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**ON THE OUTER REACHES OF THE MARKETPLACE OF
IDEAS: THE WEAPONIZATION OF TITLE VI AGAINST
PALESTINIAN COLLEGE ACTIVISTS**

*Gavriella Fried**

“[I]t’s an imbalance of speech, rights and resources that justifies one side’s arguments and not the other’s ‘When we talk about freedom of speech—not everybody’s freedom of speech is equally accessible because we don’t all come from equal places.’”

- Rabab Abdulhadi, Professor of Race and Resistance Studies, San Francisco State University¹

On U.S college campuses, Palestinian rights activists who are critical of Israel risk legal consequences. Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color, or national origin in any program receiving federal funds. Over the past two decades, at least eighteen Title VI complaints have been filed against U.S. colleges and universities, alleging that Palestinian rights activists’ political expression is a form of anti-Semitism. In December 2019, President Trump promulgated Executive Order 13,899, which formally extended Title VI protections to Jews and directed enforcement agencies to investigate allegations of anti-

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¹ Abigail Hauslohner & Susan Svrluga, *Free Speech or Hate Speech? Campus Debates Over Victimhood Put Universities in a Bind*, THE WASH. POST (Oct. 20, 2017) (quoting Rabab Abdulhadi), https://www.washingtonpost.com/national/free-speech-or-hate-speech-campus-debates-over-victimhood-put-university-officials-in-a-bind/2017/10/20/7f610dfe-aa07-11e7-92d1-58c702d2d975_story.html?utm_term=.8277ecacadc.

Semitism using guidance that includes “criticism of the state of Israel” as a form of anti-Semitic discrimination. This Note traces the history of Palestinian student activism, distinguishes anti-Semitism from criticism of Israel, and explores the tension between Title VI and campus free speech protections. Analyzing the ramifications of the executive order on the Title VI analysis, this Note argues that the executive order must be rescinded to deter the use of Title VI as a means of restricting campus free speech.

INTRODUCTION

Since the founding of its first chapter at the University of California, Berkeley, in 2001,² Students for Justice in Palestine (“SJP”) has developed into one of the most recognizable names in Palestinian rights activism on American college and university campuses.³ When founded, SJP marked a new form of Palestinian organizing, centered on Palestinian liberation as an “ideological principle” intimately connected to other anti-racist and anti-imperialist movements.⁴ SJP “welcome[d] any student wanting to work for justice in Palestine,” no matter their ethnic or national background.⁵ Today, there are approximately 200 SJP chapters on U.S. college campuses.⁶ SJP chapters participate in a broad range of campus advocacy, such as an Israeli Apartheid Week that highlights historic and contemporary violations of Palestinian human rights by

² SJP at UC Berkeley, *Interview with Students for Justice in Palestine at UC Berkeley*, JADALIYYA (Aug. 3, 2016), [hereinafter *Interview*, JADALIYYA] <https://www.jadaliyya.com/Details/33447/Interview-with-Students-for-Justice-in-Palestine-at-UC-Berkeley>.

³ See Rahim Kurwa & Omar Zahzah, *Resolving to Divest: The History of SJP at UCLA’s Divestment Campaign*, JADALIYYA (July 29, 2016), <https://www.jadaliyya.com/Details/33437> (historicizing the Palestinian solidarity movement on American college and university campuses); see discussion *infra* Part I, Section A.

⁴ Hatem Bazian, *Israel’s Losing Battle: Palestine Advocacy in the University*, AL-SHABAKA: THE PALESTINIAN POLICY NETWORK (Apr. 21, 2020), <https://al-shabaka.org/commentaries/israels-losing-battle-palestine-advocacy-in-the-university>.

⁵ *Id.*

⁶ *About Us*, NATIONAL STUDENTS FOR JUSTICE IN PALESTINE, <https://www.nationalsjp.org/about> (last visited Sept. 24, 2021).

the Israeli government, educational teach-ins, and cultural events.⁷ SJP comprises a confederated form of “vast and diverse” chapters and partners united around “core values.”⁸ Historically, SJP chapters have united primarily around Palestinian civil society’s call for the political demands of Boycott, Divestment, and Sanctions (“BDS”).⁹

BDS is a Palestinian-led organizing strategy modelled on the South African anti-apartheid movement.¹⁰ Developed in the early 2000s by a broad coalition of Palestinian civil society organizations, BDS has since been adopted as an organizing strategy by student groups such as SJP, justice movements, religious communities, cultural and academic institutions, and other groups world-wide.¹¹ BDS leverages grassroots economic boycotts of Israeli companies and other companies that violate Palestinian human rights, as well as divestment campaigns pushing for institutions such as universities, religious organizations, and banks to withdraw their investments in Israeli companies.¹² The ultimate goal of BDS is for international governmental leadership to impose sanctions on Israel

⁷ See, e.g., *Interview*, JADALIYYA, *supra* note 2 (asked about the University of California, Berkeley SJP chapter and its recent activities, a student representative reports, “[o]ur activities usually fall in three main categories: advocacy for BDS (Boycott, Divestment, and Sanctions against the Israeli occupation), direct actions, and educational events [W]e started off 2015 with a strong Israeli Apartheid Week that included a mock eviction notice action as well as a direct action on campus involving a mock apartheid wall and a mock checkpoint acted out by members and friends of the club. In the fall, we organized a campus day of action in solidarity with Palestine and put on multiple cultural events, including hosting [a] poet SJP has also worked on educating the campus community on the situation in Palestine today by publishing open editorials, collecting data and editing informational flyers, organizing lectures and public events, and tabling.”).

⁸ NATIONAL STUDENTS FOR JUSTICE IN PALESTINE, *supra* note 6.

⁹ *Points of Unity*, NATIONAL STUDENTS FOR JUSTICE IN PALESTINE (June 8, 2020), <https://web.archive.org/web/20200608063518/https://www.national.sjp.org/points-of-unity.html>; *but see* NATIONAL STUDENTS FOR JUSTICE IN PALESTINE, *supra* note 6 (explaining that “National SJP is developing Shared Principles and Values for the student Palestine solidarity network,” without specifically referencing BDS).

¹⁰ PALESTINIAN BDS NATIONAL COMMITTEE, *What is BDS?* BDS, <https://www.bdsmovement.net/what-is-bds>.

¹¹ *Id.*

¹² *Id.*

for its ongoing abuses of Palestinian human rights.¹³ The BDS movement is committed to these tactics until Israel ends its occupation of the West Bank and Gaza, grants Palestinian residents in Israel full citizenship,¹⁴ and respects the Palestinian right of return to ancestral homes seized during the founding of Israel in 1948.¹⁵

Over the past four decades, as BDS and Palestinian rights activism has gained coalitional support and momentum in the U.S.,¹⁶ the backlash against Palestinian rights activists¹⁷ has grown alongside it.¹⁸ One of the primary tools used against Palestinian rights activists on college campuses is Title VI of the Civil Rights Act,¹⁹ which prohibits discrimination against individuals on the basis of their race, color, or national origin in any program that receives federal funds.²⁰ Since 2003, at least eighteen Title VI complaints have been filed against American colleges and universities for allowing students to engage in Palestinian rights

¹³ *Id.*

¹⁴ See *infra* Part I, Section A, for a fuller discussion of the occupation of the West Bank and Gaza and Palestinian disenfranchisement.

¹⁵ See Zack Beauchamp, *What is the Nakba?*, VOX (May 14, 2018, 10:20 AM), <https://www.vox.com/2018/11/20/18080030/israel-palestine-nakba>. The *Nakba*, “catastrophe” in Arabic, is the term that Palestinians and Palestinian rights activists use to refer to the massive Palestinian refugee crisis that corresponded with the 1948 founding of the state of Israel.

¹⁶ See, e.g., Rabab Abdulhadi, *Activism and Exile: Palestinianness and the Politics of Solidarity*, in LOCAL ACTIONS: CULTURAL ACTIVISM, POWER, AND PUBLIC LIFE IN AMERICA 231, 239–43 (Melissa Checker & Maggie Fishman eds., 2004).

¹⁷ I use the term “Palestinian rights activists” to refer to the broad coalition of activists, and particularly student activists, who participate in Palestinian human rights advocacy. Not all Palestinian rights activists are Palestinian, see discussion *infra* Part I, but many are Palestinian or other Arab or Muslim students. See, e.g., Yaman Salahi & Nasrina Bargzie, *Talking Israel and Palestine on Campus: How the U.S. Department of Education Can Uphold the Civil Rights Act and the First Amendment*, 12 HASTINGS RACE AND POVERTY L.J. 155, 169 (2015).

¹⁸ See discussion *infra* Part II.

¹⁹ *Federal Crackdown on Campus Palestine Activism: Title VI Attacks*, PALESTINE LEGAL (Aug. 12, 2020), [hereinafter PALESTINE LEGAL, *Federal Crackdown*], <https://palestinelegal.org/news/2020/8/12/title-vi>; see also discussion *infra* Part II.

²⁰ 42 U.S.C. §§ 2000d–2000d-7.

activism.²¹ These complaints allege that Palestinian rights activism, which critiques Israeli policy and practices, is a form of anti-Semitism.²² This form of anti-Semitism, the complaints argue, is actionable under Title VI—which, on its face, does not provide relief for religious discrimination—because it is “comingled” with criticism on the basis of race, nationality, or color.²³ Functionally, the complaints conflate anti-Semitism with criticism of the state of Israel; stated differently, the complaints conflate Jewish identity

²¹ See *The Palestine Exception to Free Speech: A Movement Under Attack in the US*, PALESTINE LEGAL & CTR. FOR CONST. RTS. 36–38 (2015) <https://ccrjustice.org/sites/default/files/attach/2015/09/Palestine%20Exception%20Report%20Final.pdf> (explaining that six Title VI complaints had been filed as of 2015) (last visited Nov. 21, 2021); *2019 Year in Review: Movement for Palestinian rights thrives despite censorship*, PALESTINE LEGAL 5–10 (2019) [hereinafter PALESTINE LEGAL, *2019 Year in Review*] https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/5e4eef587e80e62e313eef23/1582231414630/PalLegal_EoYReport_2019.pdf (explaining that eight Title VI complaints were filed in 2019) (last visited Sept. 30, 2021); *2020 Year in Review: The Movement Will Not Be Canceled*, PALESTINE LEGAL [hereinafter PALESTINE LEGAL, *2020 Year in Review*] https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/6064bab349c5984a63275a53/1617214133195/PalLegal_EOYREPORT_2020_digital.pdf (explaining that four Title VI complaints were filed in 2020) (last visited Sept. 30, 2021).

²² See, e.g., Aaron Bandler, *Pro-Israel Students File Complaint Against NYU*, JEWISH JOURNAL (Apr. 24, 2019), <https://jewishjournal.com/news/united-states/297574/pro-israel-students-file-complaint-against-nyu/> (characterizing New York University’s SJP chapter’s anti-Zionist political activities as anti-Semitic); see also *infra* Part II, Section B.

