

THE LEGALLY BINDING CHARACTER OF THE INTERNATIONAL
HOLOCAUST REMEMBRANCE ALLIANCE WORKING DEFINITION
OF ANTI-SEMITISM*

by
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I. INTRODUCTION

As anti-Semitism¹ rates reach historic levels, both in the United States² and worldwide,³ more attention has been paid to methods of counteracting it through law and public policy. The most important legal approach has involved the use of the International Holocaust Remembrance Alliance's (IHRA) 2016 Working Definition of Antisemitism (the "IHRA Definition" or the "Definition")⁴ to identify incidents that should be considered motivated by Jew-hatred.⁵ This definition is the only internationally agreed upon definition of anti-Semitism, and it has now been embraced by 37 nations, almost half of the United States, the U.S. federal government, and more than 800 other entities.⁶ This global consensus behind the IHRA

¹ Whether or not to hyphenate "anti-Semitism" remains a subject of contention within the field. This author has elsewhere criticized the modern trend against hyphenating the word anti-Semitism, explaining the awkwardness and futility that hyphenation entails in this context. See, e.g., KENNETH L. MARCUS, *THE DEFINITION OF ANTI-SEMITISM* 61–62 (2015); see also Kenneth L. Marcus, *If You Spell it 'Antisemitism,' Then Remove Hyphen from 'Anti-Zionism'*, JERUSALEM POST (Sept. 4, 2021), <https://www.jpost.com/diaspora/antisemitism/if-you-spell-antisemitism-then-remove-hyphen-from-anti-zionism-678675> (explaining collateral problems that arise when the hyphen is removed). Given the diversity of views with respect to the hyphen, it is customary for editors "not to impose uniformity even in the case of the very term (and its derivative forms)." Kalman Weiser, *Introduction to Key Concepts in the Study of Antisemitism*, in PALGRAVE CRITICAL STUDIES OF ANTISEMITISM AND RACISM 10 (Sol Goldberg, Scott Ury & Kalman Weiser eds., 2021) (explaining why uniformity should not be imposed); see also Mark Weitzman, Robert J. Williams & James Wald, *Introduction to THE ROUTLEDGE HISTORY OF ANTI-SEMITISM* 4 (Mark Weitzman, Robert J. Williams & James Wald eds., 2024) (similarly deciding that the "personal preferences and views of individuals scholars" with respect to the hyphen "remain vital" and that it is therefore improper to insist on a single approach to hyphenation).

² Anti-Semitic incidents increased by 36% in 2022. Anti-Semitic harassment increased 29%, anti-Semitic vandalism increased 51%, and anti-Semitic assaults increased 26%. ANTI-DEFAMATION LEAGUE CTR. ON EXTREMISM, *AUDIT OF ANTISEMITIC INCIDENTS 2022* 5 (2023), <https://www.adl.org/resources/report/audit-antisemitic-incidents-2022>.

³ CTR. FOR THE STUDY OF CONTEMP. EUR. JEWRY, *ANTISEMITISM WORLDWIDE REPORT* (2021), <https://cst.tau.ac.il/wp-content/uploads/2022/04/Antisemitism-Worldwide-2021.pdf>.

⁴ See *What is Antisemitism?*, INT'L HOLOCAUST REMEMBRANCE ALL., <https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism> (last visited Nov. 20, 2023).

⁵ For a history of this definition, its history, meaning, and importance, see MARCUS, *THE DEFINITION OF ANTI-SEMITISM*, *supra* note 1, at 161–62 (2015); see also Mark Goldfeder, *Defining Antisemitism*, 52 SETON HALL L. REV. 119, 135 (2021) [hereinafter Goldfeder, *Defining Antisemitism*]; Mark Goldfeder, *Codifying Antisemitism*, 127 PENN ST. L. REV. 405, 406–07 (2023) [hereinafter Goldfeder, *Codifying Antisemitism*].

