FIRE
Foundation for Individual Rights and Expression

RE: H.R. 5894's anti-Semitism amendment is unconstitutional

Dear Representatives:

The Foundation for Individual Rights and Expression (FIRE; thefire.org) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to the freedoms of speech, expression, and conscience — the essential qualities of liberty. FIRE places a special emphasis on defending these rights on our nation's campuses because colleges and universities play a vital role in preserving free thought. Since 1999, FIRE has successfully defended expressive rights at colleges and universities across the country through public advocacy, targeted litigation, and *amicus curiae* filings.

We write today to urge you to vote "no" on H.R. 5894 because the anti-Semitism amendment (Amendment No. 114) is unconstitutional.

Background

Recent events on campuses nationwide have brought into focus the pressing need for colleges and universities to meet their legal and moral obligations to address anti-Semitic discrimination and simultaneously protect their communities' freedom of expression.

Following the October 7 Hamas attacks and Israel's response, these dual obligations have been put to the test as college students, faculty, and protesters, as well as others, have expressed opinions ranging from support for Israel, to concern for Palestinian civilians caught in the crossfire, and even, in some cases, to celebrations of Hamas's atrocities. FIRE is eager to help Congress and institutions across the nation navigate this contentious situation.

The First Amendment protects a vast majority of expression regarding the Israel-Gaza war.

Importantly, the First Amendment protects most of the protests, demonstrations, and statements related to the conflict. No matter how offensive the speech may be to some, many, or even most Americans, the First Amendment protects all viewpoints equally.

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Statements supportive of Hamas or against the state of Israel, while heinous to many, do not intrinsically constitute material support for terrorism, incitement, discriminatory harassment, or true threats. If speech falls outside those narrow exceptions to the First Amendment as defined by the Supreme Court, government actors — including public universities — cannot burden, censor, or punish it. Private universities that promise students and faculty freedom of expression, as do the majority of private institutions nationwide, are likewise bound to honor their commitments to free speech.

Congress must avoid the constitutional pitfall of defining "anti-Semitism."

Amendment No. 114 prohibits an institution of higher education from receiving any federal funds allocated in the federal budget if it "authorizes, facilitates, provides funding for, or otherwise supports any event promoting antisemitism" as defined by the International Holocaust Remembrance Alliance. This approach is unconstitutional.

The IHRA defines "antisemitism" as:

> a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.

To be clear, FIRE has no objection to the use of the definition for its originally intended purpose: as a tool to *measure* anti-Semitism. But it is too vague and overbroad to constitutionally serve as a basis for whether campus administrators must forbid expression. What constitutes a "certain perception of Jews" sufficient to qualify is anyone's guess. This vagueness — and the high stakes for institutions if they allow expression forbidden under the Act — will predictably motivate colleges and universities to bar a wide range of protected speech.

If Congress enacts this provision into law, colleges and universities will be highly motivated to stamp out speech on one side of a hotly debated issue. The policies that institutions will adopt to avoid losing federal dollars will be viewpoint-based prior restraints — and they will likely be draconian. These policies will chill constitutionally protected speech as students and professors will rationally choose to alter what they say (but, importantly, not necessarily what they think) to avoid harsh penalties.

The "contemporary examples of antisemitism in public life" that accompany the IHRA definition only compound the chilling effect, as many of them also encompass protected speech. Two egregious examples include "[a]pplying double standards by requiring of [Israel] a behavior not expected or demanded of any other democratic nation" and "[d]rawing comparisons of contemporary Israeli policy to that of the Nazis."
Applying double standards may be worthy of criticism, but the First Amendment protects speakers from liability for hypocrisy. And to be perfectly clear, the First Amendment allows comparing every country in the world's policies to those of Nazis. In fact, many prominent figures across the political spectrum have compared American policies to those of Nazi Germany. Even the United States Holocaust Memorial Museum's Holocaust Encyclopedia compares the United States to Nazi Germany on its website, noting "discriminatory and segregationist practices in Germany and the United States were similar" during the 1920s through the 1940s. All of these comparisons are constitutionally protected.

While the IHRA definition has a savings clause that "criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic," that ineffective caveat does not square with the provision quoted above, given that the policies of numerous other nations have been compared to those of Nazi Germany. The overbreadth and vagueness of the definition will lead to unconstitutional enforcement against protected speech.

FIRE is not alone in our concerns that the IHRA working definition's use to regulate campus conduct presents a serious threat to free speech. For example, Kenneth Stern — the primary author of the IHRA definition — opposes legislation requiring its use because of the likelihood it would chill campus speech. Many First Amendment scholars including Erwin Chemerinsky, Howard Gillman, and Eugene Volokh, as well as other civil liberties organizations including the American Civil Liberties Union, have also raised First Amendment concerns about the definition's adoption.

The government may not require institutions to engage in viewpoint discrimination as a condition of receiving federal dollars.

