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November 30, 2018

Dear Assistant Secretary Marcus,

We are civil and human rights organizations dedicated to defending students from all forms of discrimination in public schools and institutions of higher education. We write to express alarm that the U.S. Department of Education’s Office for Civil Rights (OCR) continues to relinquish its responsibility to protect the civil rights of all students.

Under the leadership of Secretary of Education DeVos, OCR has attacked protections for students of color, survivors of sexual violence, and victims of systemic discrimination. Now you have added free speech to the list of civil rights endangered by OCR. In August 2018, you decided to (1) reopen a 2011 Title VI complaint against Rutgers University, which OCR investigated for three years and dismissed in 2014, and (2) use the controversial International Holocaust Remembrance Alliance (IHRA) redefinition of antisemitism in revisiting the Rutgers case, and to assess others in which criticism of Israel is alleged. These actions threaten First Amendment protections and undermine the mission of your office to protect equal educational opportunity for all students. We urge you to reverse.

Instead of pursuing anti-civil rights and anti-free speech agendas, you should marshal your resources to meaningfully address the many pressing civil rights crises before you.

## 1. OCR Policies Under Secretary DeVos have eroded protections for students of color, students with disabilities, survivors of sexual assault, and more.

Under Secretary of Education DeVos, the Department has undermined rather than protected civil rights. For example, in September 2017, OCR revoked protections for student survivors of sexual violence and adopted new policies that chill and limit survivors' ability to resolve complaints.<sup>1</sup> In June 2017 OCR made procedural changes to limit broad investigations of systemic discrimination.<sup>2</sup> In July 2018, the Department put students of color with disabilities at risk by delaying regulations necessary to ensure disability services are provided on an equal basis without regard to a child's race.<sup>3</sup> That same month, under your superintendence, OCR revoked guidance to support schools in diversifying their campuses.<sup>4</sup>

Meanwhile, alarming incidents of bigotry are proliferating in schools throughout the U.S.<sup>5</sup> Long-standing systems of structural inequality continue to prevent students from various backgrounds from receiving equal access to educational opportunities.<sup>6</sup> With white supremacist attacks on the rise, including the massacre at a Jewish synagogue in Pittsburgh, the murder of two elderly Black people in Louisville, regular threats and attacks on mosques,<sup>7</sup> and white

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<sup>1</sup> U.S. Department of Education, "Department of Education Issues New Interim Guidance on Campus Sexual Misconduct," Sept. 22, 2017, <https://www.ed.gov/news/press-releases/departement-education-issues-new-interim-guidance-campus-sexual-misconduct>; Erica Green, "Education Secretary Betsy DeVos Is Sued Over Sexual Assault Guidance," *New York Times*, Jan. 25, 2018, <https://www.nytimes.com/2018/01/25/us/politics/betsy-devos-sexual-assault-guidelines-lawsuit.html>. Survivor advocates argue that these policy changes are unconstitutionally based on discriminatory beliefs about the credibility of women and girls who report sexual violence. See, <https://democracyforward.org/wp-content/uploads/2018/01/Dkt.-1-Complaint-filed.pdf>.

<sup>2</sup> See Memo from U.S. Department of Education Acting Assistant Secretary for Civil Rights, Candace Jackson, to Regional Directors, "OCR Instructions to the Field re Scope of Complaints," June 8 2017, <https://www.documentcloud.org/documents/3863019-doc00742420170609111824.html>; Jessica Huseman and Annie Waldman, "Trump Administration Quietly Rolls Back Civil Rights Efforts Across Federal Government," *ProPublica*, June 15, 2017, <https://www.propublica.org/article/trump-administration-rolls-back-civil-rights-efforts-federal-government>; Andrew Kreighbaum, "Not Looking for Patterns," *Inside Higher Ed*, June 16, 2017, <https://www.insidehighered.com/news/2017/06/16/education-department-suggests-less-expansive-approach-ocr-investigations>. The new protocol limits systemic reviews to "only" where individuals making complaints allege systemic discrimination, or where an investigative team determines that approach is appropriate.

<sup>3</sup> Edwin Rios, "A New Lawsuit Alleges Trump's Education Department is Failing Students Of Color With Disabilities," *Mother Jones*, July 12, 2018, <https://www.motherjones.com/politics/2018/07/a-new-suit-alleges-trumps-education-department-is-failing-students-of-color-with-disabilities/>; National Center for Youth Law, "COPAA v. DeVos," <https://youthlaw.org/case/copaa-v-devos/>.

<sup>4</sup> Kenneth L. Marcus, Assistant Secretary for Civil Rights, U.S. Department of Education, "Dear Colleague Letter," July 3, 2018, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-vi-201807.pdf>; Erica Green, Matt Apuzzo, Katie Benner, "Trump Officials Reverse Obama's Policy on Affirmative Action in Schools," *New York Times*, July 3, 2018, <https://www.nytimes.com/2018/07/03/us/politics/trump-affirmative-action-race-schools.html>.

