



Introduction

The Foundation for Individual Rights and Expression (FIRE) writes to express serious concerns regarding AB 446, which would require state agencies to incorporate the International Holocaust Remembrance Alliance (IHRA) definition of antisemitism into anti-discrimination enforcement.

FIRE is a nonpartisan nonprofit that has defended free speech and academic freedom on campuses nationwide for more than 25 years. We agree that antisemitism, like all forms of bigotry, is a serious problem that the state should address. However, the approach taken by AB 446 risks undermining both constitutional free speech protections and anti-discrimination law.

Executive Summary

The IHRA definition is not a legal standard and is dangerously vague

The IHRA definition was developed as a non-binding educational and data-collection tool — not for use in enforcement. It defines antisemitism as “a certain perception of Jews,” a formulation so indeterminate that speakers and institutions cannot reasonably know what expression is prohibited. The definition’s primary author, Kenneth Stern, has repeatedly made this point.

The IHRA examples sweep in protected political speech

The bill would require agencies to consult IHRA’s accompanying examples, several of which directly implicate constitutionally protected political expression, including the application of so-called “double standards” to Israel and making controversial historical comparisons to Israel. Political speech does not lose constitutional protection because it criticizes one country rather than another or is offensive, provocative, or sharply critical.

Courts are increasingly skeptical of IHRA’s constitutionality when used for anti-discrimination purposes

When vague, speech-focused definitions are embedded into enforcement regimes, institutions predictably over-censor to avoid investigations, penalties, or loss of funding. Courts have recognized that using IHRA in this manner risks unconstitutional viewpoint discrimination.¹ And ultimately, when anti-discrimination enforcement is uneven and subject to litigation, the people most harmed are those in need of reliable anti-discrimination protection.

¹ *Students for Just. in Palestine, at Univ. of Houston v. Abbott*, 756 F. Supp. 3d 410, 425 (W.D. Tex. 2024) (“the Court finds the incorporation of this specific definition of antisemitism is viewpoint discrimination [. . .] That definition, by incorporation of the IHRA’s examples, labels “calling the State of Israel a racist endeavor” and “drawing comparisons of contemporary Israeli policy to that of the Nazis” as antisemitic.”)

For these reasons, FIRE urges you to oppose AB 446 or amend it to remove any requirement that the IHRA definition be used in binding antidiscrimination enforcement.

There is no gap in existing law

Wisconsin and federal anti-discrimination laws already prohibit antisemitic discrimination. Although Title VI of the Civil Rights Act does not explicitly prohibit discrimination on the basis of religion, it has been interpreted for the past twenty years by the Department of Education under consecutive presidential administrations to protect Jewish students from discrimination based on shared ancestry or ethnic characteristics. In addition, many states including Wisconsin² prohibit religious discrimination in educational settings under state law. State agencies, including state universities, therefore are already obligated to investigate and remedy antisemitic discrimination without adopting the constitutionally suspect IHRA definition.

Detailed Legal and Policy Analysis

Federal and state antidiscrimination law already provides meaningful tools to address antisemitic discrimination. Although Title VI of the Civil Rights Act does not prohibit religious discrimination, it has long been interpreted to protect Jewish students from discrimination based on shared ancestry or ethnic characteristics.³ Where antisemitic conduct targets individuals because they are Jewish as an ethnic or ancestral group, existing law already authorizes enforcement.

In addition, many states, including yours independently prohibit religious discrimination in educational settings under state law. Where such protections exist, they provide an additional, constitutionally sound basis for addressing antisemitic discrimination without importing vague or speech-laden definitions into enforcement regimes.

Against this legal backdrop, the IHRA definition is not only unnecessary but ill-suited for use in enforcement. The definition — which its primary author has explained was never intended⁴ to function as a legal standard — defines antisemitism as “a certain perception of Jews, which may be expressed as hatred toward Jews.” This formulation offers no clear guidance as to what speech or conduct is prohibited. A dozen people could interpret that definition in a dozen different ways, showing why the definition, when used for anti-discrimination enforcement purposes, fails a basic vagueness test.⁵ And when consequences for schools include investigations, sanctions, or loss of funding under Title VI or state law, institutions will inevitably err

² Wis. Stat. Ann. § 36.12

³ *Dear Colleague Letter: Protecting Students from Discrimination, such as Harassment, Based on Race, Color, or National Origin, Including Shared Ancestry or Ethnic Characteristics*, U.S. Dep’t of Educ., Off. for C.R. (May 7, 2024), <https://www.ed.gov/media/document/dear-colleague-letter-protecting-students-discrimination-such-harassment-based-race-color-or-national-origin-including-shared-ancestry-or-ethnic>.

⁴ Kenneth Stern, *A Bad Deal: By Adopting the IHRA Definition of Antisemitism, Universities are Sacrificing Academic Freedom*, Knight Institute (Sept. 5, 2025), <https://knightcolumbia.org/content/a-bad-deal-why-using-the-ihra-definition-of-antisemitism-on-campus-is-incompatible-with-academic-freedom-and-students-right-to-open-inquiry>.

⁵ *Reno v. Am. C.L. Union*, 521 U.S. 844, 874 (1997) (holding that the Communications Decency Act’s “indecent transmission” and “patently offensive display” provisions were unconstitutionally vague because the act “unquestionably silences some speakers whose messages would be entitled to constitutional protection.”).

on the side of suppressing protected expression.⁶ Unfortunately, it's cheaper for colleges to settle First Amendment lawsuits than risk losing federal or state funding.

