidarity Committee UNT (@psc.unt), INSTAGRAM, https://www.instagram.com/p/C6Ek5-ruEJz/ (last visited Aug. 26, 2024).

[100] Rice Students for Justice in Palestine (@rice.sjp), INSTAGRAM, https://www.instagram.com/p/C-niKHGJ5zF/?img_index=3 (last visited Aug. 26, 2024).

[101] Rice Students for Justice in Palestine (@rice.sjp), INSTAGRAM, https://www.instagram.com/p/C8iyYtEgil5/?img_index=1 (last visited Aug. 26, 2024).

[102] Rice Students for Justice in Palestine (@rice.sjp), INSTAGRAM, https://www.instagram.com/p/C3tTXZPJA3_/ (last visited Aug. 26, 2024).

[103] Rice Students for Justice in Palestine (@rice.sjp), INSTAGRAM, https://www.instagram.com/p/C8FhBwcp-s4/ (last visited Aug. 26, 2024).

[104] Rice Students for Justice in Palestine (@rice.sjp), INSTAGRAM, https://www.instagram.com/p/CygulTsucaF/ (last visited Aug. 26, 2024).

terrorists.[105] The group has also hosted events in support of those convicted for supporting Hamas,[106] threatened to "stop the world,"[107] justified terrorism as "resistance,"[108] and chanted in public campus spaces about how their members were willing to "fight." Again, lest anyone make the mistake of believing that SJP-UH is simply "critical of Israel," as the group declares in its Complaint, the group has also made it clear that it does *not* want a peaceful two state solution to the Middle East conflict.[109] Perhaps most revealingly, when SJP-UH posted a video of its encampment,[110] it chose, as background music, a song that is *literally* about committing terrorist attacks for Palestine.[111]

This unfortunate description of various Texas SJP chapters provides the necessary context for examining the various enforcement actions cited by Plaintiffs. As to the first action, Plaintiffs emphasize that at UTSA, one campus official confirmed that it was his own (mis)understanding that Governor Abbott's Order

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[105] SJP Houston (@sjphtx), INSTAGRAM, https://www.instagram.com/p/CzKK3bXA5rH/ (last visited Aug. 26, 2024).
[106] SJP Houston (@sjphtx), INSTAGRAM, https://www.instagram.com/p/Cz0VIW9OY_G/ (last visited Aug. 26, 2024).
[107] SJP Houston (@sjphtx), INSTAGRAM, https://www.instagram.com/p/C2aylBkpAB3/ (last visited Aug. 26, 2024).
[108] SJP Houston (@sjphtx), INSTAGRAM, https://www.instagram.com/p/C6tUlanA0K3/ (last visited Aug. 26, 2024).
[109] SJP Houston (@sjphtx), INSTAGRAM, https://www.instagram.com/p/C6jd1MZggDO/ (last visited Aug. 26, 2024).
[110] SJP Houston (@sjphtx), INSTAGRAM, https://www.instagram.com/p/C6tHbzqg33v/ (last visited Aug. 26, 2024).
[111] *English Translation: Inn Ann,* LYRICS TRANSLATE, https://lyricstranslate.com/en/inn-ann-inn-ann.html (last visited Aug. 26, 2024).

forbade students from chanting "from the river to the sea, Palestine will be free."[112] To be clear, the Order does no such thing, because that would violate Plaintiffs' free-speech rights. Amici fully support both Plaintiffs' right to chant whichever antisemitic slogans they wish to chant and UTSA's right to label such antisemitic language properly. But one person's misunderstanding of an Order that is clear on its face does not therefore render that Order problematic.

It is worth noting that at the University of Texas, Plaintiffs and other student organizations have held dozens of demonstrations, many times over the last ten months. In the case of SJP-UTA, in particular, before the enforcement action, SJP-UTA had announced its specific intent (1) to follow "in the footsteps of other SJP's" including some, like Columbia SJP, that had engaged in rampant, violent, and threatening criminal activity, and (2) to "take back our university."[113] The University of Texas-Austin made the manifestly reasonable determination that, especially coming from a group that had already unrepentantly engaged in unlawful activity, this constituted openly disruptive intent and should not be allowed to proceed. Such a decision is entirely in line with the First Amendment, under which a university may establish reasonable restrictions on the time, place, and manner of speech or expressive activity, so long as its rules are viewpoint and content neutral, narrowly

[112] ECF No. 1 at 16–17.

[113] @RyanChandlerTV, X (formerly TWITTER) (Apr. 24, 2024, 1:02 PM), https://x.com/ryanchandlertv/status/1783179784060584198?s=46&t=sPyXONUErph9ASQGk2aLKw.

tailored to serve a significant government interest, and leave open ample alternatives. University of Texas-Austin acted to prevent reasonably foreseeable unlawful conduct and was well within its rights to do so, even if doing so also impacted some aspects of speech. In other instances, those in which the encampments were removed by state officials, the material disruption was obvious. In *Tinker*, the Supreme Court found that the Constitution allows schools to restrict even some aspects of speech if that speech will "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" or "inva[de] . . . the rights of others."[114]

A public university is not a public street, and the rules for what speech must be allowed on each are very different. The Supreme Court, in *Healy v. James*, cited *Tinker* to hold that university officials do not have to tolerate student activities that breach reasonable campus rules, interrupt the educational process, or otherwise interfere with other students' rights to receive an education.[115] This is especially true when the student speech is occurring in school-sponsored forums or is reasonably perceived as bearing the imprimatur of the institution (the latter point is particularly relevant in the context of official SJP chapters recognized by their respective universities). Additionally, the Supreme Court, in *Bethel v. Fraser* and *Hazelwood v. Kuhlmeier*, held that schools have even greater latitude to limit student expression if

[114] *Tinker*, 393 U.S. at 509.
[115] *Healy*, 408 U.S. at 189.

they can establish a legitimate pedagogical concern.[116] Ensuring that all students have a safe and harassment-free environment in which to learn is an overwhelmingly legitimate pedagogical concern.