⁶ See COMBAT ANTISEMITISM MOVEMENT & KANTOR CTR. FOR THE STUDY OF CONTEMP. EUR. JEWRY, *IHRA WORKING DEFINITION OF ANTISEMITISM WORLDWIDE ADOPTION & ENDORSEMENT REPORT* (2022), <https://combatantisemitism.org/wp-content/uploads/2022/03/>

Definition continues to expand rapidly, with a large volume of adoptions having taken place within the last few years.⁷

The widespread global adoption of the IHRA Definition has been spurred by historic increases in anti-Semitism, both in the United States and internationally, as well as by survey data indicating that almost half of Americans do not even know what is meant by the word.⁸ This process of adoption has been unique in the history of human rights efforts for the richness and global character of its democratic provenance;⁹ the breadth of Jewish communal support;¹⁰ and the Definition's practical usefulness.¹¹

One of the most frequently mentioned, but rarely explained, claims about the IHRA Definition is that it is "non-legally binding."¹² The Executive Order on Combating Anti-Semitism describes it that way.¹³ The U.S. Department of State does as well,¹⁴ as does the U.S. Department of Education.¹⁵ The European Commission concurs.¹⁶ Virtually every other authority does too.¹⁷ Indeed, IHRA itself has stated,

CAM-Kantor-Center-IHRA-Working-Definition-of-Antisemitism-Worldwide-Adoption-Endorsement-Report.pdf.

⁷ *Id.*

⁸ See *The State of Antisemitism in America 2020: AJC's Survey of the General Public*, AM. JEWISH COMM., <https://www.ajc.org/AntisemitismReport2020/Survey-of-the-General-Public> (last visited Nov. 20, 2023).

⁹ See Irwin Cotler, *To Combat Antisemitism, We Must First Agree How to Define It*, NAT'L POST (Feb. 14, 2023), <https://nationalpost.com/opinion/irwin-cotler-to-combat-antisemitism-we-must-first-agree-how-to-define-it>.

¹⁰ See *Coalition of 51 Jewish, Pro-Israel Organizations Adopts Definition of Anti-Semitism*, JEWISH NEWS SERV. (Jan. 26, 2021), <https://www.jns.org/coalition-of-51-jewish-pro-israel-organizations-adopts-definition-of-anti-semitism>.

¹¹ MARCUS, *supra* note 5, at 162–64.

¹² Some of the IHRA Definition's most enthusiastic supporters have defended the IHRA Definition on this ground. See, e.g., Dave Rich, *Common Misrepresentations of the IHRA Definition*, in IN DEFENCE OF THE IHRA WORKING DEFINITION OF ANTISEMITISM 12 (Alan Johnson ed., 2021) (stating that "it is hard to see how a non-legal definition with no legal authority could undermine legally-guaranteed rights to free expression and academic freedom").

¹³ Exec. Order No. 13,899, 84 Fed. Reg. 68,779 (Dec. 11, 2019).

¹⁴ *Defining Antisemitism*, U.S. DEP'T OF STATE, <https://www.state.gov/defining-antisemitism> (last visited Nov. 20, 2023).

¹⁵ See Press Release, Brad Sherman, U.S. Rep., Department of Education Embraces State Department Definition of Anti-Semitism (Sept. 5, 2019), <https://sherman.house.gov/media-center/press-releases/department-of-education-embraces-state-department-definition-of-anti>.

¹⁶ *Definition of Antisemitism*, EUR. COMM'N, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/combating-antisemitism/definition-antisemitism_en (last visited Nov. 20, 2023).

¹⁷ One of the very few exceptions, unsurprisingly enough, has been the author's own organization, the Louis D. Brandeis Center for Human Rights Under Law. See LOUIS D.

from the beginning, that “[o]n 26 May 2016, the Plenary in Bucharest decided to: [a]dopt the . . . *non-legally binding* working definition of antisemitism.”¹⁸ And yet they are all wrong, or at least out-of-date, because while it may have been non-legally binding on the date and in the context in which it was adopted, the IHRA Definition has become legally binding in various respects and in multiple jurisdictions, including the United States, as a result of actions taken by various governmental entities subsequent to the 2016 Bucharest plenary. Therefore, the Definition now has legal consequences, regardless of whether it was legally binding when presented by the IHRA.¹⁹

The upshot of this confusion is that institutions routinely act as if the Definition is not applicable to them. They may be encouraged in this misunderstanding by advocates who argue that they should, or should not, adopt the IHRA Definition.²⁰ After all, how could the Definition already be legally binding if advocates continually spend so much time arguing about whether it should be adopted? Institutional leaders may then choose either to embrace it or not, depending on their proclivities, as if the matter was within their sole discretion.²¹ If ill-disposed towards the Definition, they may treat it as an academic exercise or a political statement, as opposed to the authoritative interpretation of statutes with which they must comply, and therefore a binding element of their civil rights obligations. The problem is exacerbated by misunderstandings about what it might mean for a definition to be legally binding, domestically or internationally, and whether this could entail infringement on constitutionally protected expressive rights.

BRANDEIS CTR. FOR HUM. RTS. UNDER L., FAQs ABOUT DEFINING ANTI-SEMITISM 1–2 (2017), https://brandeiscenter.com/wp-content/uploads/2017/10/guide_faqs_antisemitism-2022c.pdf.