<sup>5</sup> See, e.g., KQED News, "Anti-Semitic Flyers on Kavanaugh Sexual Assault Allegations Found at UC Davis," Oct. 9, 2018, <https://www.kqed.org/news/11697621/anti-semitic-flyers-on-kavanaugh-sexual-assault-allegations-found-at-uc-davis>; CAIR-MA, "CAIR-MA Encourages Allies to Write Letters of Support for Muslim Girl Who Received Threatening Letters," November 14, 2018, [https://www.cair.com/cair\\_ma\\_encourages\\_allies\\_to\\_write\\_letters\\_of\\_support\\_for\\_muslim\\_girl\\_who\\_received\\_threatening\\_letters](https://www.cair.com/cair_ma_encourages_allies_to_write_letters_of_support_for_muslim_girl_who_received_threatening_letters).

<sup>6</sup> See, generally, Emma Garcia and Elaine Weiss, Education inequalities at the school starting gate, Economic Policy Institute, Sept. 27, 2017, <https://www.epi.org/publication/education-inequalities-at-the-school-starting-gate/>; Yossi Shavit, Stratification in Higher Education: A Comparative Study, Stanford University press, 2007.

<sup>7</sup> Matt Stevens, "3 Suspects in Bombing of Minnesota Mosque Face Weapons Charges," *New York Times*, March 13, 2018, <https://www.nytimes.com/2018/03/13/us/minnesota-mosque-bombing-suspects.html>; American Civil Liberties Union, "Nationwide Anti-Mosque Activity," May, 2018, <https://www.aclu.org/issues/national-security/discriminatory-profiling/nationwide-anti-mosque-activity>.

supremacist groups recruiting on campuses everywhere, we know that white supremacy is deadly, and that we must combat all forms of racism and bigotry together. We need the resources of the federal government now like never before to lead the nation in holding sources of bigotry accountable.

## **2. Your decision to reopen the Rutgers case – which was thoroughly investigated and dismissed – does not comport with OCR policies, and wastes OCR’s meager resources.**

OCR is constrained by limited resources, compounded by a notorious backlog in cases,<sup>8</sup> staffing cuts,<sup>9</sup> and proposed budget cuts.<sup>10</sup> Citing an efficiency rationale, OCR threw out over 500 disability complaints in April 2018.<sup>11</sup> The mass dismissal followed controversial changes to OCR’s Case Processing Manual in March 2018, which called for the dismissal of complaints placing “an unreasonable burden on OCR’s resources” and abolished an appeals process.<sup>12</sup>

Civil rights advocates decried these changes as antithetical to OCR’s mission and sued.<sup>13</sup> In a May 2018 letter to Secretary DeVos, Members of Congress warned, “Selectively choosing which students will be protected and which complaints will be investigated is a violation of the law and will result in serious civil rights violations going unchallenged.”<sup>14</sup> In response to the outcry, OCR recently reversed the procedural limitations,<sup>15</sup> but they were in place in August 2018.

One of your first acts in office at this time was to re-open the Title VI case filed by the Zionist Organization of America (ZOA), against Rutgers University, a case which OCR closed in 2014 after a three year investigation.<sup>16</sup> OCR cleared Rutgers of allegations that critics of Israel

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<sup>8</sup> Juliet Eilperin, Emma Brown, Darryl Fears, “Trump administration plans to minimize civil rights efforts in agencies,” *The Washington Post*, May 29, 2017, [https://www.washingtonpost.com/politics/trump-administration-plans-to-minimize-civil-rights-efforts-in-agencies/2017/05/29/922fc1b2-39a7-11e7-a058-dbb23c75d82\\_story.html?utm\\_term=.a4bc45e60c5c](https://www.washingtonpost.com/politics/trump-administration-plans-to-minimize-civil-rights-efforts-in-agencies/2017/05/29/922fc1b2-39a7-11e7-a058-dbb23c75d82_story.html?utm_term=.a4bc45e60c5c).

<sup>9</sup> Michelle Hackman, “Trump Job Cuts at Education Department Worry Civil-Rights Advocates,” *Wall Street Journal*, December 15, 2017, <https://www.wsj.com/articles/trump-job-cuts-at-education-department-worry-civil-rights-advocates-1513333800>.

<sup>10</sup> Michelle Hackman, “More Money? For Betsy DeVos, That’s Just One of the Problems,” *Wall Street Journal*, March 30, 2018, <https://www.wsj.com/articles/more-money-for-betsy-devos-thats-just-one-of-the-problems-1522402201>.

<sup>11</sup> Erica Green, “DeVos Education Dept. Begins Dismissing Civil Rights Cases in Name of Efficiency,” *New York Times*, April 20, 2018, <https://www.nytimes.com/2018/04/20/us/politics/devos-education-department-civil-rights.html>.

<sup>12</sup> *Id.*

<sup>13</sup> Brown Goldstein Levy, “Civil Rights Groups Sue Education Department Over Process for Dismissing Discrimination Claims Without Investigation,” May 31, 2018, <https://www.browngold.com/civil-rights-groups-sue-education-department-process-dismissing-discrimination-claims-investigation>.