Legally, schools do *not* have to wait for a disruption to occur; instead, schools can ban potentially disruptive expression if they can "reasonably forecast" that the speech in question would disrupt school discipline or operation or if it would violate the rights of other students. In *Melton v. Young*, for instance, the Sixth Circuit ruled for school officials who prohibited the wearing of a Confederate flag jacket because it was reasonable to assume that it would be disruptive in an environment of heightened racial tension.[117] An organization announcing its solidarity with—and intention to follow in—the unlawfully violent footsteps of its sister chapters is more than enough evidence for a school to develop the reasonable assumption that its own SJP chapter will engage in similarly unlawful conduct.

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[116] *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683–85 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271–72 (1988).
[117] *Melton v. Young*, 465 F.2d 1332, 1334–35 (6th Cir. 1972).

CONCLUSION

All three counts should be dismissed with prejudice for failure to state a claim.

As it relates to Counts I and II, GA 44 does not violate the First Amendment because it does not restrict *any* speech whatsoever. Nor does the Findings section of the Order chill any speech by labeling it antisemitic. Under the Order, Plaintiffs may continue engaging in antisemitic expressive activity, including the use of the phrase "from the river to the sea," and Texas may call it such. That is simply how the First Amendment works. Even if one administrator at UTSA has misread the Order, that misunderstanding is easily corrected.

Indeed, Plaintiffs may believe and state whatever they wish, however abhorrent, about Jews and about the Jewish State. All the Order does is use a standard and widely accepted definition of antisemitism to clearly delineate what would reasonably be defined as discriminatory toward Jewish people in a praxeological sense. The Order does not create any new protected class or enhance any punishment, nor does it regulate or restrict academic freedom. Much antisemitic hate speech is constitutionally protected, just as racist and sexist speech is, and this Order does not change that. Rather, it simply ensures that state and/or school authorities consider the federal government's well-accepted definition of antisemitism when considering and labeling *actions* as having been motivated by discriminatory intent.

Arguments that a carefully crafted policy could still lead to a slippery slope ending in a speech code are simply wrong, and, more importantly, such arguments are legally invalid.[118] Speech codes are constitutionally problematic; regulating discriminatory conduct is not. The way to defeat a slippery slope argument is to define a clear limiting principle or rather an obvious bright line. Here, the bright line is the First Amendment and the right to free speech that it secures. That is why the Order cites to existing State law, which Plaintiffs appear to agree is constitutional. The notion that state officials or university administrators will be somehow unable to differentiate between *acts* and *speech* is not an argument for why there should not be an accepted definition of antisemitism. If, for example, a school cannot distinguish between *acts* and *speech*, then the school presumably cannot distinguish between racist speech (protected) and racial harassment (not); between sexist speech (protected) and sexual harassment (not); or any other form of discrimination. If the state government or the university administration feels that it *can* distinguish between speech and acts in other contexts, but not in the context of antisemitic speech, then that is in itself profoundly and problematically antisemitic.

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[118] Any notion that regulating harassing speech will lead to more speech codes is belied by the current jurisprudence on hostile work environment claims and the multiplicity of courts that refuse to enforce most harassing conduct out of fear of creating a "general civility code." *See Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998); *see also* Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment-Avoiding A Collision*, 37 VILL. L. REV. 757 (1992); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

Dated: August 26, 2024

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of Court for the United States District Court for the Western District of Texas by using the CM/ECF system. I further certify that the foregoing document has been served on all counsel of record via the CM/ECF system.

Respectfully submitted,

/s/ Dallin B. Holt
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EXHIBIT B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

STUDENTS FOR JUSTICE IN PALESTINE, AT THE UNIVERSITY OF HOUSTON, ET AL., *Plaintiffs,* v. ABBOTT, ET AL., *Defendant.*	Civil Action No. 1:24-cv-00523 Hon. Judge Robert Pitman

[PROPOSED] ORDER GRANTING UNOPPOSED MOTION OF THE NATIONAL JEWISH ADVOCACY CENTER AND THE ISRAELI AMERICAN COALITION FOR ACTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURAIE* IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

The Court has reviewed The National Jewish Advocacy Center and The Israeli American Coalition for Action's Unopposed Motion for Leave to File a Brief as Amici Curiae in Support of the Defendants' Motion to Dismiss. The Motion is **GRANTED** and the Amici Brief attached to the Motion is **DEEMED FILED**.

Dated: _____, 2024

_____
District Judge Pitman
U.S. District Court for the Western District of Texas