¹⁸ INT’L HOLOCAUST REMEMBRANCE ALL., *supra* note 4 (emphasis added).

¹⁹ As further discussed below, no instrument can be legally binding in every jurisdiction and in every possible respect. The IHRA Definition is, fundamentally, a definition, and its principal purpose is merely to explain the meaning of a word. Some advocates stress that the IHRA Definition does not criminalize, or otherwise restrict, all activities that may be considered “anti-Semitic” within its terms. They are correct. In some cases, such advocates have used the term “non-legally binding” to describe this unarguably true aspect of the Definition. Indeed, the Definition does not restrict all anti-Semitic activities in any jurisdiction. Nor does it restrict anything anywhere, except to the extent that it is incorporated in other legal instruments, such as statutes or executive orders.

²⁰ See, e.g., Gabby Deutch, *New Legislation Urges University of Illinois to Adopt IHRA Definition*, JEWISH INSIDER (May 14, 2021), <https://jewishinsider.com/2021/05/university-of-illinois-ihra-definition-antisemitism-jim-durkin>.

²¹ See, e.g., Dion J. Pierre, *George Washington University Exonerates Professor Accused of Antisemitism*, ALGEMEINER (Mar. 28, 2023, 11:33 AM), <https://www.algemeiner.com/2023/03/28/george-washington-university-exonerates-professor-accused-of-antisemitism> (quoting a George Washington University statement suggesting that accepting the IHRA Definition could “infringe on free speech principles and academic freedom”).

The IHRA Definition is legally binding to the extent that it has been made binding by appropriate legal authorities. And indeed, it has been made binding in important—if constitutionally-constrained—respects, in ways that materially impact countless entities around the world, including nearly all colleges and universities in the United States.²² This fact should be obvious to those who have followed the extraordinary speed with which the Definition has been embraced by governmental and non-governmental entities around the world. And yet it must be explained, because the movement to make the IHRA Definition effective, not just educational and symbolic, is the single most important current approach to the resurgence of global and U.S. anti-Semitism.

II. HISTORY

In the early 2000s, an alarming amount of anti-Semitic activity spurred the Organization for Security and Cooperation in Europe (OSCE) to organize a conference on anti-Semitism in 2003.²³ This same activity led the European Monitoring Centre on Racism and Xenophobia (EUMC) to commission a study of anti-Semitism shortly after the OSCE.²⁴ Another OSCE conference, as well as various formal studies, followed.²⁵ The EUMC publicly acknowledged that it was stymied by the lack of a standard, widely-held definition of anti-Semitism that it could use to guide its work.²⁶ In particular, the agency needed a definition that would take into account the changing nature of anti-Semitism—one which would address not only traditional anti-Semitism but also the newer forms in which it was manifesting, such as Holocaust denial and anti-Zionism.²⁷

²² Kenneth L. Marcus, Opinion, *A Definition American Universities Need*, INSIDE HIGHER ED (Apr. 21, 2021), <https://www.insidehighered.com/views/2021/04/22/universities-should-endorse-international-holocaust-remembrance-alliances>.

²³ Goldfeder, *Codifying Antisemitism*, *supra* note 5, at 411; *see also* Rabbi Andrew Baker, Deidre Berger & Michael Whine, *The Origins of the Working Definition*, in IN DEFENCE OF THE IHRA WORKING DEFINITION OF ANTISEMITISM 9 (Alan Johnson ed., 2021); MARCUS, *supra* note 5, at 151–52.

²⁴ MARCUS, *supra* note 5, at 152.

²⁵ *See* Baker et al., *supra* note 23, at 9; *see also* MARCUS, *supra* note 5, at 159.

²⁶ Francois Dubuisson, *The Definition of Anti-Semitism by the European Monitoring Centre on Racism and Xenophobia (EUMC): Towards a Criminalisation of Criticism of Israeli Policy?*, CTR. FOR INT'L L. (July 2005), https://www.eccpalestine.org/wp-content/uploads/2018/01/Francois-Dubuisson_opinion.pdf.

²⁷ *See* David Hirsh, *It Was the New Phenomenon of Israel-Focused Antisemitism that Required the New Definition of Antisemitism*, in IN DEFENCE OF THE IHRA WORKING DEFINITION OF ANTISEMITISM 18 (Alan Johnson ed., 2021) (explaining that the IHRA Definition was required to address the new kind of anti-Semitism “which targeted Jews as Zionists and Zionism as racism,” associated with the experience of anti-Semitism at the World Conference against Racism at Durban, South Africa in 2001, and around the world during subsequent years).