<sup>14</sup> Letter from Congress Members to U.S. Secretary of Education DeVos, May 22, 2018, [https://blogs.edweek.org/edweek/campaign-k-12/5.22.2018\\_DeVos%20letter%20on%20OCR%20%281%29.pdf](https://blogs.edweek.org/edweek/campaign-k-12/5.22.2018_DeVos%20letter%20on%20OCR%20%281%29.pdf).

<sup>15</sup> U.S. Department of Education, “U.S. Department of Education Builds on Efforts to Improve Services for Students, Increase Effectiveness and Fairness of Office for Civil Rights Investigations,” Nov. 20, 2018, <https://www.ed.gov/news/press-releases/us-department-education-builds-efforts-improve-services-students-increase-effectiveness-and-fairness-office-civil-rights-investigations>; Laura Meckler, “Education Department’s civil rights office retreats, will consider claims filed en masse,” *Washington Post*, Nov, 20, 2018, [https://www.washingtonpost.com/local/education/education-departments-civil-rights-office-retreats-will-consider-claims-filed-en-masse/2018/11/20/a7ed362a-ed05-11e8-96d4-0d23f2aad09\\_story.html?noredirect=on&utm\\_term=.59cddb65c50a](https://www.washingtonpost.com/local/education/education-departments-civil-rights-office-retreats-will-consider-claims-filed-en-masse/2018/11/20/a7ed362a-ed05-11e8-96d4-0d23f2aad09_story.html?noredirect=on&utm_term=.59cddb65c50a).

The *Washington Post*, quoted Catherine E. Lhamon, who led OCR during the Obama administration and now chairs the U.S. Commission on Civil Rights, describing OCR’s reversal as a clear “cover-your-rear litigation response.”

<sup>16</sup> See Emily Frangos, Compliance Team Leader, U.S. Department of Education, Letter to Morton A. Klein, July 31, 2014, <https://www.documentcloud.org/documents/1300803-ocr-decision-on-title-vi-complaint-7-31-14.html>.

created a climate of antisemitism in a detailed eleven-page report laying out the evidence and reasoning for the dismissal. You vacated the previous findings and reopened a broad investigation, despite the strain on OCR's caseload, despite the fact that an appeals process did not exist at the time you re-opened it, and despite the fact that OCR now disfavors broad investigations.

This decision to focus the office's meager resources on reopening an old case comes at the expense of a myriad of other civil rights issues which demand OCR's urgent attention. In light of OCR's policy to prioritize efficiency, your decision was arbitrary, wasteful, and inconsistent with the OCR protocols in place at the time.

### **3. The re-definition of antisemitism for use on campuses in the U.S. has been rejected by Congress, by previous OCR leadership, by major state university systems and state legislatures.**

In the same August 27, 2018 letter to the ZOA informing it that you were re-opening its complaint against Rutgers, you noted that the IHRA definition of antisemitism<sup>17</sup> is "in use" by OCR.<sup>18</sup> But the IHRA definition had not previously been used by OCR and its current use would be a significant policy change that you personally had tried, but failed, to achieve from the outside.

OCR previously rejected this definition of antisemitism under both the Trump and Obama administrations. In response to congressional requests for OCR to adopt the IHRA definition, your current boss, Secretary DeVos, rejected such requests in September 2017, stating that "OCR does not adopt definitions of particular forms of racism or national origin discrimination."<sup>19</sup> This was consistent with a similar letter sent by President Obama's Secretary of Education Arne Duncan to members of Congress in December 2015,<sup>20</sup> as well as four OCR decisions made in 2013 and 2014 finding no violations in situations where the IHRA definition

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<sup>17</sup> The re-definition of antisemitism has several different versions and different names, including: the "IHRA definition," the "U.S. State Department definition," the "three D's", or the "European Union Monitoring Center's working definition." For more information on the history of the re-definition and its terms, *see*, Palestine Legal, "FAQ: What to Know About Efforts to Re-define Antisemitism to Silence Criticism of Israel," April 18, 2018, <https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/5ad7b16603ce646d1a0d59d9/1524085097669/FAQ+on+Definition+of+Antisemitism+4.18.18+.pdf>.

<sup>18</sup> Kenneth L. Marcus, Assistant Secretary for Civil Rights, Letter to Susan B. Tuchman, Zionist Organization of America, "Rutgers University – OCR Case No. 02-11-2157," August 27, 2018, <https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/5bae6de471c10b08c080420a/1538158057692/US+Department+of+Education+and+Working+Definition%5B1%5D+%281%29.pdf>.

<sup>19</sup> Letter from Betsy DeVos, Secretary of Education, United State Department of Education, Letter to Congressman Brad Sherman, September 8, 2017, available at <https://reason.com/assets/db/15369499618934.pdf> (Last accessed November 1, 2018). ("OCR does not adopt definitions of particular forms of racism or national origin discrimination because such inquiries are inherently fact-specific and because expressions of racism and discrimination can evolve over time.")