²³ See *infra* Part II (discussing Title VI complaints against Palestinian student activists pre-Executive Order 13,899). *But see infra* Part III (discussing Title VI complaints against Palestinian student activists post-Executive Order 13,899); see also *BREAKING: Lawfare Project Files OCR Complaint Against Columbia University on Behalf of Jewish-Israeli Student, First Since Issuance of President’s Executive Order on Combating Anti-Semitism*, THE LAWFARE PROJECT (Dec. 19, 2019), [hereinafter THE LAWFARE PROJECT, *Columbia University OCR Complaint*] <https://www.thelawfareproject.org/releases/2019/12/19/breaking-lawfare-project-files-ocr-complaint-against-columbia-university-on-behalf-of-jewish-israeli-student-first-since-issuance-of-presidents-executive-order-on-combating-anti-semitism> (quoting Brooke Goldstein, Executive Director of The Lawfare Project, as stating, “President Trump’s recent Executive Order . . . includes Jewish people among those protected under Title VI of the 1964 Civil Rights Act.”).

with Israeli identity.²⁴ To date, these complaints have either been dismissed or quietly resolved,²⁵ but they have the effect of garnering major press coverage and chilling student political speech on college campuses.²⁶

In December 2019, President Trump passed Executive Order 13,899, which formally extends Title VI protections to Jews “when the discrimination is [also] based on an individual’s race, color, or national origin.”²⁷ The order directs Title VI’s enforcing agencies to consider a definition of anti-Semitism promulgated by the International Holocaust Remembrance Alliance (“IHRA”), a Holocaust education organization, which suggests that “targeting of the state of Israel, conceived as a Jewish collectivity,”²⁸ is a possible form of anti-Semitism.²⁹ Palestinian advocates worry that the Executive Order will encourage a robust implementation of Title VI against Palestinian rights activists.³⁰ A wave of Title VI complaints, even if dismissed by the OCR, could effectively silence political speech that has been repeatedly recognized by courts and Title VI investigations as protected speech under the First Amendment.³¹

This Note analyzes the weaponization of Title VI against the free speech rights of Palestinian rights activists on American college campuses, with a particular focus on the actual and potential ramifications of Executive Order 13,899. Part I of this Note provides brief histories of social movements for Palestinian liberation and distinguishes anti-Semitism from criticism of Israel. Part II introduces Title VI mechanisms and the tension between Title VI and campus free speech protections before covering the ways in which Title VI has been wielded against Palestinian campus

²⁴ See discussion *infra* Part I, Section B.

²⁵ See PALESTINE LEGAL, *Federal Crackdown*, *supra* note 19.

²⁶ See Natasha Roth-Rowland, *Waging Lawfare*, JEWISH CURRENTS (June 8, 2020), <https://jewishcurrents.org/waging-lawfare/>.

²⁷ Exec. Order No. 13,899, 84 Fed. Reg. 68,779 (Dec. 11, 2019).

²⁸ *Working Definition of Antisemitism*, INTERNATIONAL HOLOCAUST REMEMBRANCE ALLIANCE, <https://www.holocaustremembrance.com/working-definition-antisemitism> (last visited Oct. 1, 2021).

²⁹ *Id.*

³⁰ See, e.g., Roth-Rowland, *supra* note 26.

³¹ See, e.g., *id.* (discussing present and potential legal conflict between pro-Israel and pro-Palestine groups).

activists. Part III provides a close reading of Executive Order 13,899 and discusses its potential to influence the Title VI complaint analysis. Part IV proposes that the Executive Order should be rescinded because it encourages the weaponization of Title VI investigations against Palestinian campus activists. In doing so, Executive Order 13,899 reifies the historically anti-Semitic trope linking Judaism, a religion, to race and nationality, and threatens free speech rights on campus more broadly.

I. HISTORIES OF RESISTANCE: THE STRUGGLES FOR PALESTINIAN LIBERATION AND A FULL ARTICULATION OF JEWISH IDENTITY

A. *The Multi-Coalitional Struggle for Palestinian Liberation*

Following the 1967 Six Day War, Palestinian solidarity began taking root in college and university campuses in the United States.³² During the war, Israel annexed the Gaza Strip and the West Bank—home to an estimated one million Palestinians³³—and imposed a system of military governance on the annexed territories.³⁴ Overseen by the Israeli Civil Administration, the Occupied Palestinian Territories³⁵ and their Palestinian residents were not incorporated into the Israeli political system and their daily lives were characterized by military checkpoints, extensive identification requirements, heavy taxation on the territories' imports and exports, and broad economic and political

³² See Abdulhadi, *supra* note 16, at 236.

³³ *Six-Day War*, HIST. (Aug. 21, 2018), <https://www.history.com/topics/middle-east/six-day-war>.

³⁴ See Aden Tedla, *Palestinians wage nonviolent campaign during the First Intifada, 1987-1988*, GLOB. NONVIOLENT ACTION DATABASE, <https://nvdatabase.swarthmore.edu/content/palestinians-wage-nonviolent-campaign-during-first-intifada-1987-1988> (last updated Aug. 17, 2011).

³⁵ The term “Occupied Palestinian Territories” refers to the West Bank, East Jerusalem, and the Gaza Strip. See *Key of Terms Pertaining to Israel/Palestine*, U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFFAIRS ii <https://www2.ohchr.org/english/bodies/cerd/docs/ngos/jointngo3.pdf> (last visited Nov. 21, 2021).

disenfranchisement.³⁶ Many Palestinians left the region and immigrated to the United States, where they established close-knit communities, grappled with the post-New Deal decline in economic opportunity, and encountered political hostility from the overwhelmingly pro-Israel American middle class.³⁷ This new class of refugees was politicized by the dispossession of their homes and further agitated by what was, at best, American indifference to their experiences.³⁸

Palestinian students, in particular, found a home in the peace, justice, and student movements that were mobilizing for a wide array of anti-imperialist and anti-racist causes.³⁹ The Organization of Arab Students (“OAS”) and the General Union of Palestinian Students (“GUPS”), both founded in the 1960s by Arab immigrants and refugees, were early manifestations of pan-Arabic identity and anti-imperialist solidarity organizing on U.S. college campuses.⁴⁰ Some anti-racist and anti-imperialist groups in the U.S.—particularly Black liberation groups, such as the Black Panthers—began explicitly aligning themselves with Palestinian civil society movements.⁴¹ In the following decades, through the 1980s, student support for Palestinian causes grew, particularly among other groups of color.⁴² The anti-apartheid movement of the 1980s created a strategic opportunity for Palestinian students to align themselves with other groups of color organizing for South African liberation and to draw connections between the shared dynamics of South African apartheid and Israeli territorial occupation.⁴³ Mutual solidarity also formed between Palestinian activist groups and other

³⁶ *See id.*

³⁷ *See* Abdulhadi, *supra* note 16, at 234–35. *See infra* Part I, Subsection B (discussing information on broad socio-cultural allegiance to Israel in midcentury America).

³⁸ *See* Abdulhadi, *supra* note 16, at 235–36.

³⁹ *Id.* at 236.

⁴⁰ *Id.* at 236–38.

⁴¹ *See, e.g.*, Kristian Davis Bailey, *Black-Palestinian Solidarity in the Ferguson-Gaza Era*, 67 AM. Q. 1017, 1017 (2015) (tracing the history of solidarity formation between Black liberation groups and Palestinian movement organizers).

⁴² *See* Abdulhadi, *supra* note 16, at 240.

⁴³ *Id.* at 242–43.

anti-imperialist movements, such as those “... against U.S. intervention in Central America.”⁴⁴

As Palestinian activist groups developed coalitions on college and university campuses, Palestinian resistance in Israel/Palestine⁴⁵ evolved in response to continued Israeli military occupation. The first *intifada*, or Palestinian popular uprising against Israeli occupation,⁴⁶ began in December 1987 and involved largely nonviolent resistance—such as mass demonstrations, boycotts of Israeli goods, and general labor strikes—in addition to forceful resistance, such as Molotov cocktails and barricades erected to impede advances of the Israeli Defense Forces (“IDF”).⁴⁷ The second *intifada*, borne of the failure of the Oslo Accords to specify a future for Palestinian residents of the Occupied Palestinian Territories, was much more violent.⁴⁸ Beginning in September 2000, the second *intifada* lasted over four years.⁴⁹ By its close in February 2005, the second *intifada* had resulted in over 1,000 Israeli deaths, many from suicide attacks staged by Palestinian militants, and over 3,000 Palestinian deaths⁵⁰—largely from IDF military campaigns

⁴⁴ Bazian, *supra* note 4.

⁴⁵ The term “Israel/Palestine” refers to the land comprising the current state of Israel, historic Palestinian land, and contested territories such as the West Bank, Gaza, and East Jerusalem. Its framing acknowledges competing claims to nationality, sovereignty, and recognition. See ALAN DOWTY, ISRAEL/PALESTINE 1–3 (2005).

⁴⁶ *What Is An Intifada?*, THE ECONOMIST (Jan. 24, 2017), <https://www.economist.com/the-economist-explains/2017/01/24/what-is-an-intifada> (“In its most basic sense, *intifada* is a variant of the Arabic verb ‘to shake.’ In modern times it is associated with a popular uprising: *intifada* was first used this way in 1952, to describe Iraqis protesting against their king. The term has remained popular throughout the Middle East . . . [b]ut the word is most closely linked to the Palestinian cause.”).

⁴⁷ Joel Beinin & Lisa Hajjar, *Palestine, Israel, and the Arab-Israeli Conflict: A Primer*, 8 (2014), MIDDLE EAST RSCH. & INFO. PROJECT, http://merip.org/wp-content/uploads/2017/02/Primer_on_Palestine-IsraelMERIP_February2014final.pdf.

⁴⁸ *Id.* at 11.

⁴⁹ Gideon Levy, *The Second Intifada, 20 Years On: Thousands Died in a Struggle that Failed*, HAARETZ (Sept. 26, 2020), <https://www.haaretz.com/israel-news/premium/MAGAZINE-the-second-intifada-20-years-on-thousands-died-in-a-struggle-that-failed-1.9185099>.

⁵⁰ *Id.*

that treated the West Bank and Gaza as active war zones and subjected Palestinian civilian neighborhoods to incursion by tanks, shelling, and aerial bombardments by F-16 fighter planes.⁵¹ In the summer of 2014, following the establishment of a unity government between Hamas in the Gaza Strip and the Palestinian Authority in the West Bank, and in direct response to the disappearance of three Israeli settlers in the West Bank, Israel launched an offensive attack (“Operation Protective Edge”) on the Gaza Strip that ultimately killed over 2,250 Palestinians.⁵² From March 2018 through November 2019,⁵³ Gazans organized a massive, ongoing nonviolent “March of Return” along the Israeli-Gaza border.⁵⁴ They demanded the right to return to their ancestral homes, an end to the Israeli military and economic blockade of Gaza, and the termination of the restrictions on Gazans’ freedoms of movement outside of the Gaza Bank.⁵⁵ In May 2021, attempted evictions of Palestinian families from their homes in the East Jerusalem neighborhood of Sheikh Jarrah⁵⁶ and Israeli police’s violent storming of the al-Aqsa mosque during the holy month of Ramadan⁵⁷ led to both nonviolent⁵⁸ and

⁵¹ See Beinun & Hajjar, *supra* note 47.

⁵² See Hana Hussain, *Remembering the 2014 Israeli Offensive Against Gaza*, MIDDLE EAST MONITOR (July 8, 2018, 8:30 AM), <https://www.middleeastmonitor.com/20180708-remembering-the-2014-israeli-offensive-against-gaza/>.

⁵³ *Great March of Return: Shattered Limbs, shattered lives*, MÉDICINS SANS FRONTIÈRES, <https://www.msf.org/great-march-return-depth> (last visited Sept. 22, 2021).

⁵⁴ *Id.*

⁵⁵ See Huthifa Fayyad, *Gaza’s Great March of Return protests explained*, AL JAZEERA (Mar. 30, 2019), <https://www.aljazeera.com/news/2019/3/30/gazas-great-march-of-return-protests-explained>.

⁵⁶ See, e.g., Linah Alsaafin, *What is happening in Occupied East Jerusalem’s Sheikh Jarrah?*, AL JAZEERA (May 1, 2021), <https://www.aljazeera.com/news/2021/5/1/what-is-happening-in-occupied-east-jeruselems-sheikh-jarrah> (providing an overview of the proposed May 2, 2021 eviction of Sheikh Jarrah residents).

⁵⁷ See Oliver Holmes & Peter Beaumont, *Israeli police storm al-Aqsa mosque ahead of Jerusalem Day march*, THE GUARDIAN (May 10, 2021), <https://www.theguardian.com/world/2021/may/10/dozens-injured-in-clashes-over-israeli-settlements-ahead-of-jerusalem-day-march>.

