AMERICAN CIVIL LIBERTIES UNION
Wisconsin

207 East Buffalo Street, Suite 325
Milwaukee, WI 53202
(414) 272-4032
aclu-wi.org

Comments in Opposition to Assembly Bill 446/Senate Bill 445

For over 100 years, the ACLU and its state affiliates have defended the First Amendment as a cornerstone of our democracy, protecting every person's right to speak out by ensuring the government does not use times of crisis – or labels like hate speech – as an excuse to censor views it doesn't like.[1] The U.S. Supreme Court has held that political speech is "at the core of what the First Amendment is designed to protect."[2] **Ultimately, the ability to criticize government actions is the most fundamental protection provided by the First Amendment – and this includes the actions of foreign governments**.

AB-446/SB-445 directs all state and local government entities to consider the International Holocaust Remembrance Alliance (IHRA) definition of antisemitism, including its examples, when evaluating evidence of discriminatory intent for any law, ordinance, or policy prohibiting discrimination based on race, religion, color, or national origin and determining whether a hate crime enhancer is applied in a criminal charging decision.

Federal law already prohibits discrimination – including antisemitic discrimination – on the basis of race, color, or national origin in programs receiving federal financial assistance,[3] employment,[4] public places of accommodation or amusement,[5] and housing.[6] In the education context, for example, the federal government itself has interpreted Title VI to prohibit harassment or discrimination against Jews, Hindus, Muslims, and Sikhs as well as others when that discrimination is based on the group's actual or perceived shared ancestry or ethnic characteristics.[7]

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[1] *See, e.g., DeJonge v. Oregon*, 299 U.S. 353 (1937) (holding a labor organizer's Communist affiliation was not sufficient grounds for restricting his rights to free speech and assembly); *Kunz v. New York*, 340 U.S. 290 (1951) (invalidating an ordinance requiring a permit to hold public worship meetings on the streets); *Watkins v. U.S.*, 354 U.S. 178 (1957) (reversing a labor leader's conviction for refusing to answer questions from the House UnAmerican Activities Committee); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (striking down a Cold War-era law requiring public school teachers to sign a loyalty oath); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding the government can only penalize direct incitement to imminent lawless action); *Tinker v. Des Moines* (1969) (holding that a prohibition against wearing armbands in public school, as a form of symbolic protest, violated students' freedom of speech); *Cohen v. California*, 403 U.S. 15 (1971) (convicting an anti-war protester for breach of the peace for wearing a jacket emblazoned with "Fuck the Draft" violated his freedom of expression); *Nat'l Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977) (holding strict procedural safeguards, including immediate appellate review, are required when prior restraint of speech is asserted); *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that burning the American flag during a protest rally was protected expression under the First Amendment).

[2] *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (*quoting Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality opinion)).

[3] Title VI, 42 U.S.C. § 2000d et seq.

[4] Title VII, 42 U.S.C. § 2000d et seq.

[5] Title II, 42 U.S.C. § 2000d et seq.

[6] 42 U.S.C. § 3601 et seq.

[7] Know Your Rights: Title VI and Religion, U.S. Department of Education (2017), available at https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201701-religious-disc.pdf.

State law also prohibits discrimination based on race, religion, color, national origin, and ancestry.[8] Wisconsin's hate crime law increases the maximum penalty for a crime in which the victim was intentionally selected because of the actor's belief or perception regarding the victim's race, religion, color, disability, sexual orientation, national origin, or ancestry.[9] In 1993, a unanimous U.S. Supreme Court upheld the constitutionality of Wisconsin's hate crime statute under the First Amendment;[10] the NAACP Legal Defense Fund, American Jewish Committee, and ACLU were among the organizations filing amicus briefs in support of the law.[11]

Also under Wisconsin law, it is a Class I felony to intentionally damage or graffiti on any church, synagogue or other building, structure or place primarily used for religious worship or another religious purpose, any school, educational facility or community center publicly identified as associated with a group of persons of a particular race, religion, color, disability, sexual orientation, national origin or ancestry or by an institution of any such group.[12]

Antisemitic discrimination is abhorrent; it's destructive to both individuals and communities. The IHRA definition and its non-exhaustive list of examples,[13] however, are overbroad by equating protected speech with unprotected discrimination. Criticism of the Israeli government and its policies is political speech, squarely protected by the First Amendment.

The constitutional concerns with this definition were highlighted in *Students for Justice in Palestine v. Abbott*, where the U.S. District Court for the Western District of Texas found that an executive order directing all Texas higher education institutions to update and enforce campus free speech policies to address antisemitic speech and apply the IHRA definition of antisemitism likely violates the First Amendment. The judge found that "the incorporation of [the IHRA definition of antisemitism] is viewpoint discrimination" because it makes the utterance of specific content punishable. Speech that is critical of Israel or any other government cannot, alone, constitute harassment.

The ability to criticize governments and their policies is a critical component of our democracy. Promoting discussion and debate on issues of public interest are critical for "the bringing about of political and social changes desired by the people."[14] Likewise, the principles of academic freedom require the educational institutions implicated by this legislation to safeguard protected speech and political debate in order to help students pursue knowledge.

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[8] Wis. Stat. §§ 111.31-111.395 (prohibiting discrimination in employment); Wis. Stat. § 106.52 (prohibiting discrimination in places of public accommodation); Wis. Stat. § 106.50 (prohibiting housing discrimination); Wis. Stat. §§ 38.23, 106.58, 118.13 (prohibiting discrimination in education).

[9] Wis. Stat. § 939.645.

