



US Campaign for
Palestinian Rights



H.3643 is Unconstitutional and Must Be Opposed

H.3643 proposes amending South Carolina’s education laws by directing public colleges and universities to classify virtually all political speech critical of Israel and Israeli government policies as anti-Semitic when “reviewing, investigating, or deciding whether there has been a violation of university policy prohibiting discriminatory practices on the basis of religion.” H.3643 is a blatantly unconstitutional attack on individual liberties, academic freedom, and human rights.

By endorsing a widely criticized, vague, and overbroad definition of anti-Semitism, H.3643 will legitimize censorship of and punishment for political speech supportive of Palestinian human rights. Because this bill targets the expression of viewpoints that some lawmakers may disfavor, it invites South Carolina to violate the First Amendment of the U.S. Constitution.

Further, at a time when bias incidents and hate crimes, including those motivated by anti-Semitism and Islamophobia, are on the rise, this bill provides no new legal protections for Jewish or other residents of South Carolina. On the contrary, if enacted, this bill will almost certainly increase unwarranted government suspicion, surveillance, and investigation into the lives of Muslim and Arab students in South Carolina as well as all students – including many Jewish students – who advocate for Palestinian human rights. As a result, this bill may actually encourage Islamophobia and anti-Semitism. Instead of offering constructive solutions to counter the disturbing rise in discrimination and bigotry that has been documented in recent months, this bill will compound the problem while trampling on Constitutional rights. **We call on you to oppose H.3643.**¹

¹ This memorandum has been endorsed by the following organizations: Palestine Legal (www.palestinelegal.org); the Center for Constitutional Rights (www.ccrjustice.org); the American-Arab Anti-Discrimination Committee (www.adc.org); the Arab American Institute (www.aaiusa.org); the Bill of Rights Defense Committee and Defending Dissent Foundation (www.bordc.org); the Carolina Peace Resource Center (www.carolinapeace.org); Jewish Voice for Peace (www.jewishvoiceforpeace.org); the National Lawyers Guild – Palestine Subcommittee (www.nlginternational.org/palestine-subcommittee); the U.S. Campaign for Palestinian Rights (www.uscpr.org); and the U.S. Palestinian Community Network (www.uspcn.org).

I. Applying the definition of anti-Semitism endorsed by H.3643 domestically would violate the First Amendment

H.3643 would incorporate a widely-criticized, overbroad definition of anti-Semitism that is currently used for limited international monitoring purposes by the U.S. State Department.² The State Department definition is not applied domestically, and is not used by any other federal or state government agency. If adopted by South Carolina, it will unconstitutionally restrict First Amendment-protected speech and advocacy supportive of Palestinian human rights. Even the lead author of the State Department definition opposes its use in the university context.³

The State Department definition of anti-Semitism distorts and undermines traditional definitions of anti-Semitism by including criticism of Israel. The definition radically departs from traditional definitions of anti-Semitism with its listing of examples of “Anti-Semitism Related to Israel,” known as the “three D’s”: “demonizing Israel,” “applying a double standard to Israel” and “delegitimizing Israel.”⁴ The “three D’s” brand critics of Israeli policies and advocates for Palestinian human rights as anti-Semitic by blurring the important distinction between criticism of Israel as a nation-state and expressions of hatred against Jewish people.

This approach denies the legitimacy of extensive and widely recognized documentation of Israel’s human rights abuses, and claims that criticism of Israel’s policies and practices is in fact motivated by hatred of Jewish people and not a concern for Palestinian rights. Moreover, distorting the real definition of anti-Semitism by incorporating criticism of Israel distracts from and undermines the prevention of and relief from truly discriminatory practices.

Because of the State Department definition’s vagueness and overbreadth, bringing within its scope virtually all speech supportive of Palestinian rights, its incorporation into South Carolina’s education laws would violate the First Amendment. Such violations are particularly troubling given the nature of the speech being targeted: Palestinian rights and Israeli government policies are important matters of public concern, regularly debated in the media, in the halls of government, and on college campuses.