⁵⁸ See, e.g., *US expresses concern as Israeli police crack down in Jerusalem*, AL JAZEERA (last updated May 11, 2021), <https://www.aljazeera.com>

armed Palestinian resistance, including eleven days of rocket exchange between the Israeli military and Palestinian armed groups that resulted in the deaths of at least 253 Palestinians and twelve Israelis.⁵⁹

In the past few years, Palestinian activists and American Black Lives Matter activists have forged particularly strong ties,⁶⁰ drawing on historic connections as well as the concurrence of the 2014 Israeli offensive and police killing of Michael Brown.⁶¹ Palestinian and Black activists highlighted the commonalities between police forces in Black communities in the United States and Israeli military forces in the West Bank and Gaza.⁶² In late fall of 2014 and January of 2015, contingents of Palestinian students and activists travelled to the United States to collaborate and protest with Black activists, and Black Lives Matter organizers travelled to the Occupied Palestinian Territories to witness the experiences of Palestinians under Israeli

/news/2021/5/9/jerusalem-court-delays-palestinian-sheikh-jarrah-eviction-hearing (providing live updates of Israeli police responses to nonviolent demonstrations against the Sheikh Jarrah evictions); *End Brutal Repression of Palestinians Protesting Forced Displacement in Occupied East Jerusalem*, AMNESTY INTERNATIONAL (May 11, 2021), <https://www.amnestyusa.org/press-releases/end-brutal-repression-of-palestinians-protesting-forced-displacement-in-occupied-east-jerusalem/> (last updated May 11, 2021) (discussing various people's experiences at a nonviolent demonstration protesting the Sheikh Jarrah evictions).

⁵⁹ *Gaza Strip: Escalation of hostilities 10-21 May 2021*, U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (May 25, 2021), https://docs.google.com/viewerng/viewer?url=https://www.ochaopt.org/sites/default/files/gaza_escalation_of_hostilities_may_2021.pdf.

⁶⁰ See generally Bailey, *supra* note 41.

⁶¹ See Bakari Kitwana, *Message From the Ferguson Grassroots, 5 Years After Michael Brown's Death*, COLORLINES (Aug. 9, 2019), <https://www.colorlines.com/articles/message-ferguson-grassroots-5-years-after-michael-browns-death>. After white police officer Darren Wilson shot and killed Black teenager Michael Brown in Ferguson, MO, the resulting uprising catalyzed the national Movement for Black Lives, which changed the political discourse around police violence in Black communities.

⁶² Bailey, *supra* note 41, at 1018–19; see generally ANGELA DAVIS, *On Palestine, G4S, and the Prison-Industrial Complex*, in FREEDOM IS A CONSTANT STRUGGLE: FERGUSON, PALESTINE, AND THE FOUNDATIONS OF A MOVEMENT, 51–60 (Frank Barat ed., 2016) (linking the transnational operations of security company G4S in the West Bank and Gaza to private prisons and police forces in the United States).

occupation.⁶³ These relationships extended to, and were strengthened by, Palestinian rights activists on college campuses, who have created coalitional relationships predicated on this recent rekindling of the decades-long relationship between Black Americans and Palestinian rights advocates.⁶⁴

*B. Defining Anti-Semitism in the United States and
Distinguishing Anti-Semitism from Criticism of Israel*

In nineteenth- and twentieth-century America, anti-Semitism was both an explicit and subtextual part of American politics, society, and culture.⁶⁵ In the early 1900s, in the midst of a mounting xenophobia toward “inferior” immigrant populations,⁶⁶ Congress passed strict quotas limiting the amount of Eastern European Jews, among others, who were able to immigrate to the United States.⁶⁷ The Jews who were allowed entrance, as well as those who had lived in the United States for generations, faced anti-Semitic violence from the Ku Klux Klan and other populist mobs.⁶⁸ Ivy League

⁶³ See Bailey, *supra* note 41, at 1020–22.

⁶⁴ See Gaye Theresa Johnson & Alex Lubin, *Angela Davis on Black Lives Matter, Palestine, and the Future of Radicalism*, LITHUB (Sept. 1, 2017), <https://lithub.com/angela-davis-on-black-lives-matter-palestine-and-the-future-of-radicalism/> (“Alliances on university campuses that bring together Black student organizations, Students for Justice in Palestine, and campus chapters of Jewish Voice for Peace are reminding us of the profound need to unite antiracist efforts with strong challenges to Islamophobia and anti-Semitism, and with the global resistance to the apartheid policies and practices of the State of Israel.”); see also *Letter in Support of the Movement for Black Lives*, NATIONAL STUDENTS FOR JUSTICE IN PALESTINE, <https://www.nationalsjp.org/statement-10> (last visited Sept. 30, 2021).

⁶⁵ Julian E. Zelizer, *Trump Needs to Demilitarize His Rhetoric*, ATLANTIC (Oct. 29, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/americas-long-history-anti-semitism/574234/>.

⁶⁶ KAREN BRODKIN SACKS, *How Did Jews Become White Folks?*, in RACE 78, 79–80 (Steven Gregory & Roger Sanjek eds., 1994).

⁶⁷ Tisa Wenger, *How American anti-Semitism Reflects the Centuries-Long Struggle Over the Meaning of Religious Liberty*, THE CONVERSATION (Nov. 25, 2019), <https://theconversation.com/how-american-anti-semitism-reflects-the-centuries-long-struggle-over-the-meaning-of-religious-liberty-126004>.

⁶⁸ Zelizer, *supra* note 65; see also Aaron Surrain, *Leo Frank*, BRITANNICA, <https://www.britannica.com/biography/Leo-Frank> (last updated Aug. 13, 2021)

universities imposed “Jewish quotas” limiting the number of Jews admitted to their institutions,⁶⁹ and in some neighborhoods, restrictive covenants prevented Jews from buying property.⁷⁰ In the 1950s, however, postwar economic prosperity and changing views on whiteness created a broad coalition of middle class white Americans, into which American Jews were largely able to assimilate.⁷¹

When Israel was founded in 1948, most American Jews were devastated by the traumas of the Holocaust and eager to support and identify with the new Jewish nation.⁷² These American Jews proudly identified as Zionist, believing in the divine and political mandate of establishing a Jewish state where Jews would be free from historic persecution.⁷³ In the following decades, American Jewish support for Israel steadily increased, particularly after the 1967 Six Day War, which supporters of Israel viewed as an unexpected military victory that preserved Israel from the brink of extinction.⁷⁴ As Jewish religious observance and cultural affiliations waned in the

(describing the 1915 mob lynching in Marietta, Georgia, of Jewish American Leo Frank, who had been falsely accused of assaulting and murdering a young girl).

⁶⁹ Peter Jacobs, *Harvard Is Being Accused of Treating Asians The Same Way It Used To Treat Jews*, BUSINESS INSIDER (Dec. 4, 2014), <https://www.businessinsider.com/the-ivy-leagues-history-of-discriminating-against-jews-2014-12> (charting the history of Harvard University’s admissions quotas and quoting President A. Lawrence Lowell, Harvard’s President from 1909–1933, who wrote that enrolling too many Jewish students would “ruin the college.”).

⁷⁰ Zelizer, *supra* note 65.

⁷¹ SACKS, *supra* note 66, at 86–88.

⁷² Edward S. Shapiro, *American Jews and Israel in the Post-War Period*, MY JEWISH LEARNING, <https://www.myjewishlearning.com/article/american-jews-and-israel-in-the-post-war-period/> (last visited Nov. 9, 2021).

⁷³ See, e.g., Ben Lorber, *Jewish Alternatives to Zionism: A Partial History*, JEWISH VOICE FOR PEACE (Jan. 11, 2019), <https://jewishvoiceforpeace.org/a-partial-history-of-jewish-alternatives/> (“For many, understandably desperate for concrete safety in vulnerable and traumatic times, the Zionist conviction that Jews would never be safe in the diaspora, and could only be protected by a strong Jewish nation-state, seemed fortified by common sense itself.”).

⁷⁴ Dov Waxman, *American Jews and the Israeli-Palestinian Conflict: Part of the Problem or Part of the Solution?*, 132 POL. SCI. Q. 313, 317 (2017).

mid-to-late 20th century,⁷⁵ support for Israel—which enjoyed a bipartisan consensus and broad national backing⁷⁶—became a stand-in for American Jewish identity. It was considered a “way of being Jewish.”⁷⁷

While American Jewish support for Israel was⁷⁸ and remains⁷⁹ widespread, it has never been univocal; instead, American Jewish allegiance to Israel falls along a broad ideological spectrum.⁸⁰ Before the founding of Israel, both Orthodox⁸¹ and Reform⁸² Jewish groups critiqued the Zionist mandate; the latter group stressed that Jews were a “faith-based religious community” rather than an ethnic group.⁸³ Many Eastern European Jewish immigrants had belonged to thriving socialist, communist, and anarchist movements in their countries of origin and they believed that salvation was found by

⁷⁵ *A Portrait of American Jews*, PEW RES. CTR. (Oct. 1, 2013) [hereinafter PEW RES. CTR., *Portrait*] <https://www.pewforum.org/2013/10/01/jewish-american-beliefs-attitudes-culture-survey/> (charting the generational decline of American Jews who religiously identify as Jewish, and the rise of Jews for whom being Jewish is primarily an issue of ancestry and culture, rather than religious observance or belief in God).

⁷⁶ See Waxman, *supra* note 74, at 322.

⁷⁷ *Id.* at 317.

⁷⁸ *Id.*

⁷⁹ PEW RES. CTR., *Portrait*, *supra* note 75 (“Overall, about seven-in-ten Jews surveyed say they feel either very attached (30%) or somewhat attached (39%) to Israel, essentially unchanged since 2000-2001.”).

⁸⁰ See Lorber, *supra* note 73 (describing various anti-Zionist Jewish groups from the nineteenth century to the present day).

⁸¹ See *Orthodox Judaism: Background and Overview*, JEWISH VIRTUAL LIBRARY, <https://www.jewishvirtuallibrary.org/background-and-overview-of-orthodox-judaism> (last visited Oct. 1, 2021) (“Orthodox Judaism is not a unified movement with a single governing body, but many different movements adhering to common principles . . . Orthodox Judaism views itself as the continuation of the beliefs and practices of normative Judaism.”).

⁸² See *Reform Judaism: The Tenets of Reform Judaism*, JEWISH VIRTUAL LIBRARY, <https://www.jewishvirtuallibrary.org/the-tenets-of-reform-judaism> (last visited Oct. 1, 2021) (“Reform Judaism is the most liberal of the major movements within Judaism today. It started in the 1800s in Germany during the emancipation and encouraged the examination of religion with an eye toward rationality and egalitarianism.”).

⁸³ Lorber, *supra* note 73.

advocating for the working class, not through Zionism.⁸⁴ Even after the mid-century American Jewish ideological regrouping around Zionism, American Jews involved in progressive politics and racial and economic justice “continued to articulate Jewish identities founded, not upon Israel-centrism, but upon intersectional struggles for liberation wherever [they] live[d].”⁸⁵ Following the 1967 Israeli annexation of the West Bank and Gaza, and as American-based Palestinian activism grew,⁸⁶ Jewish American groups emerged that were specifically critical of Israeli policy,⁸⁷ such as the New Jewish Agenda⁸⁸ and Jewish Voice for Peace.⁸⁹

In and through their work, Jewish activists critical of Israel distinguish between anti-Semitism and anti-Zionism.⁹⁰ There are several prongs of this disambiguation. The first is a careful articulation of what anti-Semitism actually means: the exploitation, marginalization, discrimination, and violence towards Jewish

⁸⁴ *See id.*

⁸⁵ *Id.*

⁸⁶ *See* discussion *infra* Part I, Section A.

⁸⁷ *See* Lorber, *supra* note 73.

⁸⁸ *See generally* EZRA BERKLEY NAPON, JUSTICE, JUSTICE SHALL YOU PURSUE: A HISTORY OF THE NEW JEWISH AGENDA 9 (2012). The New Jewish Agenda, active from 1982–1990, billed itself as “a Jewish voice among progressives and a progressive voice among Jews.” *Id.* at 9. A central platform for the organization was its Middle East Task Force (METF), which organized with Arab-American activists and called for a nuanced understanding of Middle Eastern politics (“Our task in the METF was to persuade Jews not to be anti-Arab racists and to persuade Leftists not to be anti-Israel rejectionists.”). *Id.* at 27.

