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"Antisemitism on America's College and University Campuses:
Current Conditions and the Federal Response"

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

Although the applicable law is nuanced, the bottom line is relatively simple. In general, protests against Israel do not contribute to an actionable "hostile environment" for Jewish students or otherwise amount to prohibited discrimination under the law. And that does not change just because the anti-Israel activity at issue is highly offensive, or violates campus rules, or even has the unfortunate effect of making some Jewish students feel unwelcome. Because Title VI is an antidiscrimination statute—not a "general civility code" for college campuses—it is implicated only when students are disfavored or harassed on the basis of a protected characteristic. And as I'll explain, in the case of Title VI, that means a person's race or ancestry, not their religion or other beliefs. Thus, even though hostility toward a person based on his holding traditional Jewish religious beliefs would be antisemitic, it is not covered by Title VI. Similarly, regardless of whether hostility to Zionism or to Israel is properly deemed antisemitic, it does not ordinarily implicate Title VI either.

The most plausible argument to the contrary depends on an unusually expansive conception of what it means to be excluded "on the ground of" a particular trait. By way of background, it is well settled that harassment can be so "severe, pervasive, and objectively offensive" that it effectively denies someone an opportunity to participate in a given program. So, if someone is severely harassed—even in non-racial terms, like with generic threats of violence—and the perpetrators mistreat them in this way because of their race, Title VI is implicated. Against that settled backdrop, the most aggressive interpretation of Title VI posits that the statute is also implicated if nobody intends to harass the victim because of their race, but the environment is permeated with conduct that is not just severely, but also racially, offensive. This theory borrows from employment discrimination cases under Title VII—where courts have held, for instance,

that a Black employee forced to work in an environment permeated with racial slurs might have a viable claim even if his co-workers never directed those slurs at him or otherwise singled him out for adverse treatment.

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

I respectfully submit that a conscientious "report . . . that monitors Federal civil rights enforcement efforts" in this area needs to acknowledge and articulate these important limits on the lawful scope of those "enforcement efforts." "[N]o legislation pursues its purposes at all costs," and failing to recognize as much is especially dangerous when the costs are censoring and chilling political expression. In reviewing the Executive Branch's response to claims of campus antisemitism, therefore, the Commission should consider whether that response has respected the internal limits on Title VI that I will describe. And, of course, it would be inappropriate for the Commission to recommend additional enforcement efforts—such as further measures to curb anti-Israel activities on college campuses that some deem antisemitic—if the law does not authorize those steps.

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

But it is crucial to distinguish the question of how universities should further "their dual commitments to robust debate and a thriving, pluralist student body" from the question of what the law permits federal agencies to mandate on pain of crippling sanctions. Gaps of that kind—where moral obligations outstrip legal obligations—are the hallmark of a free society. I agree with Suzanne Goldberg and Olatunde Johnson that to "lead[] with Title VI" in our efforts to promote a robust and inclusive learning environment is "to err as a matter of law and

educational strategy." And because Title VI empowers political actors with an extraordinarily powerful tool for bending universities to their will, anyone who values free thought should take care not to stretch the law from the specific ban on race or ancestry discrimination that it is to the vague ban on hostile expression that some might like it to be.

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

When Congress adopted the Civil Rights Act of 1964, it prohibited job discrimination on the basis of "race, color, religion, sex, or national origin," but it omitted two of these characteristics—religion and sex—from Title VI's ban on discrimination by recipients of federal funds. For a time, the relevant federal agencies seemingly interpreted that choice as placing anti-Jewish discrimination wholly outside Title VI. Since the mid-2000s, however, the Government's position has shifted to recognize that anti-Jewish discrimination can fall within the statute's terms.

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

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

In light of this Commission's special concern for bipartisanship, let me emphasize that, at least until very recently, the basic distinction that I've just drawn has been a matter of bipartisan consensus. The Department of Education's Office of Civil Rights (OCR) first affirmed that it would investigate claims of "race or ethnic harassment against Arab Muslim, Sikh, and Jewish students" during the George W. Bush Administration. In announcing that policy, the agency correctly explained both that Title VI applies to these covered forms of discrimination (even if "the groups targeted for discrimination also exhibit religious characteristics") and also that the statute "does not extend to religious discrimination." When the Justice Department was asked to assess Title VI's application to "discrete religious groups" during the Obama Administration, it "agree[d] with" the Bush-era analysis and reaffirmed the same central distinction: "Although Title VI does not prohibit discrimination on the basis of religion, discrimination against Jews, Muslims, Sikhs, and members of other religious groups violates Title VI when that discrimination is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than its members' religious practice."

