April 29, 2025

Chair Bill Cassidy
Ranking Member Berrnie Sanders
Senate Committee on Health, Education, Labor & Pensions

Sent by e-mail

RE: Heterodox Academy's Opposition to S.558

Dear Chair Cassidy and Ranking Member Sanders,

I am writing on behalf of the Heterodox Academy to urge your committee to revise or reject S.558. Heterodox Academy (HxA) is a nonpartisan, nonprofit membership organization of more than 7,500 faculty, staff, and students who defend the ideals of open inquiry, viewpoint diversity, and constructive disagreement in higher education.

Institutions of higher education have been struggling to meet their legal and moral obligations to protect Jewish students and faculty from harassment and other forms of discrimination. **Heterodox Academy would like to see your committee advance legislation that will help schools meet their responsibilities, but we cannot support S.558, because its requirement that institutions define "antisemitism" using the International Holocaust Remembrance Alliance (IHRA) definition is unconstitutional.**

Part of the challenge is that existing legal tools for addressing antisemitism are inadequate. However, a complicating factor involves a lack of clarity by administrators about how to address antisemitism in a way that is compatible with their obligations to protect the free speech and academic freedom rights of the members of their communities. S.558 does not solve this fundamental problem. In fact, it exacerbates it.

Heterodox Academy can help.

First, it's important to remember that for solutions to be effective and durable, they must be constitutional. **There is no hate speech exception to the First Amendment, and there is no antisemitic speech exception to the First Amendment either.** *See Texas v. Johnson, 491 U.S. 397, 414 (1989)("*If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *See also Matal v. Tam*, 582 U.S. 218, (2017)("Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'").

For practical purposes, this means that attempts to define "antisemitism" for use in campus disciplinary proceedings are misguided. Such attempts also are likely unconstitutional, as the only federal court to address the question preliminarily concluded. See *Students for Justice in Palestine v. Abbott*, 1:24-CV-523-RP (W.D. Tex. Oct. 28, 2024)(Declining to issue a preliminary injunction, but concluding that a Texas Executive Order instructing public institutions to use the IHRA definition and its examples in campus disciplinary proceedings likely violated the First Amendment.).

The IHRA definition is vague and overbroad. It reads (emphasis added):

> Antisemitism 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.

The definition targets "a certain perception of Jews, which may be expressed as hatred toward Jews" — a description so broad that it allows for the investigation and punishment of core political speech.

The chilling effect will be exacerbated by the fact that the definition explicitly incorporates "contemporary examples of antisemitism in public life," most of which are protected under the First Amendment. Two egregious examples on the list include "[a]pplying double standards by requiring of [Israel] a behavior not expected or demanded of any other democratic nation" and "[d]rawing comparisons of contemporary Israeli policy to that of the Nazis."

To be clear, speech does not lose its protection because it may involve "double standards." Moreover, if one may constitutionally compare any other country's policies to Nazi policies, similar criticisms of Israel are equally protected. It is 100% constitutional to compare any country's policies to those of Nazi Germany, and the First Amendment's protection is not contingent upon whether the comparison is or is not persuasive.

It is tempting to believe that institutions must have a definition of antisemitism if they are to effectively combat it. But this is not true. In the American legal system, we don't define "racism," "sexism," "ageism," or any other form of "ism." Instead, we prohibit discrimination on the basis of broad protected classes and empower courts to evaluate facts to determine whether discrimination on those categories occurred. Defining those terms statutorily would open a Pandora's box where future Congresses (and lawmakers across the country) could adopt competing definitions. How a Democratically controlled Congress might define one of those terms would look very different from how this Congress would. In considering whether to adopt the IHRA definition of harassment for use in college campus disciplinary hearings, you are not merely deciding how the term will be used today; you are declaring that it is also acceptable for future Congresses to define these hotly contested terms as they see fit.

The real question isn't whether the particular expression is antisemitic but whether it crosses the line into one of the unprotected categories of speech, such as true threats, harassment, or incitement of violence. S.558 makes no attempt to define harassment, incitement, or violence in a way consistent with First Amendment jurisprudence, and the savings clause in the bill does not fix its constitutional defect.

Heterodox Academy's Recommendation

Rather than define "antisemitism," Heterodox Academy recommends that you enact legislation that requires the Department of Education to ensure that institutions under its purview define harassment using the precise definition provided by the Supreme Court in *Davis v. Monroe County Board of Education*. There, the Court defined student-on-student harassment as conduct that is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." 526 U.S. 629, 631 (1999). This would focus institutions on determining whether the conduct in question was protected under the First Amendment or crossed into an unprotected category that warrants sanction.

Congress should also empower the Department of Education to require institutions to adopt policies that constitutionally regulate the time, place, and manner of otherwise protected expression. The language should require those policies to employ reasonable, content-and viewpoint-neutral criteria, to be narrowly tailored in furtherance of a significant institutional interest, and to leave open ample alternative channels of communication. This is the standard that is set forth by the Supreme Court in *Ward v. Rock Against Racism*, 491 U.S. 781, 804 (1989). Institutions have significant interests in preventing disruptions to classes and campus events, preserving libraries as places of study, and protecting the physical safety of every member of their communities. Policies that advance those interests are permissible—and in many instances even necessary—provided they otherwise pass Constitutional muster. Requiring institutions that accept federal funds to ensure their time, place, and manner regulations are constitutional will help address antisemitism and have the benefit of promoting free speech as well. Moreover, codifying the Supreme Court standard and framework will give institutions the proper leeway to set their own policies, rather than impose a one-size-fits-all federal policy.

Conclusion

It's vital that whatever reforms you enact do not limit open inquiry and viewpoint diversity. We can best address antisemitism by re-committing ourselves to the time-tested principles of First Amendment jurisprudence. We urge you to amend S.558 to remove the requirement that institutions use the IHRA definition of antisemitism in their campus disciplinary proceedings and instead require institutions to define harassment properly and to adopt constitutional time, place, and manner restrictions that protect the ability of the institution to take action against those who would harass their peers or otherwise threaten the functioning of the institution without violating anyone's free speech rights.

Thank you so much for your attention to this matter. If you would like to discuss ways this bill can be improved, I can be reached at cohn@heterodoxacademy.org.

Respectfully,

Joseph Cohn
Director of Policy

cc: Distinguished members of the Committee on Health, Education, Labor & Pensions (Sent by email)