<sup>20</sup> Arne Duncan, Secretary of Education, United States Department of Education, Letters to Congressman Brad Sherman and Senator Harry Reid, December 18, 2015, on file with Palestine Legal.

would have resulted in a different analysis.<sup>21</sup> And Congress has twice failed to enact stand-alone legislation that would have required OCR to consider this definition in its enforcement.<sup>22</sup>

Although your August 2018 letter does not acknowledge it, you used the letter to attempt a change in the status quo and overrule the judgment of your own Secretary of Education as well as prior OCR policy and Congress. The failure to acknowledge the change and the absence of a reasoned justification for the change makes your action arbitrary and capricious.

It is no secret that adopting this definition has been a significant goal of yours for years in your work outside of OCR. In your advocacy, however, you had never suggested that OCR already used the IHRA definition. To the contrary, you co-authored multiple letters with the ZOA demanding that OCR adopt the re-definition,<sup>23</sup> you conferenced multiple times with OCR officials to discuss such demands,<sup>24</sup> you supported the filing of multiple failed complaints to the OCR alleging that campus speech critical of Israel creates a hostile climate for Jewish students,<sup>25</sup> and more.<sup>26</sup>

Your efforts to have other entities adopt this definition have also failed. As noted above, you unsuccessfully lobbied, along with ZOA and others, for Congress to impose the re-definition

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<sup>21</sup> Letter from Zachary Pelchat, Team Leader, Department of Education Office for Civil Rights, San Francisco, to UC Irvine Chancellor Michael Drake, OCR Case No. 09-07-2205 (August 19, 2013), [https://ccrjustice.org/sites/default/files/assets/files/OCR-UCIrvine\\_Letter\\_of\\_Findings\\_to\\_Recipient.pdf](https://ccrjustice.org/sites/default/files/assets/files/OCR-UCIrvine_Letter_of_Findings_to_Recipient.pdf); Letter from Zachary Pelchat, Team Leader, Department of Education Office for Civil Rights, San Francisco, to Carole E. Rossi, Chief Campus Counsel, UC Santa Cruz, OCR Case 09-09-2145 (August 19, 2013), [http://news.ucsc.edu/2013/08/images/OCR\\_letter-of-findings.pdf](http://news.ucsc.edu/2013/08/images/OCR_letter-of-findings.pdf); Letter from Zachary Pelchat, Team Leader, Department of Education Office for Civil Rights, San Francisco, to UC Berkeley Chancellor Robert Birgeneau, OCR Case No. 09-2-2259 (August 19, 2013), [http://news.berkeley.edu/wp-content/uploads/2013/08/DOE.OCR\\_.pdf](http://news.berkeley.edu/wp-content/uploads/2013/08/DOE.OCR_.pdf); Letter from Emily Frangos, Compliance Team Leader, Department of Education Office for Civil Rights, New York, to Morton A. Klein, President, Zionist Organization of America, re case No. 02-11-2157 (July 31, 2014), <https://www.documentcloud.org/documents/1300803-ocr-decision-on-title-vi-complaint-7-31-14.html>.

<sup>22</sup> Palestine Legal, “Bill aimed at censoring Palestine advocacy on campuses fails to pass U.S. House, Palestine Legal,” Dec. 12, 2016, <https://palestinelegal.org/news/2016/12/12/bill-aimed-at-censoring-palestine-advocacy-on-campus-fails-to-pass-us-house>.

<sup>23</sup> Letter from Kenneth L. Marcus, President and General Counsel of the Louis D. Brandeis Center (hereinafter “Kenneth Marcus, Brandeis Center”), Susan P. Tuchman, Director, Center for Law and Justice at the Zionist Organization of America (hereinafter “Susan Tuchman, ZOA”), and Morton A. Klein, National President of the Zionist Organization of America, to Seth Galanter, Acting Assistant Secretary, Office for Civil Rights, U.S. Department of Education, May 2, 2013, on file with Palestine Legal (The letter expressed concern that OCR’s definition of antisemitism does not include criticism of Israel and complained about two unresolved Title VI cases filed against UC Irvine alleging criticism of Israel created an antisemitic environment.); Letter from Kenneth Marcus, Brandeis Center, Susan Tuchman, ZOA et al, to James Ferg-Cadima, Deputy Assistant Secretary for Policy, U.S. Department of Education Office for Civil Rights, June 2, 2016, on file with Palestine Legal. (The letter insists that OCR should use the U.S. State Department definition of antisemitism).

<sup>24</sup> Email from Kenneth Marcus, Brandeis Center to James Ferg-Cadima, Deputy Assistant Secretary for Policy, OCR, “Re Call: Brandeis Center + OCR,” May 21 2015, on file with Palestine Legal, (regarding a meeting in April 2015.); Email from James Ferg-Cadima to Kenneth Marcus, Susan Tuchman et al, “Re Letter from AJC, B’nai Brith, LDB and ZOA,” June 10, 2016, on file with Palestine Legal, (discussing an upcoming meeting).