⁸⁹ *Mission*, JEWISH VOICE FOR PEACE, <https://jewishvoiceforpeace.org/mission/> (last visited Sept. 17, 2021) (detailing how Jewish Voice for Peace was founded in the early 1990s as a grassroots network of activists dedicated to an end to the Israeli occupation of the West Bank and Gaza and Palestinian self-determination).

⁹⁰ *See* Peter Beinart, *Debunking the Myth that anti-Zionism is anti-Semitic*, THE GUARDIAN (Mar. 7, 2019), <https://www.theguardian.com/news/2019/mar/07/debunking-myth-that-anti-zionism-is-antisemitic>; *see also* Ghada Karmi, *How Did Antisemitism Become Conflated with Anti-Zionism?*, MIDDLE EAST EYE (Aug. 27, 2019), <https://www.middleeasteye.net/opinion/how-antisemitism-conflated-anti-zionism>; Ian Almond, *The Danger of Conflating Anti-Zionism with Anti-Semitism*, AL JAZEERA (Aug. 12, 2018), <https://www.aljazeera.com/opinions/2018/8/12/the-danger-of-conflating-anti-zionism-with-anti-semitism/>.

people, with underlying “dehumanization and degradation via lies and stereotypes about Jews.”⁹¹ Anti-Zionism, by contrast, is a form of political critique.⁹² Jewish anti-Zionists situate Zionism in its historical context, as a product of nineteenth-century nationalist ideologies that valorized ethnic statehood.⁹³ Anti-Zionists problematize viewing Israel as the only means of Jewish self-determination. Many anti-Zionists argue that Jews in Israel and elsewhere would fare “better [by fostering] civic nationalism . . . built around borders rather than heritage.”⁹⁴ A civic nationalist approach to Israeli policy, in particular, would necessitate enfranchisement of Palestinians living in the Occupied Palestinian Territories, which would create a fully democratic Israel/Palestine that would no longer be a Jewish-majority state.⁹⁵ A second prong of disambiguation highlights how equating anti-Semitism with anti-Zionism leads to a reductive and potentially dangerous attribution to Jews of a distinct nationality, when Judaism is, in fact, a religion to which individuals and groups with all matters of national and ideological affiliations belong.⁹⁶

⁹¹ *Understanding Anti-Semitism: An Offering to Our Movement*, JEWS FOR RACIAL AND ECON. JUST., 11 (Nov. 2017), <https://www.jfrej.org/assets/uploads/JFREJ-Understanding-Antisemitism-November-2017-v1-3-2.pdf>. This primer provides a thorough articulation of anti-Semitism in historical context.

⁹² Beinart, *supra* note 90.

⁹³ *See Our Approach to Zionism*, JEWISH VOICE FOR PEACE, <https://jewishvoiceforpeace.org/zionism/> (last visited Sept. 17, 2021); *see also* Liora Halperin, *Origins and Evolution of Zionism*, FOREIGN POL’Y RSCH. INST. (Jan. 9, 2015), <https://www.fpri.org/article/2015/01/origins-and-evolution-of-zionism/>.

⁹⁴ Beinart, *supra* note 90. *See also* Judith Butler, *No, it’s not anti-semitic*, LONDON REV. OF BOOKS (Aug. 21, 2003), <https://www.lrb.co.uk/the-paper/v25/n16/judith-butler/no-it-s-not-anti-semitic>. While the essay does not refer specifically to anti-Zionism, it distinguishes between Judaism and Zionism and discusses the political positions taken by Jews critical of Israel, particularly those who critique Zionism as a political foundation for statehood and those who reject statehood based on “the violent appropriation of Palestinian land, and dislocation of 700,000 Palestinians.”

⁹⁵ Beinart, *supra* note 90.

⁹⁶ *See generally* JEWS FOR RACIAL AND ECON. JUST., *supra* note 91 (historicizing anti-Semitism). *See also* Lorber, *supra* note 73 (describing various Jewish political responses to anti-Semitism).

Today, an increasing number of American Jews are vocally critical of Israeli policies.⁹⁷ Young American Jews, in particular, are much more likely to disagree with Israeli policies toward Palestinians or express discomfort with the idea of the Jewish state altogether.⁹⁸ Unlike their parents and grandparents, young American Jews are now several generations removed from the Jewish consensus for Israeli support that emerged in the years following the Holocaust.⁹⁹ For Jews under the age of thirty-five, the primary signifiers of Israeli foreign policy are not the 1967 Six Day War, but the encroaching West Bank settlements, Israel's 2014 offensive on Gaza, and the highly-publicized attempted displacement of Palestinian residents in Sheikh Jarrah.¹⁰⁰ Younger Jews are therefore much more likely to view Israeli occupation and Palestinian self-determination as “civil rights issue[s], much as they see, for example, the case against police brutality and systematic violence against Black people in the United States.”¹⁰¹

In recent years, and particularly since the 2016 election of President Trump, there have been a number of high-profile incidents of anti-Semitism in the U.S., which have led to a diagnosis of a “new anti-Semitism.”¹⁰² The most prominent incidents—the 2017 far-

⁹⁷ See, e.g., Emily Tamkin, *Why Jewish Americans Are Shifting Positions on Israel*, THE NEW STATESMAN (July 9, 2020), <https://www.newstatesman.com/world/middle-east/2020/07/why-jewish-americans-are-shifting-position-israel>; Azad Essa, *The New Faces of Jewish Resistance to Israel*, MIDDLE EAST EYE (Mar. 18, 2019), <https://www.middleeasteye.net/big-story/new-faces-jewish-american-resistance-israel>.

⁹⁸ See *Jewish Americans in 2020: 7. U.S. Jews' Connections with and Attitudes Toward Israel*, PEW RSCH. CTR. (May 11, 2021), <https://www.pewforum.org/2021/05/11/u-s-jews-connections-with-and-attitudes-toward-israel/> [hereinafter PEW RSCH. CTR., *Jewish Americans*] (analyzing the 2020 Pew poll of U.S. Jews, finding, *inter alia*, that caring strongly about Israel is more central to Jewish identity for older Jews than for younger Jews); Dov Waxman, *As Israel Turns 70, Many Young American Jews Turn Away*, THE CONVERSATION (May 3, 2018), <https://theconversation.com/as-israel-turns-70-many-young-american-jews-turn-away-95271>.

⁹⁹ Essa, *supra* note 97.

¹⁰⁰ *Id.*

¹⁰¹ Tamkin, *supra* note 97 (quoting Ilan Goldenberg, Middle East Security Director at the Centre for a New American Security).

¹⁰² See, e.g., Amy Kaplan, *The Old “New Anti-Semitism” and Resurgent White Supremacy*, MIDDLE EAST RSCH. & INFO. PROJECT (Summer 2017),

right rally in Charlottesville, VA,¹⁰³ the 2018 mass shooting of worshippers at the Tree of Life Synagogue in Pittsburgh, PA,¹⁰⁴ and the 2019 murder of a Jewish woman in a synagogue in Poway, CA¹⁰⁵—were planned by explicitly anti-Semitic white nationalists.¹⁰⁶ Following the summer 2021 uprisings in Israel/Palestine, organizations such as the Anti-Defamation League (“ADL”) have reported an uptick in anti-Semitic incidents;¹⁰⁷ other

<https://merip.org/2018/02/the-old-new-anti-semitism-and-resurgent-white-supremacy/> (writing about the history of American anti-Semitism, its connection to white nationalist movements, and the political utility of “rediscovering” American anti-Semitism).

¹⁰³ *Anti-Semitism on Full Display in Charlottesville*, ANTI-DEFAMATION LEAGUE (Aug. 15, 2017), <https://www.adl.org/blog/anti-semitism-on-full-display-in-charlottesville> (detailing reports of anti-Semitic activity at the Charlottesville rally).

¹⁰⁴ Campbell Robertson, et al., *11 Killed in Synagogue Massacre; Suspect Charged With 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html>.

¹⁰⁵ Zack Beauchamp, *Poway and Pittsburgh: the Rise in Murderous anti-Semitism, Explained*, VOX (May 1, 2019), <https://www.vox.com/policy-and-politics/2019/5/1/18524103/poway-synagogue-shooting-anti-semitism>.

¹⁰⁶ *See, e.g.*, Mark Scolforo & Mark Gillispie, *Pittsburgh Synagogue Massacre Leaves 11 Dead, 6 Wounded*, ASSOCIATED PRESS (Oct. 27, 2018), <https://apnews.com/article/shootings-north-america-us-news-ap-top-news-massacres-23b04dc5e5af4129b544ab50cbba3dd6> (describing how the gunman “expressed virulently anti-Semitic views on a social media site called Gab . . . [t]he cover photo for his account featured a neo-Nazi symbol, and his recent posts included a photo of a fiery oven like those used in Nazi concentration camps used to cremate Jews during World War II”); Emma Green, *Why the Charlottesville Marchers Were Obsessed with Jews*, THE ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/nazis-racism-charlottesville/536928/> (explaining the anti-Semitic foundation of the Charlottesville march); Beauchamp, *supra* note 105 (linking the rise of murderous anti-Semitic attacks to white nationalist ideology, specifically the idea that Jews are responsible for the “genocide of the European race”).

¹⁰⁷ *Antisemitic Incidents Reported to ADL Increase Sharply During Israel-Hamas Conflict*, ANTI-DEFAMATION LEAGUE (May 24, 2021), <https://www.adl.org/blog/antisemitic-incidents-reported-to-adl-increase-sharply-during-israel-hamas-conflict> (detailing reported instances of violent anti-Semitic incidents in May 2021); Ruth Graham & Liam Stack, *U.S. Faces Outbreak of Anti-Semitic Threats and Violence*, N.Y. TIMES (May 26, 2021), <https://www.nytimes.com/2021/05/26/us/anti-semitism-attacks-violence.html>

organizations, however, have criticized the metrics of this assessment on both practical and ideological grounds.¹⁰⁸

II. TITLE VI DISCRIMINATION COMPLAINTS AGAINST PALESTINIAN CAMPUS ACTIVISTS

A. Title VI Overview

Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color, or national origin by programs or activities receiving federal funding.¹⁰⁹ Any educational program or activity that receives funding from the United States Department of Education (“DOE”) is therefore bound by the non-discrimination mandate.¹¹⁰ Title VI’s mandate covers a wide range of educational institutions, including approximately 4,700 colleges and universities¹¹¹—nearly all private and public institutions of higher education.¹¹²

(connecting the ADL’s reported rise in anti-Semitic hate crimes to the Israel/Palestine conflict).

¹⁰⁸ See, e.g., Mari Cohen, *A Closer Look at the ‘Uptick’ in Antisemitism*, JEWISH CURRENTS (May 27, 2021), <https://jewishcurrents.org/a-closer-look-at-the-uptick-in-antisemitism/> (pointing out that self-reported incidents of hate crimes are more reflective of media focus than on-the-ground reality and that many of these reported incidents concern anti-Zionist, rather than anti-Semitic, speech).

¹⁰⁹ 42 U.S.C. §§ 2000d–2000d-7.

¹¹⁰ *Education and Title VI*, OFF. FOR CIV. RTS., <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html> (last updated Jan. 10, 2020).

¹¹¹ *Id.*

¹¹² See Richard Vedder, *There Are Really Almost No Truly Private Universities*, FORBES (Apr. 8, 2018), <https://www.forbes.com/sites/richardvedder/2018/04/08/there-are-really-almost-no-truly-private-universities/?sh=65ff7ba57bc5> (explaining that nearly all private universities receive federal funding of some kind); see also Allie Grace Garnett, *What’s the Difference Between a Public and Private University?* EDMIT, <https://www.edmit.me/blog/whats-the-difference-between-a-public-and-private-university> (last visited Sept. 24, 2021) (explaining that the main difference between private and public colleges are their sources of funding, with private colleges funded primarily by endowment funds and tuition money, and public universities primarily funded by the state and federal governments).