The Supreme Court has frequently reaffirmed that speech on public issues – like Palestinian rights – occupies the “highest rung on the hierarchy of First Amendment values” and is therefore “entitled to special protection.”⁵ Codifying the State Department definition would violate this principle, and would require the state to engage in unconstitutional content and viewpoint-based discrimination. The First Amendment savings clause tacked onto the end of this bill does not magically save it. **Requiring public colleges and universities to use the State Department definition when investigating alleged instances of anti-Semitism is tantamount to inviting these government actors to violate the First Amendment.**

² See Palestine Legal, FAQ: What to know about efforts to re-define anti-Semitism and to silence criticism of Israel, <http://bit.ly/2kt31HJ>; see also Foundation for Individual Rights in Education, Problematic Campus anti-Semitism Bill Clears Senate, Dec. 2, 2016, <https://www.thefire.org/problematic-campus-anti-semitism-bill-clears-senate>.

³ See 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>.

⁴ See Palestine Legal FAQ, *supra* note 2.

⁵ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980).

II. The definition of anti-Semitism endorsed by H.3643 is particularly destructive to colleges and universities that value unfettered speech

Adopting a definition of anti-Semitism that encompasses even the most routine criticism of a nation-state is particularly inappropriate for South Carolina's educational institutions because of the essential role that academic freedom and unfettered debate play in the university setting. The United States Supreme Court has recognized the importance of this role, stating that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."⁶ The State Department definition would silence legitimate opinions and perspectives, and would impose standards on universities that undermine their commitments to academic freedom and inquiry.

Would a mock-checkpoint on a campus quad, aimed at raising awareness about the way Israeli military checkpoints severely curtail Palestinians' freedom of movement, be considered demonizing Israel, and therefore anti-Semitic? Would a lecture on Israel's violations of international law be considered delegitimization of Israel? Would a legal panel on the constitutional right to engage in boycotts for Palestinian rights be considered a double standard against Israel? Similar accusations have been made against activities on college campuses by the same Israel advocacy groups that support legislation like H.3643.⁷ Notably, criticism of Israeli government policy has been found, again and again, to be protected political speech, not discrimination against a protected group.⁸ Nevertheless, this is the type of inquiry South Carolina's educational institutions will be required to enter into if this bill becomes law.

The University of California and other universities have already been subjected to pressure to adopt the anti-Semitism definition endorsed by this bill, and have ultimately rejected it due to free speech concerns.⁹ Israel advocacy organizations pushed for

⁶ *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

⁷ For example, Kenneth Marcus of the Brandeis Center for Human Rights, a proponent of this bill, was an architect of the failed strategy to use Title VI of the federal Civil Rights Act of 1964 to censor Palestinian rights advocacy on campuses. For more information, see Palestine Legal and Center for Constitutional Rights, *The Palestine Exception to Free Speech: a Movement Under Attack in the U.S.: Lawsuits and Legal Threats*, <http://palestinelegal.org/thepalestine-exception/#tactics7>.

⁸ For example, the U.S. Department of Education Office for Civil Rights (OCR) has affirmed in four separate cases—after conducting lengthy investigations of alleged harassment of Jewish students based on student and faculty advocacy for or academic engagement on Palestinian rights issues—that expression of political viewpoints does not, standing alone, give rise to actionable harassment under Title VI simply because some may find it offensive. More information about the four cases are available at the following links: <http://palestinelegal.org/thepalestine-exception-appendix#berkeley2> (UC Berkeley); <http://palestinelegal.org/thepalestine-exception-appendix#irvine1> (UC Irvine); <http://palestinelegal.org/thepalestine-exception-appendix#santacruz1> (UC Santa Cruz); and <http://palestinelegal.org/thepalestine-exception-appendix#rutgers2> (Rutgers University).

⁹ See UC Drops Consideration of State Department Anti-Semitism Definition, Palestine Legal, July 22, 2015, <http://palestinelegal.org/news/2015/7/22/uc-drops-consideration-of-state-department-anti-semitism-definition>.

its adoption in March 2015, causing outcry from free speech advocates¹⁰ across the political spectrum, media,¹¹ students,¹² graduate student instructors,¹³ and Jewish¹⁴ and other civil rights organizations.¹⁵ Jewish commentators,¹⁶ including the State Department definition's original author, Kenneth Stern, repudiated its use on college campuses.¹⁷

Legislation similar to H.3643 was introduced – and defeated – in the U.S. Congress in December 2016 after public outcry from human rights and free speech advocates¹⁸ and lawyers,¹⁹ and criticism from the media.²⁰ Earlier this year, a similar proposal was defeated in Virginia.²¹

South Carolina lawmakers should heed the constitutional concerns this bill raises, and follow other lawmakers in rejecting this blatant attempt to unconstitutionally suppress and chill student advocacy for Palestinian human rights.