After an initial failed attempt to develop a workable definition, the EUMC's director, Beate Winkler, worked with Rabbi Andrew Baker of the American Jewish Committee to develop a new definition.²⁸ Winkler and Baker were aided by the work of an international committee of scholars, including major figures such as Dina Porat, Robert Wistrich, and Yehuda Bauer, as well as representatives of Jewish communal organizations.²⁹ The committee's draft served as the basis for the EUMC Working Definition, negotiated by Winkler and Baker, which became the model for all subsequent work, including its adoption by the IHRA in a plenary session.³⁰ IHRA's now-authoritative version of the Definition (including its guiding examples), provides as follows:

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.

To guide IHRA in its work, the following examples may serve as illustrations: Manifestations might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic. Antisemitism frequently charges Jews with conspiring to harm humanity, and it is often used to blame Jews for "why things go wrong." It is expressed in speech, writing, visual forms and action, and employs sinister stereotypes and negative character traits.

Contemporary examples of antisemitism in public life, the media, schools, the workplace, and in the religious sphere could, taking into account the overall context, include, but are not limited to:

Calling for, aiding, or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion.

Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as collective—such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.

Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.

²⁸ MARCUS, *supra* note 5, at 161–62.

²⁹ *Id.*

³⁰ IHRA is a multigovernmental organization whose primary purpose is "to strengthen, advance, and promote Holocaust education, remembrance, and research worldwide." INT'L HOLOCAUST REMEMBRANCE ALL., <https://www.holocaustremembrance.com> (last visited Nov. 20, 2023).

Denying the fact, scope, mechanisms (e.g.,] gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust).

Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.

Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.

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.

Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.

Using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.

Drawing comparisons of contemporary Israeli policy to that of the Nazis.

Holding Jews collectively responsible for actions of the state of Israel.

Antisemitic acts are criminal when they are so defined by law (for example, denial of the Holocaust or distribution of antisemitic materials in some countries).

Criminal acts are antisemitic when the targets of attacks, whether they are people or property—such as buildings, schools, places of worship and cemeteries—are selected because they are, or are perceived to be, Jewish or linked to Jews.

Antisemitic discrimination is the denial to Jews of opportunities or services available to others and is illegal in many countries.³¹

In the United States, the EUMC's predecessor version of the IHRA Definition was first adopted by the U.S. Commission on Civil Rights and, specifically, in the website accompanying the Commission's Campus Anti-Semitism initiative as early as 2006.³² That initiative was motivated by the resurgence of anti-Semitism on U.S. college campuses,³³ as well as concerns regarding whether the U.S. Department of

³¹ INT'L HOLOCAUST REMEMBRANCE ALL., *supra* note 4.

³² See U.S. COMM'N ON C.R., FINDINGS AND RECOMMENDATIONS OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS REGARDING CAMPUS ANTI-SEMITISM (2006), <https://www.usccr.gov/files/pubs/docs/050306FRUSCCRRCAS.pdf>. The author was Director of the Commission at that time and responsible for overseeing the Campus Anti-Semitism initiative, including the inclusion of the IHRA Definition within the website, with concurrence of a majority of commissioners.

³³ See, e.g., Kenneth L. Marcus, *The Resurgence of Anti-Semitism on American College Campuses*, 26 CURRENT PSYCH. 206 (2007).

Education's Office for Civil Rights (OCR) was properly handling such cases.³⁴ The following year, the Bush-Cheney Department of State followed suit, using the same definition in the first report of the newly created Office to Monitor and Combat Anti-Semitism.³⁵ The Obama-Biden State Department formally adopted a very slightly modified version of the same definition in 2010.³⁶ As a member of IHRA, the United States adopted IHRA's substantially similar definition after its adoption in IHRA's 2016 Bucharest plenary.³⁷ None of these adoptions had legal effect, however; the Civil Rights Commission's work was merely advisory, while the various State Department pronouncements applied only to its work overseas.