Title VI is enforced by the DOE through its Office of Civil Rights (“OCR”), which is responsible for processing Title VI complaints filed by students or others alleging discrimination on the basis of race, color, or national origin.¹¹³ Title VI may also be enforced by private suit against a discriminatory program.¹¹⁴ If the OCR decides to investigate a Title VI complaint, it will inform the institution; act as a neutral fact-finder by reviewing documentary evidence, conducting interviews, and/or visiting the educational facility; issue a determination on whether the institution violated Title VI; and, if the institution has violated Title VI, negotiate a resolution agreement with the educational institution.¹¹⁵ Importantly, a plaintiff does not need to prove intentional discrimination for the OCR to make a finding of Title VI violation; it is sufficient for them to show that a hostile environment exists based on the totality of the circumstances.¹¹⁶ The OCR considers whether a hostile environment exists by analyzing the severity, pervasiveness, and persistence of the discrimination in light of the particular individuals and groups involved.¹¹⁷

In 2004, then-Staff Director (and, a decade later, Director) of the OCR, Kenneth Marcus, expressed in a public letter that while Title VI protections were limited to discrimination on the basis of race and national origin, certain forms of religious discrimination might involve a racial or national element and therefore be eligible for OCR investigation under the Title VI mandate.¹¹⁸ The letter explains that following the events of September 11, 2001, “we must remain particularly attentive to the claims of students who may be targeted

¹¹³ See OFF. FOR CIV. RTS., *Education and Title VI*, *supra* note 110.

¹¹⁴ U.S. DEP’T OF JUSTICE, JUSTICE MANUAL § 8-2.140 (2018), <https://www.justice.gov/jm/jm-8-2000-enforcement-civil-rights-civil-statutes>.

¹¹⁵ See *Department of Education Office for Civil Rights (OCR) Complaint Processing Procedures*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/complaints-how.pdf> (last updated Nov. 2018).

¹¹⁶ Department of Education Office for Civil Rights, *Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidelines* (Mar. 10, 1994), <https://www2.ed.gov/about/offices/list/ocr/docs/race394.html>.

¹¹⁷ See *id.*

¹¹⁸ Letter from Kenneth L. Marcus, Deputy Assistant Sec’y for Enforcement, Off. of Civ. Rts., to Colleague, Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004) (on file with author).

for harassment based on their membership in groups that exhibit both ethnic and religious characteristics, such as Arab Muslims, Jewish Americans and Sikhs.”¹¹⁹ This interpretation of Title VI was affirmed in an OCR letter from 2010 which explained that “anti-Semitic harassment can trigger responsibilities under Title VI,” and that “[t]hese principles apply not just to Jewish students, but also to students from any discrete religious group that shares, or is perceived to share, ancestry or ethnic characteristics (e.g., Muslims or Sikhs).”¹²⁰ Elsewhere, the OCR has told external organizations that it will “investigate race, color, or national origin discrimination that is *comingled* with allegations of religious discrimination.”¹²¹ While Title VI’s plain language does not permit religious discrimination claims, the OCR’s internal and public-facing guidance establish a predicate for interpreting the statute to allow religious discrimination claims that contain a racial or ethnic component.

B. *Free Speech on Campus*

Within the university context, Title VI’s antidiscrimination mandate reflects the tension between American universities’ twinned legacies of free speech mandates and hate speech codes.¹²² The First Amendment¹²³ provides broad protection to political and ideological expression, which the Supreme Court has described as

¹¹⁹ *Id.*

¹²⁰ Letter from Russlyn Ali, Assistant Sec’y for Civ. Rts., Off. of Civ. Rts., to Colleague (Oct. 26, 2010) (on file with author).

¹²¹ Letter from Seth Galanter, Acting Ass’t Sec’y, Off. of C.R., to Morton A. Klein, Nat’l Pres., Zionist Org. of Am., et al. (July 17, 2013), <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20130717-first-amend-anti-semitism-harassment.pdf> (emphasis added).

¹²² See generally Erwin Chemerinsky, *Hate Speech is Protected Free Speech, Even on College Campuses*, VOX, <https://www.vox.com/the-big-idea/2017/10/25/16524832/campus-free-speech-first-amendment-protest> (Dec. 26, 2017) (discussing the conflict between upholding free speech and enacting hate speech codes at universities); *Speech on Campus*, ACLU, <https://www.aclu.org/other/speech-campus> (last visited Sept. 24, 2021) (explaining the bounds of free speech on college campuses).

¹²³ U.S. CONST. amend. I.

the “fixed star in our constitutional constellation.”¹²⁴ This protection extends to college campuses.¹²⁵ Free speech rights on college campuses enjoy a storied history,¹²⁶ but many consider the University of California, Berkeley, campus as the origin point of the modern university free speech movement.¹²⁷ In the early 1960s, the University of California school system still operated under McCarthy-era anti-communist policies and student political groups were banned from gathering on Berkeley’s campus.¹²⁸ Beginning in 1964, organizers trained in civil rights movement tactics and philosophies protested the university’s policy.¹²⁹ These protesters referred to themselves as the Free Speech Movement and argued that free speech on college campuses implicated nothing less than “the right to participate as citizens in a democratic society.”¹³⁰ After an escalating series of sit-ins at Berkeley’s administrative building and stand-offs with police, the University’s Board of Regents granted the protesters’ demands to abolish free speech restrictions on all

¹²⁴ W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

¹²⁵ See ACLU, *supra* note 122.

¹²⁶ See Tyler Holmes, *On-Campus Protests: Free Speech, Discrimination, History, and Power*, AM. BAR ASS’N, https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/higher-education-law/on-campus-protests-free-speech-discrimination-history-and-power/ (last visited Oct. 1, 2021) (tracing the history of student movements that emerged following World War II).

¹²⁷ See, e.g., Robert Hurwitt, *Free Speech Movement at UC sparked change Across U.S. beyond, S.F. Gate* (Oct. 2, 2014), <https://www.sfgate.com/bayarea/article/Free-Speech-Movement-at-UC-sparked-change-across-5769930.php> (“The energy the FSM unleashed spread through campuses across the country, with protests and ‘takeovers’ everywhere from San Francisco State to the University of Michigan to Columbia and abroad.”).

¹²⁸ Karen Aichinger, *Berkeley Free Speech Movement*, THE FIRST AMEND. ENCYCLOPEDIA (2009), <https://mtsu.edu/first-amendment/article/1042/berkeley-free-speech-movement>.

¹²⁹ See *id.*

¹³⁰ Jill Lepore, *Flip-Flopping on Free Speech*, THE NEW YORKER (Oct. 1, 2017), <https://www.newyorker.com/magazine/2017/10/09/flip-flopping-on-free-speech>.

University of California campuses.¹³¹ Through the rest of the decade and into the 1970s, American college students vigorously asserted their right to free speech on campus through civil rights and anti-Vietnam War protests and demonstrations.¹³²

In 1972, the Supreme Court decided *Healy v. James* and held that the First Amendment protects students' political expression at public colleges and universities.¹³³ The Court qualified its ruling by explaining that colleges may restrain free speech to prevent disruption on campus, but that the college faces a "heavy burden" to demonstrate that the speech restriction is necessary.¹³⁴ Furthermore, a college may be justified in imposing "reasonable regulations" regarding "the time, the place, and the manner in which student groups conduct their speech-related activities."¹³⁵ It is important to keep in mind that unlike public colleges, private colleges are under no constitutional obligation to conform to First Amendment standards.¹³⁶ Some state courts and legislatures, however, prohibit private colleges' infringement on students' political speech rights, and some private colleges have adopted similar policies.¹³⁷

In the decades since the Free Speech Movement and the *Healy* decision, the conversation surrounding free speech on college

¹³¹ See Aichinger, *supra* note 128.

¹³² See Lepore, *supra* note 130.

¹³³ *Healy v. James*, 408 U.S. 169 (1972).

¹³⁴ *Id.* at 184. *Cf.* *Braxton v. Mun. Ct.*, 10 Cal. 3d 138, 146 (1973) ("[N]either the 'content' of speech nor freedom of association can be restricted merely because such expression or association disrupts the tranquility of a campus or offends the tastes of school administrators or the public . . . [C]ourts have never held that such 'disruption' falls outside the boundaries of the First Amendment.").

¹³⁵ *Healy*, 408 U.S. at 192.

¹³⁶ *First Amendment on Private Campuses*, HARV. CIV. RTS. –CIV. LIBERTIES L. REV.: AMICUS BLOG (Dec. 1, 2015), <https://harvardcrcl.org/first-amendment-on-private-campuses/> (explaining that private universities (universities not operated by the government) are regarded as such even if they receive significant funding from the federal government).

¹³⁷ See *Freedom of Speech*, PALESTINE LEGAL (May 7, 2015), <https://palestinelegal.org/legal-student-handbook/2015/5/1/overview> (citing protections in Cal. Educ. Code § 94367(a); see also *State v. Schmid*, 423 A.2d 615, 627–29 (N.J. 1980); *Commonwealth v. Tate*, 432 A.2d 1382, 1390–91 (Penn. 1981); *Alderwood Assoc. v. Wash. Env't Council*, 635 P.2d 108, 117 (Wash. 1981)).

campuses has developed new arguments and political valences.¹³⁸ In the 1980s and 1990s, as college campuses adopted policies designed to mitigate historically exclusionary admissions practices, students of color, women, and LGBTQ+ students faced racist, sexist, and homophobic on-campus harassment.¹³⁹ In response, over 350 universities adopted “hate speech codes” prohibiting racist and other hateful speech;¹⁴⁰ however, these codes have been routinely held unconstitutionally vague in court.¹⁴¹ The courts’ decisions affirmed the principle that universities may not “prohibit . . . certain speech because it disagreed with ideas or messages sought to be conveyed,” even when such speech was “found to be offensive, even gravely so, by large numbers of people.”¹⁴²

One prevalent narrative today holds that the right and left wings on campuses have effectively swapped places with respect to free speech. Now, conservative students and faculty vehemently defend freedom of political speech (no matter how hateful) whereas liberal students and faculty shut down speakers with whom they disagree through protest and speech codes.¹⁴³ Right wing proponents of free

¹³⁸ See, e.g., Lepore, *supra* note 130; Holmes, *supra* note 126.

¹³⁹ See Alex Aichinger & John R. Vile, *Campus Speech Codes*, THE FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/991/campus-speech-codes> (last updated June 2017).

¹⁴⁰ Chemerinsky, *supra* note 122.

¹⁴¹ See, e.g., *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 867 (E.D. Mich. 1989) (holding the University of Michigan’s hate speech code, which regulated racist or discriminatory behavior that actually or conceivably threatens academic efforts, unconstitutional for vagueness and overbreadth); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1181 (E.D. Wis. 1991) (holding the University of Wisconsin’s hate speech code, which regulated racist or particular discriminatory conduct directed at individuals and creating a hostile university environment, unconstitutional for vagueness and overbreadth); *Dambrot v. Cent. Mich. Univ.*, 839 F. Supp. 477, 482 (E.D. Mich. 1993), *aff’d*, 55 F.3d 1177, 1181 (6th Cir. 1995) (holding Central Michigan University’s “discriminatory harassment” code unconstitutionally vague and overbroad).

¹⁴² *Doe*, 721 F. Supp. at 863.