III. Conclusion

We appreciate the importance of addressing allegations of anti-Semitism on campus and elsewhere at this time of heightened threats to Jewish and other communities. H.3643's misguided reliance on the discredited State Department definition of anti-Semitism, however, fails to give colleges and universities the proper tools to fight anti-Semitism and other forms of

¹⁰ See Will Creely, State Department's Anti-Semitism Definition Would Likely Violate First Amendment on Public Campuses, Foundation for Individual Rights in Education, May 22, 2015, <https://www.thefire.org/state-departments-anti-semitism-definition-would-likely-violate-first-amendment-on-public-campuses/>.

¹¹ Editorial, How far should UC go with an anti-Semitism policy, Los Angeles Times, July 16, 2015, <http://www.latimes.com/opinion/editorials/la-ed-anti-semitism-20150716-story.html>.

¹² Letter, Students ask Janet Napolitano not to endorse conflation of anti-Semitism with critique of Israel, SJP West, June 29, 2015, <http://sjpwest.org/2015/06/29/students-ask-janet-napolitano-not-to-endorse-conflation-of-antisemitism-with-critique-of-israel>.

¹³ UAW Letter to Janet Napolitano, UC Student Workers Union – UAW Local 2865, July 6, 2015, <http://www.uaw2865.org/uaw-letter-to-president-napolitano>.

¹⁴ Action alert, Tell UC President Napolitano and the UC Regents: criticizing Israel is not anti-Semitic, Jewish Voice for Peace, http://org.salsalabs.com/o/301/p/dia/action3/common/public/?action_KEY=18000.

¹⁵ Palestine Legal, Jewish Voice for Peace, National Lawyers Guild, and the Center for Constitutional Rights sent a letter to Janet Napolitano and the UC Regents outlining First Amendment concerns with the State Department's redefinition of anti-Semitism. The letter is available at

<http://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/558abe8ae4b050f36b381190/1435156106563/UCOPLetterAntiSemitismFinal.pdf>.

¹⁶ See, e.g., Jay Michaelson, Why U. of California Should Dump “Three D” Definition of Anti-Semitism, The Forward, July 22, 2015, <http://forward.com/opinion/312358/why-u-of-california-should-dump-three-d-definition-ofanti-semitism>.

¹⁷ Kenneth Stern, *supra* note 3.

¹⁸ See Foundation for Individual Rights in Education, Problematic Campus Anti-Semitism Bill Clears Senate, Dec. 2, 2016, <https://www.thefire.org/problematic-campus-anti-semitism-bill-clears-senate>.

¹⁹ See Palestine Legal, Bill aimed at censoring Palestine advocacy fails to pass U.S. House, Dec. 12, 2016, <http://palestinelegal.org/news/2016/12/12/bill-aimed-at-censoring-palestine-advocacy-on-campuses-fails-to-pass-us-house>.

²⁰ See Palestine Legal, Media Spotlight: “Anti-Semitism Awareness Act” draws criticism in the media, Dec. 15, 2016, <http://palestinelegal.org/news/2016/12/14/media-spotlight-anti-semitism-awareness-act-draws-criticism>.

²¹ See Palestine Legal, Victory! Unconstitutional bill defeated in Virginia, Jan. 30, 2017, <http://palestinelegal.org/news/2017/1/30/virginia-lawmakers-considering-unconstitutional-bill-aimed-at-censoring-palestine-advocacy-1>.

discrimination. Instead, it will encourage the college and university administrations to infringe on free speech and academic freedom on campus, in violation of the First Amendment.

We call on you to drop consideration of this bill and, instead, engage in meaningful efforts to address the alarming rise in anti-Semitic, racist, anti-Muslim, anti-Arab, anti-immigrant, anti-women, and anti-LGBT incidents and other forms of discrimination that have been fueled by increasing tolerance for such bigotry. This bill will only intensify targeting of already vulnerable communities that are exercising their constitutional rights to speak out for Palestinian rights. It will ultimately undermine civil liberties on campuses, while failing to address or hold accountable the sources of the alarming incidents of bigotry that are occurring on campuses and elsewhere.

H.3643 is an unconstitutional and unwise proposal. It must be vigorously opposed.