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

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

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

Second, an important corollary of this point is that data purporting to track the incidence of antisemitism are highly misleading for purposes of monitoring discrimination covered by Title VI. As noted above, both the Trump Administration and the Obama Administration explained that a "detailed analysis of the allegations" is required to determine whether a particular act of

anti-Jewish discrimination falls within the purview of Title VI. When organizations such as the Anti-Defamation League (ADL) compile reports of antisemitic incidents, however, they do not undertake any such analysis. In light of its statutory responsibilities, therefore, the Commission could not responsibly opine on the incidence of relevant discrimination based on generalized assessments of a rise in antisemitism or counts of reported antisemitic incidents. Relying on these figures would be especially problematic if (as in the case of the ADL) the counts appear to incorporate bare expressions of hostility to Zionism or the State of Israel, including numerous expressions of dissent by Jews themselves.

Third, insofar as a Title VI claim must be based on intentional discrimination, a sincere intention to disfavor or exclude people who hold some view about Israel (or any other nation-state) does not suffice. Hostility toward the State of Israel, rejection of its right to exist as a distinctly Jewish state, or hostility toward all who support it might each fall within some advocacy groups' understanding of "antisemitism." But as a matter of law, these motivations do not by themselves qualify as an intent to discriminate against anyone on account of their race or ancestry. Indeed, the Supreme Court has held that the Constitution forbids the Government from acting on the premise that "minority students always (or even consistently) express some characteristic minority viewpoint on any issue." The Government thus could not presume that people of Jewish ancestry hold any particular view or attitude toward Israel even if that were generally true—which, notably, it is not. Even apart from these obstacles, moreover, courts have long rejected efforts to treat race-associated cultural practices—most often, wearing braids, locks, or cornrows—as facets of "race" for purposes of statutory bans on disparate treatment. As one leading case observed, a "conception of what 'race' means" that would extend to "cultural practices," as opposed to "immutable characteristics," "runs headlong into a wall of contrary caselaw." To treat a person's viewpoints on just and unjust geopolitical arrangements as a facet of her race or ancestry would be an especially extreme departure from that norm. Notwithstanding all of this, some argue that Zionism is different—that it is so fundamental to the identity of the Jewish people or the concept of Jewishness that to be anti-Zionist just is to be anti-Jewish. According to my co-panelist Mark Goldfeder, for example, "Zionism is a core part of [many Jews'] actual physical identity," because "Zion is not an idea" but rather "a hill . . . where Jews are from." "Zion" can certainly refer to a hill. But, respectfully, I take it there is no real dispute that "Zionism" refers either to a proposition (something one can believe) or to the movement devoted to that proposition. And while different users of the word often seem to have different propositions in mind, the dominant understandings at least encompass a claim about how or by whom certain territory in the Middle East should be governed. No belief about any such question is or possibly could be inherent in anyone's Jewish ancestry. (And if there were any doubt about that, the robust and longstanding debates on all such questions within the Jewish community ought to put it to rest.)

Although hostility to Zionism thus cannot simply be defined as a species of racial or ancestry-based hostility to Jews, it is surely true that some instances of hostility to Israel or Zionism do manifest those forms of group-based animus. Yet there are also many other reasons why a person might—rightly or wrongly—harbor hostility toward Israel, Zionism, or supporters of any particular geopolitical arrangement in the Middle East. Given that diversity of motivations,

there is no lawful way to establish that anti-Israel conduct was actually motivated by racial or ancestry-based animus without individualized evidence to that effect. As the First Circuit recently explained in rejecting a Title VI claim against MIT, "the possibility that antisemitism motivates one speaker's anti-Israel speech" does not "justify assuming that all criticism of Israel or advocacy for Palestinian sovereignty is motivated by antisemitism."