¹⁴³ See, e.g., Joshua Fatzick, *American College Campuses Increasingly Hostile to Free Speech*, VOICES OF AMERICA (Apr. 26, 2017), <https://www.voanews.com/a/us-colleges-confront-new-era-sometimes-violent-protest/3826959.html> (arguing that incidents of protest against conservative speakers such as Charles Murray and Heather MacDonald are “increasingly common” and “appear[] to indicate shifting attitudes about free speech among

speech, in particular, argue that the college campus should function as a “marketplace of ideas”—a concept coined by Justice Oliver Wendell Holmes in his First Amendment jurisprudence¹⁴⁴—in which all types of expression deserve to be heard, and the most persuasive arguments win through unrestricted debate.¹⁴⁵ Other theorists argue that the process-oriented marketplace concept pays little heed to the desirability and equity of different ideas, and that it is not transferrable to the college campus where young students who live on campus are particularly vulnerable to hateful rhetoric and do not have the analogous political power of democratic citizens.¹⁴⁶ For some of these thinkers, restrictions on hateful expression may be warranted and necessary interventions.¹⁴⁷ For others, restrictions are both overinclusive and underinclusive because they grant university administrations interlocutory power in student discourse and fail to adequately address the pervasive and subtle manifestations of racist and hateful speech and expression on campus.¹⁴⁸

The issue of campus Palestinian political activism provides an interesting inflection point to theories of campus free speech and the benefits of speech restrictions.¹⁴⁹ As discussed in Part I, college campuses have proven to be uniquely fertile ground for expanding Palestinian political activism and building cross-platform coalitions, particularly with Black solidarity movements.¹⁵⁰ Palestinian activists have experienced considerable legal and media backlash

today’s students”); Lepore, *supra* note 130 (explaining that “the left’s commitment to free speech began to unravel” in the 1970s and 1980s due to criticism on giving racist and fascist views a platform and the field of trauma studies).

¹⁴⁴ *Abrams v. U.S.*, 250 US 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”).

¹⁴⁵ *First Amendment on Private Campuses*, *supra* note 136.

¹⁴⁶ *See id.*

¹⁴⁷ *See, e.g.*, Greta Anderson, *Contradictions on Free Speech*, INSIDE HIGHER ED (May 5, 2020), <https://www.insidehighered.com/news/2020/05/05/gallupknight-foundation-survey-shows-students-conflicted-about-free-speech>; Aichinger & Vile, *supra* note 139.

¹⁴⁸ HARV. CIV. RTS.—CIV. LIBERTIES L. REV.: AMICUS BLOG, *supra* note 136.

¹⁴⁹ *See, e.g.*, Hauslohner & Svrluga, *supra* note 1.

¹⁵⁰ *See supra* Part I.

for their political speech and expression,¹⁵¹ typically from more conservative students and outside organizations.¹⁵² In this sense, Palestinian activists on college campuses today uniquely mirror campus civil rights and anti-Vietnam War protesters from the mid-twentieth century, who also demanded a platform for their restricted political speech. Instead of considering all political speech functionally equivalent, it is clarifying to consider political speech through the lenses of institutional and cultural power.¹⁵³ For all the student support for Palestinian causes, mainstream American political support for Palestinian human rights remains minimal-to-nonexistent.¹⁵⁴ Those who file Title VI complaints against Palestinian campus activists are attempting to maintain criticism of Israeli policy as beyond the pale of acceptable speech. By repeatedly banishing Palestinian human rights discourse to the outer edges of the campus “marketplace of ideas,” Title VI complainants minimize the persuasive power of anti-Zionist speech and can avoid responding to criticism of Israel on its merits.

C. Title VI Complaints Against Palestinian Activists

In 2013, the Center for Constitutional Rights, National Lawyers Guild, American-Arab Anti-Discrimination Committee, and five other civil rights organizations sent letters to the DOE and the San Francisco OCR about a disturbing trend.¹⁵⁵ In 2007, 2009, and 2011, Title VI complaints had been filed with the OCR against three University of California campuses, alleging that activities by the SJP and Muslim Student Association (“MSA”) that were critical of Israel amounted to anti-Semitic harassment, subject to Title VI

¹⁵¹ See *supra* Part II, Section C.

¹⁵² See Roth-Rowland, *supra* note 26.

¹⁵³ See generally Hauslohner & Svrluga, *supra* note 1 (discussing conflicting views of what qualifies as political speech on college and university campuses).

¹⁵⁴ Morgan Moone, *Can Pro-Palestinian Politicians win Elections?*, LAW AT THE MARGINS, (Sept. 27, 2018), <https://lawatthemargins.com/09252018-palestinianprogressives/>.

¹⁵⁵ *Coalition calls on DOE to address use of Title VI of Civil Rights Act to silence students advocating for Palestinian rights*, AMERICAN MUSLIMS FOR PALESTINE (May 28, 2013), <https://www.ampalestine.org/newsroom/coalition-calls-on-doe-to-address-use-of-title-vi-of-civil-rights-act-to-silence-students>.

redress.¹⁵⁶ At the time of the letters' writing, all three complaints remained open, despite the OCR's internal policy of resolving Title VI complaints within 180 days of commencing an investigation.¹⁵⁷ The letters' authors expressed concern that by maintaining these long-pending investigations, the OCR was "inadvertently contravening the purposes of Title VI" and its antidiscrimination mandate.¹⁵⁸ The nature of the complaints, opened in response to student group activities, resulted in Title VI being weaponized by its complainants as a means of "censor[ing] or limit[ing] protected speech and expressive activity"—despite the OCR's own stipulation that its Title VI enforcement was not intended to restrict protected expressive activity.¹⁵⁹ Moreover, the pendency of the complaints and languishing investigations contributed to a cultural "chill[ing]" of constitutionally protected political speech, both for students directly involved in groups such as SJP and MSA and for the universities' larger student bodies.¹⁶⁰

In August 2013, the OCR announced that it was dismissing all three Title VI complaints against the University of California campuses, emphasizing that the allegedly discriminatory activity was protected political speech.¹⁶¹ In its letter to one of the three

¹⁵⁶ Letter from American-Arab Anti-Discrimination Comm., et al., to Seth M. Galanter, Acting Ass't Sec'y for C.R., U.S. DOE, et al., RE: OCR Policies, Practices and Procedures That Are Violating the First Amendment Speech Rights of College and University Students (May 14, 2013) (on file with author) (describing complaints filed against the University of California, Irvine in 2007, by the University of California, Santa Cruz, in 2009, and by the University of California, Berkeley, in 2011). The Title VI complaint against the University of California, Berkeley, had originated as a suit dismissed by federal district court for its failure to state a Title VI claim against the university. *See* Salahi & Bargzie, *supra* note 17, at 165.

¹⁵⁷ Letter from American-Arab Anti-Discrimination Comm., et al., to Arthur Zeidman & Gemini McCasland, Off. of C.R., S.F. Div., RE: Pending Title VI Investigations Leading to the Chilling of Student Speech (May 14, 2013) (on file with author).

¹⁵⁸ *Id.* at 2.

¹⁵⁹ *Id.* (citing Letter from Gerald A. Reynolds, Ass't Sec'y, Off. of C.R., First Amendment: Dear Colleague (July 28, 2003) (on file with author).

¹⁶⁰ *Id.*

¹⁶¹ *See In Victory for Student Free Speech, Department of Education Dismisses Complaints*, CTR. FOR CONST. RTS., <https://cjrjustice.org/home/press->

campuses, the University of California, Irvine, the OCR explained that the campus incidents included in the original complaint demonstrated that, to the extent that there was harassment, it was based on *political* differences between the Jewish student complainants and members of the University of California, Irvine, MSU, rather than upon religious difference.¹⁶² This harassment, furthermore, did not rise to the level required for action by the OCR, which must establish a “hostile environment” for a reasonable person of the same age and race as the victim.¹⁶³ The “mere expression of views, words, symbols, or thought that a student finds personally offensive” was insufficient for establishing a finding of a hostile environment, particularly on college and university campuses, where “academic freedom [should foster] the robust exchange of ideas.”¹⁶⁴ In 2014, the OCR dismissed the claimants’ appeals.¹⁶⁵

Even though the complaints were dismissed, the investigatory processes and their repercussions nonetheless created an environment in which campus activists felt they could not express protected political speech without facing repercussions.¹⁶⁶ Students at colleges where complaints had been filed remained uncertain about the outcome of the years-long investigations and were reluctant to affiliate themselves publicly with organizations such as SJP for fear of damaging their reputation, hindering their career prospects, or incurring other sorts of reprisals.¹⁶⁷ Moreover, OCR

center/press-releases/victory-student-free-speech-department-education-dismisses (last updated Sept. 4, 2013).

¹⁶² Letter from Zachary Pelchat to Chancellor Michael V. Drake, Univ. of Cal., Irvine (Aug. 19, 2013) (on file with author).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Letters from Arthur Zeidman, Dir. of the Off. of C.R., S.F. Div., to redacted claimants (June 6, 2014) (on file with author).

¹⁶⁶ Salahi & Bargzie, *supra* note 17, at 170–71.

¹⁶⁷ *See id.* at 170–71. One particularly chilling reprisal of students’ affiliation with Palestinian activism is the threat of being blacklisted through the Canary Mission, a website that compiles dossiers of pro-Palestinian protesters and activists—most of them college and university students. *See* Alex Kane, “*It’s Killing the Student Movement*”: *Canary Mission’s Blacklist of Pro-Palestine Activists is Taking a Toll*, THE INTERCEPT (Nov. 22, 2018), <https://theintercept.com/2018/11/22/israel-boycott-canary-mission-blacklist/>.

investigations, particularly on the issue of the Israel/Palestine conflict, tend to garner considerable media attention.¹⁶⁸ They therefore impact not only the colleges at which the complaints are made, but also a broader range of colleges and universities whose administrators, seeking to avoid withdrawal of federal funds or bad media coverage, attempt to suppress or censor Palestinian activism on campus.¹⁶⁹

The OCR's dismissal of these complaints roughly coincided with dismissals of analogous Title VI complaints filed against Rutgers University, Barnard College, and Brooklyn College.¹⁷⁰ Following this rejection, there were no publicized Title VI complaints filed with the OCR until 2018, according to Palestine Legal, an organization that monitors such complaints.¹⁷¹ It is important to note, however, that OCR complaints are not made public as a matter of course; they must either be requested from the OCR through the Freedom of Information Act ("FOIA")¹⁷² or

¹⁶⁸ See Salahi & Bargzie, *supra* note 17, at 171–72.

¹⁶⁹ *Id.* at 172. See, e.g., Peter Bonilla, *Free Speech Concerns Swirl Around Northeastern University's Suspension of Pro-Palestinian Group*, FOUND. FOR INDIV. RTS. IN EDUC. (Mar. 14, 2014), <https://www.thefire.org/free-speech-concerns-swirl-around-northeastern-universitys-suspension-of-pro-palestinian-group/> (exploring the 2014 suspension by Northeastern of the university's SJP chapter after its members placed mock eviction notices under students' residence hall doors, mimicking the notices served to Palestinians in Gaza and the West Bank prior to home demolition or bombing. The article also notes that in the year prior, SJP students who staged an event walkout were required to write a "civility statement, laying down rules for future conduct.").

¹⁷⁰ See Dima Khalidi et al., *The Palestine Exception to Free Speech: A Movement Under Attack in the US*, PALESTINE LEGAL & THE CTR. FOR CONST. RTS., at 36 (Sept. 2015), <https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/560c2e0ae4b083d9c363801d/1443638794172/Palestine+Exception+Report+Final.pdf>.

¹⁷¹ See PALESTINE LEGAL, *Federal Crackdown*, *supra* note 19; see also PALESTINE LEGAL, *2019 Year in Review*, *supra* note 21.