<sup>25</sup> Complaints were filed against University of California (UC) Irvine, UC Santa Cruz, UC Berkeley, Rutgers University, Barnard College and Brooklyn College. See *The Palestine Exception to Free Speech: A Movement Under Attack in the US*, Palestine Legal and the Center for Constitutional Rights, 2016, [www.palestinelegal.org/the-palestine-exception](http://www.palestinelegal.org/the-palestine-exception).

<sup>26</sup> Adopting a re-definition of antisemitism was a primary public recommendation of a full-length book (“The Definition of Anti-Semitism” (Oxford University Press: 2015)), a law review article (Marcus, Kenneth L., The New OCR Antisemitism Policy (April, 17 2011) *Journal for the Study of Antisemitism*, Vol. 2, 2011., available at SSRN: <https://ssrn.com/abstract=1813192>) and multiple other publications.

on OCR.<sup>27</sup> The state legislature in also Virginia rejected your lobbying efforts to adopt the re-definition.<sup>28</sup> The University of California (UC) Regents rejected a similar re-definition of antisemitism after you, the ZOA and other advocacy organizations seeking to suppress criticism of Israel lobbied the university in 2015 and 2016.<sup>29</sup> The only forum in the U.S. to accept the definition for use on campuses is South Carolina, where the proposed definition failed as a stand-alone bill and only succeeded as a rider to a budget bill that expires after one year.<sup>30</sup>

Your August 2018 letter's claim that the IHRA definition is "widely used by governmental agencies, including the U.S. Department of State," is misleading. In fact the State Department only uses a version of it for the purposes of data collection abroad and it has no domestic application in the U.S.<sup>31</sup> The re-definition is used by government agencies abroad, but its validity is widely contested, and the countries where it is used do not have the same free speech protections that we have enshrined in the First Amendment to the U.S. Constitution.

#### **4. You attempted the controversial policy change with no public input and little, if any, internal consultation process with the department's experts.**

We are concerned by the backdoor manner in which you attempted a major policy change restricting the civil rights and liberties of students across the country. Overriding prior policy makers who rejected the IHRA definition, you announced the decision that the IHRA definition is "in use" in a letter directly to the ZOA who you had partnered with for years.<sup>32</sup> OCR made no

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<sup>27</sup> Kenneth Marcus, "How the government can crack down on anti-Semitism on college campuses," *Politico*, January 11, 2017, <https://www.politico.com/agenda/story/2017/01/government-crack-down-anti-semitism-college-campuses-000272>; Brandeis Center, "LBD Commends Scott and Casey's "Game-Changing" Bipartisan Anti-Semitism Awareness Act," Dec. 1, 2016, <https://brandeiscenter.com/lbd-commends-scott-and-caseys-game-changing-bipartisan-anti-semitism-awareness-act/>.

<sup>28</sup> Kenneth L. Marcus, "Virginia should adopt anti-Semitism legislation," *Richmond Times Dispatch*, January 26, 2017, [http://www.richmond.com/opinion/their-opinion/guest-columnists/kenneth-l-marcus-column-virginia-should-adopt-anti-semitism-legislation/article\\_fca91ab6-d6ce-554d-97f1-d958d7e3bd3e.html](http://www.richmond.com/opinion/their-opinion/guest-columnists/kenneth-l-marcus-column-virginia-should-adopt-anti-semitism-legislation/article_fca91ab6-d6ce-554d-97f1-d958d7e3bd3e.html); See also 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>.

<sup>29</sup> See Palestine Legal, "UC Drops Consideration of State Department Anti-Semitism Definition," July 22, 2015, <http://palestinelegal.org/news/2015/7/22/uc-drops-consideration-of-state-department-anti-semitism-definition>; 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/>; 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>; 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-anti-semitism-with-critique-of-israel>; UC Student Workers Union – UAW Local 2865, UAW Letter to Janet Napolitano, July 6, 2015, <http://www.uaw2865.org/uaw-letter-to-president-napolitano/>; See also Letter from Palestine Legal, Jewish Voice for Peace, National Lawyers Guild, and the Center for Constitutional Rights to Janet Napolitano and the UC Regents, June 18, 2015, available at <http://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/558abe8ae4b050f36b381190/1435156106563/UCOPLetterAntiSemitismFinal.pdf> (outlining First Amendment concerns with the State Department's re-definition of anti-Semitism.)

<sup>30</sup> See Jewish Telegraphic Agency, "South Carolina is set to become first state to define anti-Semitism by law," *JTA.org*, April 13, 2018, <https://www.jta.org/2018/04/13/news-opinion/politics/south-carolina-set-become-first-state-define-anti-semitism-law>.

<sup>31</sup> Kenneth S. Stern, Written Testimony Before United State House of Representatives Committee on the Judiciary, November 7, 2017, Hearing on Examining Anti-Semitism on College Campuses, <https://judiciary.house.gov/wp-content/uploads/2017/10/Stern-Testimony-11.07.17.pdf>.