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

[11] The ACLU has historically opposed legislation that would punish the mere expression of thoughts, opinions or beliefs, including expressions of bigotry. However, penalty enhancement laws—if properly drawn—do not punish protected speech or associations; rather, they reflect the heightened seriousness with which society treats criminal acts that also constitute invidious discrimination and are intended to or have the effect of depriving persons of legal rights or the opportunity to participate in their community's political or social life simply because of their race, religion, gender, national origin, sexual orientation, disability or other group characteristic.

[12] Wis. Stat. § 943.012.

[13] Working Definition of Antisemitism, International Holocaust Remembrance Alliance, https://holocaustremembrance.com/resources/working-definition-antisemitism.

[14] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1997) (quoting *Buckley v. Valeo,* 424 U.S. 1, 14 (1976)).

A lead author of the original IHRA definition, Kenneth Stern, has repeatedly opposed its legal enforcement, stating that it was never meant to be used as a tool for suppressing political speech.[15]

If enacted, AB-446/SB-445 could result in governmental entities suppressing a wide variety of speech critical of Israel or in support of Palestinian rights, even where such speech is protected and does not qualify as harassment. Individuals would be deterred from speaking or organizing on these issues if they have reason to believe the government will actively investigate such expression in connection with harassment complaints and investigations or use statements critical of the Israeli government as the basis for a hate crime enhancer.

Indeed, many complaints and lawsuits have been filed or threatened alleging colleges have violated Title VI merely by condoning Palestinian rights groups, events, and advocacy.[16] A pair of Executive Orders and statements issued by President Trump[17] escalated the investigation and enforcement priorities of the administration, including mandating a comprehensive review of higher education contracts and grants:

> All Federal Funding will STOP for any College, School, or University that allows illegal protests. Agitators will be imprisoned/or permanently sent back to the country from which they came. American students will be permanently expelled or, depending on the crime, arrested. NO MASKS! Thank you for your attention to this matter.[18]

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[15] Written Testimony of Kenneth S. Stern, United States House of Representatives Committee on the Judiciary (Nov. 7, 2017), https://docs.house.gov/meetings/ju/ju00/20171107/106610/hhrg-115-ju00-wstate-sternk-20171107.pdf; Kenneth Stern, "I drafted the definition of antisemitism. Rightwing Jews are weaponizing it," The Guardian (Dec. 13, 2019), https://www.theguardian.com/commentisfree/2019/dec/13/antisemitism-executive-order-trump-chilling-effect; Kenneth Stern, "S.C. antisemitism bill isn't needed," The Post and Courier (Sept. 14, 2020), https://www.postandcourier.com/s-c-anti-semitism-bill-isnt-needed/article_f17d607e-29e5-11e7-b4a7-a35035f3dc38.html; Kenneth S. Stern, "A Bad Deal: By Adopting the IHRA Definition of Antisemitism, Universities are Sacrificing Academic Freedom," Knight First Amendment Institute (Sept. 5, 2025), https://knightcolumbia.org/content/a-bad-deal-why-using-the-ihra-definition-of-antisemitism-on-campus-is-incompatible-with-academic-freedom-and-students-right-to-open-inquiry.

[16] For example, in September 2023, the pro-Israel group Santa Fe Middle East Watch claimed that the University of New Mexico's anthropology department would violate the New Mexico Governor's executive order using this same definition of antisemitism if they hosted Mohammed El-Kurd, a Palestinian poet and writer currently serving as the Nation's Palestine correspondent. *See also* Jordan Howell, "Free Speech Promises be Damned, Brandeis Bans Students for Justice in Palestine," Foundation for Individual Rights and Expression (Nov. 7, 2023), https://www.thefire.org/news/free-speech-promises-be-damned-brandeis-bans-students-justicepalestine.

[17] Executive Order No. 14161, "Protecting the United States from Foreign Terrorists and Other National Security and Public Safety Threats" (Jan. 20, 2025); Executive Order No. 14188, "Executive Order on Additional Measures to Combat Anti-Semitism" (Jan. 29, 2025) (incorporating Executive Order No. 13899, "Combating Anti-Semitism," which directed all executive departments to consider the IHRA definition when enforcing Title VI).

[18] President Donald J. Trump, Truth Social Post (March 4, 2025), https://truthsocial.com/@realDonaldTrump/posts/114104167452161158.

As U.S. District Court Judge Bill Young recently described in an opinion finding non-citizens lawfully present in the United States possess the same free speech rights as citizens ("The Court answers this Constitutional question unequivocally 'yes, they do'"):

> The Plaintiffs have alleged, and here have proved, a discrete practice of targeting pro-Palestine and anti-Israel speech, which arose from a kind of intentional ratcheting-up of the Executive Orders' instruction to target antisemitic harassment and violence, while referencing a definition of antisemitism that includes protected speech.[19]

Because AB-446/SB-445 incorporates the IHRA definition that includes protected speech, it cannot be rescued by the First Amendment savings clause. The clause states: "Nothing in this section may be construed to diminish or infringe upon any right protected under the first amendment to the U.S. Constitution or to conflict with federal or state antidiscrimination laws." Although the ACLU of Wisconsin appreciates the sentiment expressed by this provision, it cannot override the bill's plain terms, which incorporate the constitutionally overbroad IHRA definition and its examples into state antidiscrimination law. The law still creates a chilling effect on speech because of the potential threat of investigation or criminalization. The presence of this clause appears to signify that the bill authors acknowledge the proposed statute could be construed to suppress speech.

The speech we censor today will set the stage for what we censor tomorrow. As Justice Kennedy noted in a concurrence in the case *Matal v. Tam*, "a law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society."[20]

[19] https://storage.courtlistener.com/recap/gov.uscourts.mad.282460/gov.uscourts.mad.282460.261.0_1.pdf.
[20] *Matal v. Tam*, 582 U.S. 218, 253 (2017) (Kennedy, J., concurring).