These constitutional concerns are compounded by the bill's requirement that agencies consult IHRA's accompanying examples of antisemitism. Several of those examples directly implicate core political expression, including criticism of Israel. Speech does not lose constitutional protection because it applies "double standards," draws historical analogies, or expresses unpopular political views.⁷ The First Amendment protects political expression regardless of whether it is persuasive, fair, or widely condemned.

Established anti-discrimination precedent further underscores why this approach is flawed. Courts have long held that expression may be punished as student-on-student harassment only when it is so severe, pervasive, and objectively offensive that it effectively denies equal access to educational or employment opportunities.⁸ Embedding a viewpoint-discriminatory definition into enforcement policy risks collapsing the essential distinction between protected expression and unlawful discriminatory conduct.

The risks posed by this approach are no longer theoretical. In *Students for Justice in Palestine at the University of Houston v. Abbott*, a federal district court considered a First Amendment challenge to a Texas executive order directing public universities to use the IHRA definition "to guide" determinations of antisemitic speech. The court found that incorporation of the IHRA definition plausibly constituted unconstitutional viewpoint discrimination.⁹ The court emphasized that the IHRA examples single out particular political viewpoints — especially criticism of Israel — as indicative of antisemitism, thereby burdening one side of a contentious public debate. Because the government may not favor or disfavor speech based on viewpoint, the court held that the plaintiffs were likely to succeed on their First Amendment claim.

This case illustrates the serious constitutional risks that arise when the IHRA definition is used as an enforcement guide rather than as a voluntary educational tool. Even when framed as nonbinding "guidance," incorporation of the definition predictably pressures institutions to suppress protected political expression and exposes the state to significant legal liability.

⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (explaining how exposure to liability can prompt institutions to "steer far wider of the unlawful zone."); *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 709 (9th Cir. 2010) (explaining that exposing universities to liability for erring on the side of academic freedom would prompt schools to "steer far' from any controversial professor").

⁷ *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) ("As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate."); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) ("Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. [. . .] When such appeals do not incite lawless action, they must be regarded as protected speech."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) ("The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed").

⁸ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.) ("There is no categorical "harassment exception" to the First Amendment's free speech clause. . . . Although [. . .] *Davis* dealt with sexual harassment under Title IX, we believe that their reasoning applies equally to harassment on the basis of the personal characteristics enumerated in Title VI"); *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 322–23 (3d Cir. 2013) (upholding preliminary injunction against school for banning students from wearing bracelets because school failed to show that "bracelets would breed an environment of pervasive and severe harassment" under *Davis*); *Speech First, Inc. v. Fenves*, 979 F.3d 319, 337 n.16 (5th Cir. 2020) (citing *Davis* while casting doubt on university speech code).

⁹ *Students for Just. in Palestine, at Univ. of Houston v. Abbott*, 756 F. Supp. 3d 410, 425 (W.D. Tex. 2024) ("the Court finds the incorporation of this specific definition of antisemitism is viewpoint discrimination [. . .] That definition, by incorporation of the IHRA's examples, labels 'calling the State of Israel a racist endeavor' and 'drawing comparisons of contemporary Israeli policy to that of the Nazis' as antisemitic.).

Savings clauses or disclaimers stating that AB 446 does not infringe upon rights protected by the First Amendment do not resolve these problems. No disclaimer can cure the vagueness and overbreadth of a definition that singles out certain political viewpoints as evidence of discriminatory intent.¹⁰ In practice, institutions still over-enforce to avoid investigations, penalties, or political scrutiny.

These concerns are shared even by the IHRA definition's primary author, Kenneth Stern, who has repeatedly warned against its use as a speech-regulating or enforcement tool.¹¹ He has explained that the definition was created for data collection and monitoring—not to be weaponized to suppress campus or political speech. As Stern has cautioned, asking the state to define which political positions constitute evidence of antisemitism opens the door to abuse and fundamentally politicizes antidiscrimination law.

It's important that the state mind these constitutional distinctions. When legitimate anti-discrimination efforts are put on hold due to constitutional issues, those most affected by this failure are the students who need the law's protection.

There is a constitutionally sound alternative. The state can effectively combat antisemitism by enforcing existing anti-discrimination laws against concrete discriminatory conduct, by clearly distinguishing protected expression from actionable discriminatory harassment consistent with the First Amendment, and by focusing enforcement on exclusion, retaliation, threats, or targeted harassment that meets established legal thresholds.

Respectfully submitted,

A handwritten signature in black ink that reads "Tyler Coward". The signature is written in a cursive, flowing style.

Tyler Coward
Lead Counsel, Government Affairs
Foundation for Individual Rights and Expression

¹⁰ *Dambrot v. Cent. Michigan Univ.*, 839 F. Supp. 477, 482 (E.D. Mich. 1993), *aff'd*, 55 F.3d 1177 (6th Cir. 1995) (“The Court is emphatically unimpressed with the mid-stream letter [. . .] that the policy was not intended to be enforced, and would not be enforced, in such a way as to “interfere impermissibly with individuals' rights to free speech.” [. . .] The Court is not willing to entrust the guardianship of the First Amendment to the tender mercies of this institution's discriminatory harassment/affirmative action enforcer.”); *Baggett v. Bullitt*, 377 U.S. 360, 373 (1964) (“Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law.”); *United States v. Stevens*, 559 U.S. 460, 480 (2010) (“We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”).

¹¹ Kenneth Stern, *Will Campus Criticism of Israel Violate Federal Law?*, New York Times, (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/opinion/will-campus-criticism-of-israel-violate-federal-law.html>.