<sup>32</sup> Kenneth L. Marcus, Letter to Susan B. Tuchman, *supra*, note 18.

public announcement of your decision to adopt the IHRA decision. Your letter to ZOA was made public only through media reports.<sup>33</sup>

It is not clear what type of process you engaged in, if any. For a major policy decision, it is customary for multiple offices within the agency, in addition to parallel offices in other agencies, to review the proposed policy change and provide comments, which your team would duly consider. It is also customary to hear from stakeholders affected by the change, including advocacy groups, students and universities. But you made the decision to declare IHRA definition is “in use” two months after taking office.<sup>34</sup> Certainly, you did not request or receive any public input. Given the short timeline, it appears you attempted the policy change unilaterally within your own office.

##### **5. The re-definition of antisemitism provides no new legal protections for Jewish students and infringes on First Amendment rights.**

Your statement that OCR will use the IHRA definition is equivalent to stating that OCR will violate the First Amendment by establishing a federal requirement for universities to abrogate their educational missions and violate campus free speech principles.

We support long-standing OCR efforts to protect Jewish, Sikh, and Muslim students from discrimination.<sup>35</sup> We appreciate OCR’s work to address discrimination based on actual or perceived, shared ethnic characteristics as a form of national origin discrimination. Under previous administrations OCR has already enforced this policy to address multiple cases of antisemitic discrimination.<sup>36</sup>

The IHRA definition of antisemitism provides no new legal protections for Jewish students who are subjected to discrimination. It carves out special treatment for students to be shielded from criticism of Israel. Such protection from political opinions and human rights advocacy against the abuses of a foreign state has no grounding in statute, and in fact would violate the U.S. Constitution and bedrock principles of academic freedom intended to ensure open debate.

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<sup>33</sup> Michael Stratford, “Trump administration adopts new definition of anti-Semitism in schools,” *Politico*, September 12, 2018, <https://www.politico.eu/article/donald-trump-administration-adopts-new-definition-of-anti-semitism-in-schools-education-department/>.

<sup>34</sup> On June 7, 2018, Marcus was confirmed as Assistant Secretary for Civil Rights and on August 27, 2018 the decision to use the IHRA definition was communicated to the ZOA.

<sup>35</sup> See Kenneth L. Marcus, Deputy Assistant Secretary for Enforcement, Office for Civil Rights, U.S. Department of Education, “Dear Colleague Letter: Title VI and Title IX Religious Discrimination in Schools and Colleges,” September 13, 2004, available at <https://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>; Russlyn Ali, Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Department of Education, “Dear Colleague Letter,” October 26 2010, available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

<sup>36</sup> See Sheralyn Goldbecker, Team Leader, District of Columbia Office, Office for Civil Rights, U.S. Department of Education, Letter To Patrick Russo, Henrico County Public Schools, January 7, 2011, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11101244-a.pdf> (regarding failure of the Henrico County Public Schools to respond appropriately to complaints alleging antisemitic harassment); Timothy Blanchard, Director, New York Office, Office for Civil Rights, U.S. Department of Education, Letter to Mark D. LaRoach, Vestal Central School District, May 21, 2012, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02111270-a.pdf> (regarding failure of Vestal Central School District to respond appropriately to complaints alleging antisemitic harassment); U.S. Department of Justice, Statement of Interest, *T.E. v. Pine Bush Central School District* (S.D.N.Y. Jan. 21, 2014), <https://www.scribd.com/document/203255227/T-E-v-Pine-Bush-Opposition-to-Summary-Judgment-1-21-14-00169723>.

Much of the IHRA definition is uncontroversial and aligns with a traditional understanding of the term.<sup>37</sup> But the definition radically departs from that understanding with its listing of “contemporary examples of antisemitism” which include, “Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor” and “Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.”

This vague and overbroad re-definition falsely conflates political criticism of Israel with antisemitism and puts OCR in the position of government censor. For example, in order to apply the IHRA definition in evaluating campus complaints, OCR and university officials must determine: in order to avoid applying a “double standard,” must students first criticize China, Saudi Arabia, or other states before or after criticizing Israel? Are universities required to punish students and faculty who call the Israeli state, or the U.S. or any other government, “racist”? Is a campus discussion of Israel’s “Nation State” law (enacted in July 2018, to enshrine the right of national self-determination for Jews only<sup>38</sup>) grounds for a federal investigation? The answers must certainly be no.

Application of the IHRA definition will drive OCR investigators into a morass of viewpoint-based distinctions and may compel and punish speech in violation of the First Amendment. OCR officials may be directly liable for First Amendment violations.<sup>39</sup>

The re-definition of antisemitism is especially detrimental to universities, whose missions necessitate respect for freedom of speech, critical inquiry, and unfettered debate.<sup>40</sup> First Amendment experts across the political spectrum, public commentators, and the re-definition’s original drafter have all repudiated its use on college campuses.<sup>41</sup>

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<sup>37</sup> For example, the IHRA re-definition begins: “Anti-Semitism 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.” Merriam-Webster defines anti-Semitism as, “Hostility toward or discrimination against Jews as a religious, ethnic or racial group.”