On the House floor, the Amendment's sponsor argued "the U.S. Constitution grants people the right to say what they want, but that doesn't mean that the taxpayers should be paying for it." But the First Amendment forbids universities from engaging in the viewpoint discrimination that the legislation would require.

For over six decades, the Supreme Court has made clear the First Amendment applies in full force at public colleges and institutions and prohibits them from

engaging in viewpoint discrimination. In *Healy v. James*, 408 U.S. 169 (1972), for example, the Court held that public institutions violate the First Amendment when they deny student groups recognition on account of the views they might espouse. If the government could selectively ban disfavored views from campus, free speech on college campuses would be illusory.

In *Widmar v. Vincent*, 545 U.S. 263 (1981), the Supreme Court established that public institutions of higher education violate the First Amendment when they deny student organizations resources based on the content of the student organizations' expression. *Widmar* involved a public university denying an evangelical Christian student organization access to room reservations at the university for their group meetings. Congress should take note that if the government can deny resources based on viewpoint, that power could also be wielded against organizations with views they share.

The Supreme Court addressed the unconstitutionality of making content- and viewpoint- discriminatory funding decisions again when it decided *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). There, the Supreme Court held that student activity fees must be distributed to student organizations in a content- and viewpoint-neutral manner. The Supreme Court concluded that student activity fees — which were collected from students and generally made available to student organizations — could not be denied to a student group that sought to publish a Christian magazine because to do so would amount to unconstitutional viewpoint-based discrimination.

Taken as a whole, the Supreme Court jurisprudence makes it clear that Amendment No. 114's viewpoint-based restrictions on disbursement of federal dollars cannot and will not survive constitutional challenge.

How Congress can help.

Rather than try to define "antisemitism," Congress should help institutions consistently recognize and apply the distinctions between protected expression, categorically unprotected speech, and non-expressive conduct that lies beyond the First Amendment's protection.

Although not ideally suited for an appropriations bill, there are three legislative solutions that will both protect First Amendment rights and provide the Department of Education and institutions the necessary tools to best address anti-Semitic and other forms of discriminatory harassment.

Confirming that Title VI prohibits discrimination based on ethnic stereotypes.

Federal law currently prohibits institutions of higher education from discriminating on the basis of religion during the admissions process. However, once admitted, federal law does not protect students from discriminatory harassment based on religion.

Thankfully, since 2004, the Department of Education of each successive administration has attempted to remedy this shortfall by stating the Civil Rights Act of 1964 protects students from discriminatory harassment based on "their actual or perceived: (i) shared ancestry or ethnic characteristics; or (ii) citizenship or residency in a country with a dominant religion or distinct religious identity." As such, while discrimination based on religious practice is not barred by federal law, harassment based on a Jewish student's "real or perceived . . . ancestry" is prohibited.

The guidance is helpful, and Congress should codify it into law. However, it does not assist every religious student deserving of protection. More is needed.

Prohibiting harassment on the basis of "religion."

For Congress to properly address campus anti-Semitism — and other forms of anti-religious discrimination — lawmakers must also make it unlawful for institutions of higher education to ignore allegations of student-on-student harassment on the basis of religion. Of course, such an expansion would require an exemption excluding religious institutions who have a First Amendment right to exclude on the basis of religion.

This change would ensure that students of all faiths may practice their religions openly on campus without fear that doing so will subject them to discriminatory harassment.

Codifying the Supreme Court's speech-protective definition of discriminatory harassment.

Colleges and universities have both a legal and a moral duty to effectively respond to all accusations of discriminatory harassment that, if true, would be actionable. However, institutions must accomplish this goal without trampling student and faculty First Amendment rights. Institutions would be required to meet this dual mandate effectively if Congress statutorily defined when conduct constitutes unlawful discriminatory harassment based on the Supreme Court's 1999 ruling in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

In *Davis*, the Court defined student-on-student harassment as targeted, discriminatory conduct that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience,

that the victim-students are effectively denied equal access to an institution's resources and opportunities." This standard ensures that schools address discriminatory conduct without infringing on the First Amendment. Using a lesser standard, which the Department of Education has attempted previously, will no doubt sweep in broad swaths of protected expression and expose institutions to costly litigation.

By codifying the Supreme Court's longstanding standard into federal law, Congress can require colleges and universities to effectively combat unlawful anti-Semitic harassment in a way that will survive constitutional scrutiny.

Conclusion

Amendment No. 114's method of addressing the real threat of anti-Semitism on campus is unconstitutional, but there are effective alternatives that would pass constitutional muster. FIRE's three proposals discussed above are not radical changes. Instead, they are practical legislative solutions that build upon and strengthen current practice and law that Congress can employ to effectively address anti-Semitic discriminatory harassment.

So long as H.R. 5894 includes the unconstitutional provision on anti-Semitism, it is vulnerable to invalidation under the First Amendment and the House must reject it.

If you are interested in discussing our suggestions or have any questions regarding free speech on campus, please feel free to contact us at (215) 717-3473 or at greg.gonzalez@thefire.org.

Respectfully submitted,

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