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

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

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

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

Meanwhile, the Court has also recognized—albeit with reservations in recent years—that federal agencies may "effectuate" Title VI through prohibitions that go beyond the operative provision's own requirements. That authority is the traditional basis for federal regulations that require funding recipients to address disparate impact as well as disparate treatment. In theory, at least, the Federal Government could rely on this regulatory authority to require that schools justify any choice to countenance student conduct that has the incidental or collateral effect of disproportionately excluding members of a race- or ancestry-defined group. Indeed, it is possible—though, again, not clear—that the Department of Education's guidance on "racial harassment," dating to the 1990s, is best understood as: (1) charging schools with curbing

certain unintentionally exclusionary conduct of that kind; and (2) relying on the Department's longstanding disparate-impact regulation to justify that step. If that is so, however, any such obligation will not survive the Justice Department's recent determination that "any version of imposing liability for unintentional discrimination is inconsistent with Title VI[]" or President Trump's directive for all agencies to rescind their disparate-impact regulations.
In the present context, all of this raises serious doubts about whether the Federal Government has any authority to enforce Title VI on the basis of anything other than traditional disparate treatment based on Jewish or Israeli ancestry. Again, a conscientious report on Title VI enforcement in this area will need to acknowledge as much.

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

This formulation has its origin in workplace harassment cases brought under Title VII—and because Title VI cases are so rarely litigated, Title VII cases remain the main source of guidance about what the test requires. In truth, the question is still somewhat unsettled even there. Generally speaking, however, the leading cases focus on what the challenged activity expresses about the protected group and whether that expression, viewed objectively and in context, rises to the level of altering someone's conditions of employment. For example, one common fact pattern involves a woman whose male-dominated workplace is permeated with sexual remarks, obscene graffiti, and pornography. Even if none of this activity is directed at the plaintiff on the basis of sex (or even directed at her at all), courts have reasoned that it can create a sexually hostile environment for her if it was "sexually demeaning" and "conveyed a profound disrespect for women." Likewise, a Black worker may face a racially hostile environment if his workplace is adorned with "photos of Blacks being lynched" and "permeated by racial slurs." The crucial through-line in these cases is an alignment between the class that is severely demeaned, the class that is protected by the statute, and the class to which the plaintiff belongs.

In its recent enforcement actions, the Government seems to have lost sight of this requirement entirely. In its formal Title VI finding against Harvard, for instance, the Trump Administration asserted that a "hostile environment [was] created for Jewish and Israeli students" in part because they "were repeatedly denied access to . . . libraries." But in most of the cited instances, the only support for this claim consisted of reports in the student newspaper that some students had "silently studied in the [library]" with political slogans taped to the backs of their laptops—messages such as "No normalcy during genocide," "Justice for Palestine," and "Israel Bombs Harvard Pays." Now, in this part of the analysis, I am assuming (for the sake of argument) that the lack of any evidence of intent to offend Jewish students does not preclude these acts from contributing to a "hostile environment" under Title VI. But even under that assumption, the Government would still need to explain why the objective meaning of these slogans is a severely offensive message about Israeli people or about people of Jewish

ancestry. And here that is impossible to do, because the slogans are not reasonably read as saying anything about either of those classes of people at all, let alone anything of a highly demeaning nature. Put another way: When a woman's co-workers express "profound disrespect for women," they necessarily express profound disrespect for her. Here, by contrast, the protesters' messages may have offended their peers, but they were not about their peers—not even as generic members of any racial or ancestral group. Rather, they were about the undeniably legitimate topics of "genocide," "Harvard," "Palestine," and "Israel."

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

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

I do not mean to say that there are no hard cases or no limits. Even in the context of untargeted speech in a university setting, an environment might be actionably hostile under Title VI when it is pervaded by rhetoric that can only plausibly be interpreted as expressing a pejorative attitude toward people who share a protected characteristic. In context, some symbols and messages—think of swastikas and "Jews will not replace us" banners—really do lend themselves to only one interpretation. But the practical reality is that much of the unsettling rhetoric in this area is genuinely ambiguous: The same slogans that some see as "calls for

genocide" are seen by others (including many Jews) as expressing an attitude toward the State of Israel, not toward people of Jewish ancestry or Israeli nationality. For that reason, too, only a small fraction of the anti-Israel or anti-Zionist activity that has unfolded on college campuses in recent years could be deemed to contribute to an actionable hostile environment, even under the various assumptions that I've granted for the sake of argument here.

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

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

For similar reasons, the Congress that enacted Title VI was not wrong that claims of religious discrimination pose special and complicated issues. At a minimum, any amendment to the statute that would extend it to religion would require careful consideration to ensure that particular ideas or institutions are not afforded special insulation from criticism just because some embrace those ideas or institutions on religious grounds. As a result, I doubt that an appropriately careful amendment to Title VI would materially alter the bottom line with respect to the main issues that I have addressed here. And more fundamentally, I doubt that efforts to police campus activism (in contrast to conventional harassment) through federal civil rights law will ever yield the open and respectful campus environments that Jewish students, like all students, deserve.