<sup>38</sup> See David M. Halbfinger and Isabel Kershner, “Israeli Law Declares the Country the ‘National-State of the Jewish People,’” *New York Times*, July 19, 2018, <https://www.nytimes.com/2018/07/19/world/middleeast/israel-law-jews-arabic.html>.

<sup>39</sup> See, e.g., *White v. Lee*, 227 F.3d 1214, 1237 (9th Cir. 2000), in which the court denied qualified immunity to Department of Housing and Urban Development (HUD) officials who investigated protected speech activity – like op-eds, protests and pamphlets - causing unconstitutional chilling effects. The investigators were looking into alleged violations of unlawful intimidation under the Fair Housing Act. The case prompted a public outcry and HUD adopted a policy not to investigate First Amendment protected expression. See also Yaman Salahi and 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 & POVERTY L.J 155 (2015).

<sup>40</sup> The U.S. Supreme Court has recognized the importance of campus free speech, 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.” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

<sup>41</sup> Kenneth Stern’s 2017 testimony to the House of Representatives Judiciary Committee is available at <https://judiciary.house.gov/wp-content/uploads/2017/10/Stern-Testimony-11.07.17.pdf>; See also Kenneth Stern, “Will Campus Criticism of Israel Violate Federal Law?,” *New York Times*, December 12, 2016, <https://www.nytimes.com/2016/12/12/opinion/will-campus-criticism-of-israel-violate-federal-law.html>; See also Editorial Board, “Enough Already. Not all criticism of Israel is Anti-Semitism,” *Los Angeles Times*, June 8, 2018, <http://www.latimes.com/opinion/editorials/la-ed-anti-semitism-20180608-story.html>, (asserting that freedom of speech on college campuses is under enough pressure without the federal government adding to the problem by threatening to withdraw funding to punish people for expressing their political opinions.); Editorial Board, “Trump Embraces a dangerously broad definition of anti-Semitism,” *Los Angeles Times*, September 15, 2018,



Even if OCR takes no further action to enforce the re-definition, your announcement that the re-definition is “in use” will have an unconstitutional chilling effect.<sup>42</sup> It is well-documented that the same organizations that promote the IHRA re-definition – including the ZOA and the organization you founded and previously led, the Brandeis Center – use it as a tool to pressure campus administrators to restrict protected speech.<sup>43</sup> Students, professors, researchers and university administrators will inevitably act in ways to avoid scrutiny of their activities and the specter of a federal investigation into their political speech activities.<sup>44</sup>

The threat to protected speech has already materialized. For example, a November 2018 vigil organized by Jewish students at UC Berkeley to jointly mourn the deaths of Palestinian children killed in Gaza and Jews killed in the Pittsburgh massacre<sup>45</sup> is now the subject of a Title VI complaint to OCR.<sup>46</sup> In September 2018, a pro-Israel professor at San Jose State University cited the possibility of a federal investigation under OCR’s new policy in warning other

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<http://www.latimes.com/opinion/editorials/la-ed-trump-antisemitism-20180915-story.html>; Eugene Volokh, “The University of California, ‘microaggressions,’ and supposedly anti-Semitic criticism of Israel,” *Washington Post*, August 31, 2015, [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/31/the-university-of-california-microaggressions-and-supposedly-anti-semitic-criticism-of-israel/?utm\\_term=.b9f8e8665662&wpisrc=nl\\_volokh&wpm=1](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/31/the-university-of-california-microaggressions-and-supposedly-anti-semitic-criticism-of-israel/?utm_term=.b9f8e8665662&wpisrc=nl_volokh&wpm=1); Erwin Chemerinsky and Howard Gillman, “A Bill to Police Campus Speech,” *Wall Street Journal*, December 15, 2016, <https://www.wsj.com/articles/a-bill-to-police-campus-speech-1481846338>; Will Creely, “New federal anti-Semitism act, same First Amendment problem,” Foundation for Individual Rights in Education, May 29, 2018, <https://www.thefire.org/new-federal-anti-semitism-act-same-first-amendment-problem/>.

<sup>42</sup> In your letter to the ZOA, you acknowledge in a footnote that OCR’s enforcement activity cannot prohibit expressions protected by the First Amendment. However, you deem it unnecessary to “delve into the complexities of such issues” and conclude without explanation, “suffice it to say for now that OCR’s enforcement activity will not prohibit what the First Amendment allows...” Given the universal free speech concerns over your re-definition, your dismissive footnote does not suffice. As the ACLU has noted, stapling a copy of the First Amendment to a law that violates free speech does not cure the violation. (Tana Ganeva, “How legitimate fear over bias-motivated crimes is generating potentially unconstitutional policies,” *Washington Post*, December 7, 2016, [https://www.washingtonpost.com/news/the-watch/wp/2016/12/07/how-legitimate-fear-over-bias-motivated-crimes-is-generating-potentially-unconstitutional-policies/?utm\\_term=.64fc866e0ef8](https://www.washingtonpost.com/news/the-watch/wp/2016/12/07/how-legitimate-fear-over-bias-motivated-crimes-is-generating-potentially-unconstitutional-policies/?utm_term=.64fc866e0ef8).)

