



HB 2261 is Unconstitutional and Must be Opposed

HB 2261 amends the Virginia Human Rights Act to bring within the scope of “unlawful discrimination” virtually all criticism of Israel and Israeli government policies. By adopting a widely criticized, vague, and overbroad definition of anti-Semitism, this bill will classify political speech supportive of Palestinian human rights as unlawful discrimination in the workplace, in public accommodations, and in educational institutions in Virginia.

HB 2261 is a blatantly unconstitutional attack on individual liberties, academic freedom, and human rights. While ostensibly introduced to expand the Human Rights Act’s reach, this bill provides no new legal protection for Jewish or other residents of Virginia who are subjected to discrimination on the basis of their religion, and also fails to cover vulnerable populations – like LGBTQ Virginians – who are currently not explicitly protected.

This bill, rather, targets the expression of certain viewpoints that lawmakers may disfavor, and thereby invites Virginia to violate the First Amendment. It makes a mockery of the state’s Human Rights Act by punishing, rather than uplifting, human rights advocacy. **We call on you to oppose HB 2261.**¹

I. The definition of anti-Semitism endorsed by HB 2261, if adopted, would violate the First Amendment

HB 2261 would incorporate a widely-criticized 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 integrated into Virginia’s Human Rights Act, it will unconstitutionally restrict First Amendment-protected speech and advocacy supportive of Palestinian human rights.

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

¹ This memorandum is endorsed by the following organizations: Palestine Legal (<http://www.palestinelegal.org>), the Center for Constitutional Rights (<http://www.ccrjustice.org>), and the Bill of Rights Defense Committee & Defending Dissent Foundation (<http://www.bordc.org>).

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 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>; 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/>.

Israel” and “delegitimizing Israel.”³ 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, which is the purpose of Virginia’s Division of Human Rights.⁴

Because the State Department definition is so vague and overbroad, bringing within its scope virtually all speech supportive of Palestinian rights, its incorporation into Virginia’s Human Rights Act would not just distort the purpose and intent of the human rights law, but it would also 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 and in the halls of government.

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 in the Human Rights Act would violate this principle, and would require the state to engage in unconstitutional content and viewpoint-based discrimination. **Requiring public universities to adopt policies and regulations based on this definition and directing the state attorney general to consider the definition when investigating alleged violations of the Human Rights Act is tantamount to inviting these government actors to violate the First Amendment.**

Consider the following example of what could happen if this bill becomes law: A non-profit human rights organization based in Virginia documents human rights abuses in illegal Israeli settlements. A Jewish staff member who strongly supports Israel, alleging the organization’s focus on Israeli settlements “demonizes” Israel, resigns in response. HB 2261 would make it possible for the staff member to file a complaint with the Division of Human Rights in the Virginia attorney general’s office, asserting that the organization’s work created a hostile, anti-Semitic environment for her. This complaint could trigger an investigation and, oddly, a finding that the organization’s human rights documentation violates Virginia’s Human Rights Act. This finding would be consistent with HB 2261, but would be a violation of the First Amendment and a travesty for human rights advocacy.

³ See Palestine Legal FAQ, *supra* note 1.

⁴ VA CODE ANN. §2.2-520 (2016).

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 HB 2661 is particularly destructive to universities that value unfettered speech

In addition to inviting unconstitutional actions in the workplace and in public accommodations, HB 2661 imposes a re-definition of anti-Semitism on educational institutions. Any definition that encompasses even the most routine criticism of a nation-state is particularly inappropriate at Virginia'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 HB 2661.⁷

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 educational institutions and the state attorney general's office will be required to enter into if this bill becomes law. **The type of viewpoint and content-based discrimination that would be required to determine that educational events are anti-Semitic would be constitutionally intolerable.**

The University of California and other universities have already been pressured to adopt the anti-Semitism definition endorsed by this bill, and have ultimately rejected it due to free

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 HB 2661, 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/the-palestine-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/the-palestine-exception-appendix#berkeley2> (UC Berkeley); <http://palestinelegal.org/the-palestine-exception-appendix#irvine1> (UC Irvine); <http://palestinelegal.org/the-palestine-exception-appendix#santacruz1> (UC Santa Cruz); and <http://palestinelegal.org/the-palestine-exception-appendix#rutgers2> (Rutgers University).

speech concerns.⁹ Israel advocacy organizations pushed for its adoption in March 2015, causing outcry from free speech advocates¹⁰ across the political spectrum, from 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 drafter, Kenneth Stern, repudiated its use on a college campus.¹⁷

Virginia lawmakers would be wise to heed the constitutional concerns raised by these previous attempts to suppress speech critical of Israel, and vigorously oppose HB 2661.

III. Recommendations

Virginia's Human Rights Act is a crucial anti-discrimination law, and a vital safeguard for Virginians who face discrimination based on race, color, religion, national origin, sex, pregnancy, childbirth, age, marital status, or disability. At a time when bias-motivated incidents, including but not limited to anti-Semitic, anti-Muslim, and anti-Sikh harassment, are on the rise across the country, it is important for state lawmakers to take meaningful and appropriate action to ensure the safety and legal protection of all Virginians.

HB 2261 does not accomplish this goal. Instead of further protecting residents of Virginia against discrimination on the basis of their religion, which the Virginia Human Rights Act already does, this bill attacks Virginians' constitutionally protected right to express criticism of Israeli government policies. A smarter – and constitutionally sound – approach to expanding anti-discrimination protections for targeted Virginians would do the following:

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>.

¹⁰ 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-anti-semitism-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 re-definition 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-of-anti-semitism/>.

¹⁷ Kenneth Stern, *supra* note 1.

First, acknowledging that the Virginia Human Rights Act already prohibits religious discrimination, the state legislature should enhance Virginia's ability to respond to these incidents, including through funding more preventive programs, documenting the problem, and allocating additional resources to the state's Human Rights Division.

Second, expand the Human Rights Act to include sexual orientation, gender identity, and gender expression as protected classes. HB 2261 as currently drafted adds no new legal protections to Jewish or other residents of Virginia, except against political ideas that some may disagree with. If the state legislature is serious about expanding the Human Rights Act's protections, lawmakers should add sexual orientation, gender identity, and gender expression to the list of protected classes in §2.2-3901 of the Code of Virginia.

Finally, Virginia lawmakers must recommit to protecting and defending the First Amendment, including the right to criticize government policies – domestic and foreign. In workplaces, public fora, and especially in educational institutions, the free exchange of ideas, particularly on matters of public concern, allows for intellectual growth and development, and ultimately leads to a healthier and more sustainable democracy. Legislators must protect our First Amendment rights, not limit those ideas that they may personally dislike.

As currently drafted, HB 2261 is an unconstitutional proposal that fails to expand legal protections and educational opportunities. This bill must be vigorously opposed.