¹⁷² *Case Processing Manual (CPM)*, U.S. DEPT. OF EDUC., OFF. OF CIV. RTS., 33 (effective date Aug. 26, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> (explaining that, while FOIA requests may be filed to examine documents related to Title VI investigations, the OCR is "not required to release documents, or portions thereof, during the case resolution and investigation process or enforcement proceedings if the release could reasonably be expected to interfere with OCR's law enforcement activities."). Complaints

informally disseminated. In 2018, two Title VI complaints were reported to Palestine Legal, and in 2019, eight Title VI complaints were reported to the organization, three of which were filed after President Trump signed Executive Order 13,899 in December 2019.¹⁷³ In 2020, at least four investigations were reported to Palestine Legal.¹⁷⁴

III. EXECUTIVE ORDER 13,899 AND ITS AFTERMATH

A. Executive Order 13,899: “Combatting Anti-Semitism”

On December 11, 2019, President Trump signed Executive Order 13,899, which codified the definition of anti-Semitism adopted by the International Holocaust Remembrance Alliance (“IHRA”)¹⁷⁵ for the purpose of Title VI complaints.¹⁷⁶ Section 1 of the order explains that its purpose is to combat rising anti-Semitic incidents, and that “students, in particular, continue to face anti-Semitic harassment in schools and on university and college campuses.”¹⁷⁷ The section also states that while Title VI’s

may be publicized by complainants themselves. *See, e.g.*, THE LAWFARE PROJECT, *supra* note 23 (counsel for Title VI complainant against Columbia University publicizing its filing of the complaint). They may also be released to the media by complainants. *See, e.g.*, Jenni Fink, *Civil Rights Office Investigating NYU Over Claim It Allowed Hostile Atmosphere for Jewish Students*, NEWSWEEK (Nov. 15, 2019), <https://www.newsweek.com/civil-rights-office-investigating-nyu-over-claim-it-allowed-hostile-atmosphere-jewish-students-1472118> (publicizing Title VI complaint filed against New York University).

¹⁷³ PALESTINE LEGAL, *2019 Year in Review*, *supra* note 21; *see also* Michael Arria, *Pro-Palestine Campus Groups Are Being Targeted Via Federal Complaints Thanks to the Trump Administration*, MONDOWEISS (Jan. 7, 2020), <https://mondoweiss.net/2020/01/pro-palestine-campus-groups-are-being-targeted-via-federal-complaints-thanks-to-the-trump-administration/> (reporting two Title VI complaints filed against Columbia University in December 2019).

¹⁷⁴ PALESTINE LEGAL, *2020 Year in Review*, *supra* note 21.

¹⁷⁵ The IHRA is a transnational Holocaust education organization that “unites governments and experts to strengthen, advance and promote Holocaust education, research and remembrance.” *About Us*, INTERNATIONAL HOLOCAUST REMEMBRANCE ALLIANCE, <https://www.holocaustremembrance.com/about-us> (last visited Oct. 1, 2021).

¹⁷⁶ Exec. Order No. 13,899, 84 Fed. Reg. 68,779 (Dec. 11, 2019).

¹⁷⁷ *Id.*

protections are restricted to discrimination on the basis of race, color, or national origin, individuals “do not lose protection under Title VI for *also* being a member of a group that shares common religious practices,” and that “[d]iscrimination against Jews may give rise to a Title VI violation when the discrimination is based on an individual’s race, color, or national origin.”¹⁷⁸ Lastly, the section commits the executive branch “to enforce Title VI against prohibited forms of discrimination *rooted in anti-Semitism* as vigorously as against all other forms of discrimination prohibited by Title VI.”¹⁷⁹

In Section 2, “Ensuring Robust Enforcement of Title VI,” the order provides,

(a) In enforcing Title VI, and identifying evidence of discrimination based on race, color, or national origin, all executive departments and agencies (agencies) charged with enforcing Title VI shall consider the following:

(i) the non-legally binding working definition of anti-Semitism adopted on May 26, 2016, by the International Holocaust Remembrance Alliance (IHRA), which states, “Antisemitism is 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”; and

(ii) the “Contemporary Examples of Anti-Semitism” identified by the IHRA, to the extent that any examples might be useful as evidence of discriminatory intent.¹⁸⁰

The IHRA definition of “Contemporary Examples of Anti-Semitism” includes, *inter alia*,

¹⁷⁸ *Id.* (emphasis added).

¹⁷⁹ *Id.* (emphasis added).

¹⁸⁰ *Id.*

the targeting of the state of Israel, conceived as a Jewish collectivity . . . [d]enying the Jewish people their right to self-determination, e.g., by claiming that the existence of the State of Israel is a racist endeavor . . . [and a]pplying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.”¹⁸¹

Sections 3, 4, and 5 provide that each executive agency should submit a report to the President “identifying additional nondiscrimination authorities within its enforcement authority with respect to which the IHRA definition of anti-Semitism could be considered,” as well as rules of construction and general provisions ensuring compliance with existing laws and orders.¹⁸²

Executive Order 13,899 mirrors the 2004 enforcement guidelines promulgated and subsequently reiterated by the OCR, which already specify that discrimination on the basis of religion may be subject to Title VI redress if it contains an element of racial or national discrimination.¹⁸³ The only truly novel portion of the order is its embedded expansion of the terms of anti-Semitic discrimination to include speech or activity that is critical of Israel.

B. The Future of Title VI OCR Complaints Following Executive Order 13,899

Following the promulgation of the order, at least six Title VI complaints alleging anti-Semitism have been filed with the OCR.¹⁸⁴ On December 18, 2019, the Lawfare Project¹⁸⁵ filed a complaint on

¹⁸¹ INTERNATIONAL HOLOCAUST REMEMBRANCE ALLIANCE, *supra* note 28.

¹⁸² Exec. Order No. 13,899, 84 Fed. Reg. 68,779 (Dec. 11, 2019).

¹⁸³ See Marcus, *supra* note 118; Ali, *supra* note 120; Seth Galanter, *supra* note 121.

¹⁸⁴ See *supra* Part II, Section C.

¹⁸⁵ The Lawfare Project is a coalition of attorneys dedicated to litigating claims of anti-Semitism. See *Who We Are*, THE LAWFARE PROJECT, <https://www.thelawfareproject.org/who-we-are> (last visited Sep. 29, 2021). Critics of the Lawfare Project characterize the organization as a far-right group “supported by donors who also fund neoconservative think tanks like the David Horowitz Freedom Center and Pamela Geller’s American Freedom Defense

behalf of a Jewish student against Columbia University for allegedly discriminatory behavior that produced a hostile environment.¹⁸⁶ The Lawfare Project alleged that Jewish students “have endured systematic discrimination from tenured professors and anti-Israel groups like [SJP].”¹⁸⁷ In particular, the Lawfare Project noted that the Columbia chapter of SJP held educational events during Israel Apartheid Week, including “a hand-painted display of Israel’s apartheid wall,” and facilitated a BDS campaign urging Columbia University to divest from Israeli companies involved in the mistreatment of Palestinians.¹⁸⁸ In its public statement regarding the filing, the Lawfare Project cited Executive Order 13,899, noting, “[t]hanks to President Trump’s newly issued Executive Order on Combating Anti-Semitism, Jewish students are now granted the same protections as other minority groups, and anti-Semitic harassment like [that which the Jewish student] experienced is expressly prohibited under Title VI of the Civil Rights Act of 1964.”¹⁸⁹ On December 23, 2019, a 1980 alumnus of Columbia University’s Middle East Institute filed an OCR complaint alleging that the Institute, as well as the University’s Center for Palestine Studies, held events criticizing Israel that created a hostile environment for Jewish students.¹⁹⁰ To date, the OCR has not opened investigations into either of these complaints.¹⁹¹

On December 27, 2019, the American Center for Law and Justice (“ACLJ”)¹⁹² filed a Title VI complaint with the OCR against

Initiative (also known as Stop Islamization of America).” See Roth-Rowland, *supra* note 26.

¹⁸⁶ THE LAWFARE PROJECT, *supra* note 23; see also *Federal Complaint Filed Against Columbia, After Trump Gives Nod to Target Political Speech on Palestine (Updated)*, PALESTINE LEGAL, —<https://palestinelegal.org/news/2019/12/20/federal-complaint-filed-against-columbia-after-trump-gives-nod-to-target-political-speech-on-palestine> (last updated Jan. 3, 2020).

¹⁸⁷ THE LAWFARE PROJECT, *supra* note 23.

¹⁸⁸ PALESTINE LEGAL, *supra* note 186; see also PALESTINE LEGAL, *2020 Year in Review*, *supra* note 21.

¹⁸⁹ THE LAWFARE PROJECT, *supra* note 23.

¹⁹⁰ See PALESTINE LEGAL, *Federal Crackdown*, *supra* note 19; see also PALESTINE LEGAL, *2019 Year in Review*, *supra* note 21.

¹⁹¹ PALESTINE LEGAL, *Federal Crackdown*, *supra* note 19.

¹⁹² The ACLJ is a conservative, Evangelical-funded legal and advocacy group that has distinguished itself most notably in its right-to-life cases. See *About*

Georgia Institute of Technology (“Georgia Tech”).¹⁹³ In April 2019, the Director of the Hillel¹⁹⁴ at Georgia Tech, a non-student employee, was denied entrance to an event sponsored by the Young Democratic Socialists of America (“YDSA”) billed as “Palestine 101.”¹⁹⁵ According to Palestine Legal’s report, the Director had sent out an email “announcing plans to offer a ‘counter-narrative’” at the event, and, in response, the YDSA limited event attendance.¹⁹⁶ Following the event, Hillel filed a complaint with Georgia Tech directly, and after several months’ investigation, Georgia Tech sanctioned YDSA for its conduct.¹⁹⁷ The YDSA disputed these sanctions via a formal appeal, a student petition, and on-campus organizing, and in November 2019, Georgia Tech dropped the sanctions.¹⁹⁸ The next month, the ACLJ filed a complaint with OCR that alleged that Georgia Tech “allowed blatant anti-Semitic exclusion and harassment at a campus group event,” thereby permitting a hostile environment for Jewish students.¹⁹⁹ The

the American Center for Law and Justice, ACLJ, <https://aclj.org/our-mission/about-aclj> (last visited Sept. 29, 2021).

¹⁹³ Mark Goldfeder, *ACLJ Files Federal Complaint to Combat Antisemitism on Major University Campus*, ACLJ (Jan. 3, 2020), <https://aclj.org/israel/aclj-files-federal-complaint-to-combat-anti-semitism-on-major-university-campus>; PALESTINE LEGAL, *Federal Crackdown*, *supra* note 19.

¹⁹⁴ Hillel is the largest Jewish student organization in the world, serving over 550 colleges and universities. *FAQS*, HILLEL, <https://www.hillel.org/about/faqs>. In recent years, Hillel has come under scrutiny by Jewish students critical of Israel for the organization’s Standards of Partnership for Israel Activities, which “exclude individuals and groups from the Jewish community on campus on the basis of their views on Israel.” *Mission and Vision*, OPEN HILLEL, <http://www.openhillel.org/about>.

¹⁹⁵ PALESTINE LEGAL, *Federal Crackdown*, *supra* note 19; *see also* Goldfeder, *supra* note 190.

¹⁹⁶ PALESTINE LEGAL, *Federal Crackdown*, *supra* note 19.

¹⁹⁷ *Georgia Tech Students Defeat Censorship Campaign*, PALESTINE LEGAL (Nov. 8, 2019), <https://palestinelegal.org/news/2019/10/24/tell-georgia-tech-dont-punish-students-over-palestine-talk-gnnkx>.

¹⁹⁸ *Id.*

¹⁹⁹ Letter from Stuart J. Roth, Senior Counsel, American Ctr. for Law and Justice, to Kenneth Marcus, Assistant Sec’y for Civil Rights, United States Dep’t of Educ. 1 (Dec. 27, 2019) (on file with author). Later in the letter, its authors write, “[t]o be clear, the violation of [the Director’s] rights had absolutely nothing

complaint cites Executive Order 13,899, claiming “[t]he problem of anti-Semitism on campuses around the country is so well-known that the President of the United States recently issued an Executive Order specifically designed to combat it.”²⁰⁰ The OCR opened its investigation in March 2020.²⁰¹ In January 2021, Hillel dropped the case, and Georgia Tech released a statement recognizing the Executive Order and the OCR’s use of the IHRA definition of anti-Semitism “when evaluating the intent in cases of discriminatory harassment.”²⁰²

The Georgia Tech resolution parallels a September 2020 complaint resolution at New York University (“NYU”); both resolutions may be illustrative of trends to anticipate in future Title VI complaints.²⁰³ An April 2019 complaint filed against NYU alleged that SJP’s campus activities had created a hostile environment for Jewish students.²⁰⁴ It noted, in particular, that a member of SJP took the microphone from a Jewish student singing Israel’s national anthem at an Israeli Independence Day rave and yelled, “Free Palestine!”²⁰⁵ In September 2020, before the OCR could finish its investigation, NYU opted for a voluntary resolution of the complaint.²⁰⁶ The resolution cleared NYU of any wrongdoing, thereby bypassing an underlying determination of whether NYU

to do with Israel or Palestine. The violation of [the Director’s] rights was a simple case of anti-Semitic discrimination.”