<sup>43</sup> Israel-aligned groups have relied on the re-definition of antisemitism to allege violations of Title VI at universities where students/faculty have engaged in the following speech activities: a screening of the film *Occupation 101*; an event critical of Israeli policies featuring a Holocaust survivor; using the term “apartheid” to describe Israeli government policies; equating Zionism with racism; calling for a boycott for Palestinian rights; and wearing a Palestinian keffiyeh, or scarf. Palestine Legal and the Center for Constitutional Rights documented these and other incidents in a 2015 report, *The Palestine Exception to Free Speech*, <https://palestinelegal.org/the-palestine-exception>. Palestine Legal published a 2016 update (<https://palestinelegal.org/2016-report>) and a 2017 update (<https://palestinelegal.org/2017-report>).

<sup>44</sup> See, e.g., *Monteiro v. Tempe Union High School Dist.*, 158 F.3d 1022, 1029 (9th Cir. 1998) (legal complaints based on speech protected by the First Amendment have far-ranging and deleterious effects, and the mere threat of civil liability can cause schools to “buy their peace” by avoiding controversial material.) See also, Eugene Volokh, “Department of Education Decision May Pressure Universities to Restrict Some Anti-Israel Speech,” *Reason*, September 14, 2018, (“The message to universities, which understandably don’t want to face OCR investigations -- and certainly don’t want a finding that they are violating federal law -- is that it’s dangerous to allow the criticisms of Israel identified in the letter, and that universities should try to do what they can to suppress them.”) <https://reason.com/volokh/2018/09/14/departement-of-education-decision-may-pre>.

<sup>45</sup> Joint Statement on Vigil With Jewish Voice for Peace at Berkeley, Nov. 9, 2018, <https://www.facebook.com/notes/students-for-justice-in-palestine-at-uc-berkeley/joint-statement-on-vigil-with-jewish-voice-for-peace-at-berkeley/1917395535013465/>.

<sup>46</sup> Aaron Bandler, “Pro-Israel Students File Complaint to Department of Education About SJP Vigil at Berkeley,” *Jewish Journal*, Nov. 13, 2018, <http://jewishjournal.com/news/nation/241882/pro-israel-students-file-complaint-department-education-sjp-vigil-berkeley/>.

professors against holding an event called *We Will Not Be Silenced*, which planned to discuss intimidation against Israel's critics.<sup>47</sup>

Instead of safeguarding against expressions of hatred towards Jewish people, this re-definition censors First Amendment-protected speech by discriminating against viewpoints critical of Israel and chilling one side of an important political debate.

#### **6. Your focus on reopening Rutgers and redefining antisemitism exhibits extreme partiality and misuse of the Office.**

As Assistant Secretary for Civil Rights your actions exhibit extreme partiality in carrying out an agenda which you were unable to accomplish as an advocate prior to your appointment. You adopted a controversial, anti-speech definition of antisemitism in a highly irregular and backdoor manner. You re-opened an old investigation, contravening OCR's efficiency policies and wasting the resources of your office. It is rare, and perhaps unprecedented, for an Assistant Secretary to sign an appeal letter, but you personally signed the letter to your former advocacy partner at the ZOA re-opening the case it had filed.

Such irregular actions indicate a disturbing focus on complaints of antisemitism based on criticism of Israel, at the expense of many other civil rights complaints demanding the urgent attention of federal investigators. This is the danger of selective enforcement which members of Congress warned against.

Your actions disregard growing concerns over free speech on college campuses that are gripping the nation. Congress, the Department of Justice, civil society, students, teachers, administrators, and people on all sides of multiple social issues are wringing their hands over the narrowing of public debate. And yet weeks after taking office, you casually and surreptitiously discarded the enshrined right to criticize a foreign government on university campuses.

We implore you to cease attacking free speech and begin engaging in meaningful efforts to address antisemitic, racist, anti-Muslim, anti-immigrant, and anti-LGBT incidents and other forms of discrimination that have been fueled by increasing tolerance for bigotry.

Sincerely,

Arab American Anti-Discrimination Committee  
Asian Americans Advancing Justice- Asian Law Caucus  
Center for Constitutional Rights  
Council on American-Islamic Relations  
Defending Rights and Dissent  
Know Your IX, a project of Advocates for Youth  
Muslim Justice League  
National Lawyers Guild  
Palestine Legal  
Partnership for Civil Justice  
Project South

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<sup>47</sup> Palestine Legal, "San José State Professor Threatens Event With Federal Investigation If No Anti-Palestinian Voices," Nov. 14, 2018, <https://palestinelegal.org/news/san-jose-state-event>.