²⁰⁰ *Id.* at 4.

²⁰¹ PALESTINE LEGAL, *Federal Crackdown*, *supra* note 19.

²⁰² *Statement from Georgia Tech on Resolution of Department of Education Review*, GEORGIA TECH (Jan. 18, 2021), <https://www.news.gatech.edu/news/2021/01/18/statement-georgia-tech-resolution-department-education-review>.

²⁰³ See Kery Murakami, *NYU Settles Anti-Semitism Case*, INSIDE HIGHER ED (Oct. 2, 2020), <https://www.insidehighered.com/news/2020/10/02/new-york-university-settles-anti-semitism-case-education-department>.

²⁰⁴ Aaron Bandler, *Pro-Israel Students File Complaint Against NYU*, JEWISH J. (Apr. 24, 2019), <https://jewishjournal.com/news/united-states/297574/pro-israel-students-file-complaint-against-nyu/>.

²⁰⁵ *Id.*

²⁰⁶ Letter from Terrance J. Nolan, Senior Vice President, Gen. Couns. and Sec’y, New York Univ. & Timothy C.J. Blanchard, Reg’l Dir., United States Dep’t of Educ., to Joel H. Siegal & Neal M. Sher (Sept. 25, 2020) (on file with author).

SJP's actions could be considered to have created a hostile environment for Jewish students under Executive Order 13,899.²⁰⁷ As part of the resolution, however, NYU agreed to add portions of the IHRA definition of anti-Semitism to its nondiscrimination and anti-harassment policies, thus formalizing criticism of Israel as a type of anti-Semitic discrimination.²⁰⁸ This formalization threatens to label criticism of Israel by NYU student activists as discriminatory speech,²⁰⁹ a designation which could chill students' willingness to engage in political activity.²¹⁰

As of this writing, it is unclear whether several similar pending Title VI complaints against Bard College, the University of Illinois at Urbana-Champaign, and the University of California, Los Angeles,²¹¹ will eventually be dismissed.²¹² In its dismissals of Title VI complaints rendered before the Executive Order, the OCR reasoned that the complainants conflated political difference with discriminatory harassment and that these expressions of political speech did not constitute a "hostile environment" necessary for the finding of a Title VI violation.²¹³ However, if the OCR complies with the Executive Order and considers anti-Zionist speech to be anti-Semitic, the Office may find discriminatory harassment where it has previously found expressions of political disagreement. The Title VI hostile environment analysis is quite discretionary, based on a "severe, pervasive, or persistent" standard in which "the severity of the incidents needed to establish a racially hostile environment . . . varies inversely with their pervasiveness or

²⁰⁷ See Murakami, *supra* note 203.

²⁰⁸ See *id.*

²⁰⁹ See *infra* Part II, Section B.

²¹⁰ See *infra* Part II, Section C; see also Salahi & Bargzie, *supra* note 17, at 170–71.

²¹¹ See PALESTINE LEGAL, *Federal Crackdown*, *supra* note 19 (describing open complaints at Bard College, UCLA, and Rutgers University); see also Dynahlee Padilla, *Dept. of Ed. To Investigate Alleged Anti-Semitism Complaint at U of Illinois at Urbana-Champaign*, DIVERSE (Nov. 17, 2020), <https://www.diverseeducation.com/home/article/15108172/dept-of-ed-to-investigate-alleged-anti-semitism-complaint-at-u-of-illinois-at-urbana-champaign> (describing a Title VI complaint filed against the University of Illinois in October 2020 and under investigation as of November 2020).

²¹² See *infra* Part II, Section C.

²¹³ See *infra* Part II, Section C.

persistence.”²¹⁴ The Executive Order opens the door for OCR investigators to find “severe incidents” of discriminatory harassment where the Constitution and Supreme Court have repeatedly found the highest forms of protected political speech.²¹⁵

IV. RESCINDING EXECUTIVE ORDER 13,899 AND ESTABLISHING PROTECTIONS FOR PALESTINIAN RIGHTS ACTIVISTS AND JEWS ON COLLEGE CAMPUSES

In order to safeguard the rights of Palestinian rights activists and Jewish students on college campuses, as well as to ensure the safety of political expression more broadly, the President must rescind Executive Order 13,899.

Rescinding the order would protect Palestinian student rights activists in two major ways. First, it would discourage complainants from weaponizing Title VI and foreclose their ability to use the IHRA definition of anti-Semitism as a means of suppressing political speech.²¹⁶ It is not enough for the OCR to dismiss the pending Title VI complaints.²¹⁷ The harms of Title VI complaints extend beyond the OCR’s investigations—they bring about extensive media coverage of particular students and student groups, discourage student participation in activities promoting Palestinian human rights, and often require student activists to defend themselves in time-consuming administrative hearings.²¹⁸ The net effect is a “massive chill” of Palestinian rights activism and political speech on college and university campuses.²¹⁹

²¹⁴ See OFFICE FOR CIVIL RIGHTS, *supra* note 116; *infra* Part II, Section A.

²¹⁵ See *id.* at 4. The guidelines explain that “in some cases, a racially hostile environment requiring appropriate responsive action may result from a single incident that is sufficiently severe.”

²¹⁶ See *Expert Q&A: Trump’s Executive Order on Campus Antisemitism*, INSTITUTE FOR MIDDLE EAST UNDERSTANDING (Dec. 18, 2019), <https://imeu.org/article/expert-qa-trumps-executive-order-on-campus-antisemitism>.

²¹⁷ See *infra* Part III, Section B.

²¹⁸ See *infra* Part II, Section C; see also PALESTINE LEGAL, *Federal Crackdown*, *supra* note 19.

²¹⁹ INSTITUTE FOR MIDDLE EAST UNDERSTANDING, *supra* note 216.

Second, rescinding the order would protect Palestinian rights activists from university policies that are hostile to activism that is critical of Israel. As the NYU and Georgia Tech resolutions indicate, a possible after-effect of the order is the adoption of the IHRA definition by universities themselves.²²⁰ Faced with the possibility of negative media attention, protracted investigations, and the threat of cuts in federal funding, already cash-strapped universities are incentivized to make concessions that seem symbolic but, in actuality, have material ramifications on student activism and free speech protections on campus.²²¹ University and college adoption of the IHRA definition subjects student activists to administrative repercussions at their own schools for expressing political opinions that critique Israel.²²² Furthermore, decisions made on university campuses tend to have a “ripple chilling effect,” possibly influencing the decisions of administrators and students elsewhere.²²³

Rescinding the order will also protect Jewish students on campus. American Jewish students hold a wide range of political ideologies, and many are themselves involved in organizations like SJP,²²⁴ as well as a wide range of Jewish anti-Zionist or liberal Zionist organizations.²²⁵ Administrative and governmental censure of Palestinian rights activism, then, also censures the political expression of many Jewish students on college campuses. Furthermore, by conflating anti-Semitism with anti-Zionism, the order reifies the idea that Judaism is a nationality or ethnicity, rather than a religion.²²⁶ It also obscures the fact that the most recent incidents of American anti-Semitism have come from white nationalist groups, not Palestinian rights activists.²²⁷ White

²²⁰ See *infra* Part III, Section B.

²²¹ See INSTITUTE FOR MIDDLE EAST UNDERSTANDING, *supra* note 216.

²²² See Salahi & Bargzie, *supra* note 17, at 170–71.

²²³ *Id.* at 171.

²²⁴ *Id.* at 176.

²²⁵ See Waxman, *supra* note 98; Essa, *supra* note 97; PEW RES. CTR., *Jewish Americans*, *supra* note 98 (finding that approximately 1 in 10 American Jews supports the BDS movement, with support strongest among Jews under 50).

²²⁶ See *supra* Part I, Section B.

²²⁷ See United Nations Secretary-General, *U.N. Secretary-General, Rise in Anti-Semitism, White Supremacy Exacerbated by Pandemic*, Secretary-General

nationalist leaders such as Richard Spencer simultaneously laud Israel as a “model for an ethnically homogeneous state”²²⁸ while espousing virulent anti-Semitic ideology that has, in recent years, turned deadly.²²⁹ White nationalist ideology hinges on the conflation of the Jewish religion with the idea that Judaism is an ethnicity—just as the Executive Order does.

Finally, rescinding the order is necessary to ensure the protections of all types of political expression on college campuses. Speech criticizing government conduct is protected expression under the First Amendment and cannot serve as the basis for a government regulation.²³⁰ By conflating criticism of Israel with anti-Semitism, the order creates an administrative loophole through which it can censor otherwise constitutionally protected political expression.²³¹ Kenneth S. Stern, the author of the IHRA definition, warned that the definition was in no way intended to apply to college and university campuses and that its inclusion in the Executive Order would lead to troubling violations of academic freedom and free speech.²³² The order and its potential adoption by campus

Warns at Holocaust Remembrance Service, Calling for End to Attacks on Truth, UNITED NATIONS MEETINGS COVERAGE AND PRESS RELEASES (Jan. 25, 2021), <https://www.un.org/press/en/2021/sgsm20553.doc.htm>; see also Kaplan, *supra* note 102 (writing about the rise of anti-Semitism in the context of the 2017 white supremacist march in Charlottesville, VA).

²²⁸ Kaplan, *supra* note 102.

²²⁹ See, e.g., Robertson et al., *supra* note 104 (detailing the shooting at the Pittsburgh, PA Tree of Life synagogue by a white nationalist that resulted in 11 deaths).

²³⁰ See *supra* Part II, Section B.

²³¹ *Backgrounder on Efforts to Redefine Antisemitism as a Means of Censoring Criticism of Israel*, PALESTINE LEGAL, <https://palestinelegal.org/redefinition-efforts> (last updated Jan. 2020) (“The redefinition of antisemitism is so broadly drawn—and its examples so vague—that any speech critical of Israel or supportive of Palestinian rights could conceivably fall within it.”).

²³² Kenneth S. Stern, *Will Campus Criticism of Israel Violate Federal Law?*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/opinion/will-campus-criticism-of-israel-violate-federal-law.html>. (“What’s next? Should Congress define what speech is Islamophobic? Anti-Palestinian? Racist? . . . How about defining ‘anti-United States’ speech? We could dust off the files of the House Un-American Activities Committee.”).

administrations suppresses the types of debate and dissent that are essential to post-secondary education.²³³

CONCLUSION

In 1963, before the passage of the Civil Rights Act, President John F. Kennedy said that “[d]irect discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of federal funds, is just as invidious.”²³⁴ The weaponization of Title VI against Palestinian college activists has perversely inverted the framework of the Civil Rights Act. The Constitution protects political speech, but through the use of Title VI complaints and their aftereffects, complainants seek to use the Office of Civil Rights to effectively silence a form of constitutionally protected expression. All college students deserve to learn in an environment free from racial, national, or ethnic harassment. They also deserve the right to express constitutionally protected political speech. In order to protect the free speech rights of Palestinian activists and Jewish students, and safeguard political expression on campus, the President must rescind Executive Order 13,899.

²³³ See *supra* Part II, Section B; see also Salahi & Bargzie, *supra* note 17, at 179.

²³⁴ U.S. Department of Justice Civil Rights Division Accomplishment, 2009-2012, U.S. DEPT. OF JUSTICE CIV. RTS. DIV., <https://www.justice.gov/crt/us-department-justice-civil-rights-division-accomplishments-2009-2012> (last updated Nov. 20, 2015).