The first major effort to apply the Definition with legally binding effect domestically was contained in the bipartisan 2016 Anti-Semitism Awareness Act (AAA), introduced by U.S. Senators Bob Casey (D-PA) and Tim Scott (R-SC).³⁸ It was reintroduced in 2019.³⁹ Thanks to forceful advocacy by then-Senate Democratic Leader Harry Reid, the AAA passed the U.S. Senate by unanimous consent before it was bottled up in the Republican-controlled House Judiciary Committee.⁴⁰ In the form that passed the U.S. Senate, the bill was limited to OCR's administration of Title VI of the Civil Rights Act of 1964.⁴¹ Although this bill has not yet been passed by Congress, it established the method of subsequent IHRA laws by directing public officials to use the IHRA Definition to determine whether conduct that meets the standards of legally actionable discrimination was motivated by anti-Semitic intent.⁴²

President Donald Trump issued Executive Order 13899 on Combatting Anti-Semitism ("E.O. 13899" or the "E.O.") in 2019 to accomplish the objectives of the bi-partisan AAA, codifying OCR and Justice Department guidance from 2004 and

³⁴ See KENNETH L. MARCUS, *JEWISH IDENTITY AND CIVIL RIGHTS IN AMERICA* (2010).

³⁵ See "Working Definition" of Anti-Semitism, U.S. DEP'T OF STATE (Feb. 8, 2007), <https://2001-2009.state.gov/g/drl/rls/56589.htm>.

³⁶ MARCUS, *supra* note 5, at 167.

³⁷ Goldfeder, *Defining Antisemitism*, *supra* note 5, at 127–28.

³⁸ Anti-Semitism Awareness Act, S. 10, 114th Cong. § 3 (2016).

³⁹ Anti-Semitism Awareness Act, S. 852, 116th Cong. § 3 (2019).

⁴⁰ *How Trump's Executive Order on Antisemitism Originated in Harry Reid's Office*, JEWISH INSIDER (Dec. 11, 2019), <https://jewishinsider.com/2019/12/how-trumps-executive-order-on-antisemitism-originated-in-harry-reids-office-2>; see also *Letter to House Leaders Regarding Anti-Semitism Awareness Act*, ANTI-DEFAMATION LEAGUE (Dec. 4, 2018), <https://www.adl.org/resources/letter/letter-house-leaders-regarding-anti-semitism-awareness-act>.

⁴¹ This limitation was based in part on the concern that OCR was unable to effectively address anti-Semitism in the absence of a consistent, uniform definition. See MARCUS, *supra* note 5, at 24–25; Kenneth L. Marcus, *The New OCR Antisemitism Policy*, 2 J. FOR STUDY OF ANTISEMITISM 479, 483–85 (2010).

⁴² The Anti-Semitism Awareness Act of 2019 adopted the IHRA definition of anti-Semitism, including the "contemporary manifestations of anti-Semitism." See Anti-Semitism Awareness Act, S. 852, 116th Cong. § 2 (2019).

2010.⁴³ The E.O. has two primary components. First, it confirms that Title VI, which prohibits discrimination on the basis of race, color, or national origin, applies to discrimination against Jews, even though the statute is anomalously silent with respect to religion.⁴⁴ This portion of the order codified OCR and Justice Department guidance from the Bush and Obama administrations.⁴⁵ The second component directs federal officials to apply the IHRA Definition to determine whether conduct that meets Title VI standards is motivated by anti-Semitic animus. This component tracks the AAA and codifies actions taken by OCR earlier in the Trump administration.⁴⁶ OCR incorporated E.O. 13899 in formal guidance, which remains active during the Biden-Harris administration. Indeed, Assistant Secretary Catherine Lhamon recently confirmed that the Biden-Harris administration remains committed to complying with its terms.⁴⁷ In addition, President Joseph Biden's U.S. National Strategy to Combat Antisemitism reiterates the United States' embrace of the IHRA Definition, and OCR released an accompanying Dear

⁴³ Exec. Order No. 13,899, 84 Fed. Reg. 68,779 (Dec. 11, 2019).

⁴⁴ See *id.* (Section 1 notes that Title VI does not cover discrimination based on religion).

⁴⁵ See Letter from Kenneth L. Marcus, Deputy Assistant Sec'y for Enf't, Off. for C.R., U.S. Dep't of Educ., to Colleague (Sept. 13, 2004), <https://www2.ed.gov/about/offices/list/ocr/letters/religious-rights2004.pdf>; Letter from Russlynn Ali, Assistant Sec'y for C.R., Off. for C.R., U.S. Dep't of Educ., to Colleague (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>; Memorandum from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Just., on Title VI Coordination and Enforcement (Aug. 19, 2010), https://www.justice.gov/sites/default/files/crt/legacy/2011/01/21/titlevi_memo_tp.pdf. For further discussion of this issue, see Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 WM. & MARY BILL RTS. J. 837 (2007).

⁴⁶ Those actions were undertaken by the author in the course of deciding the long-pending appeal of a Title VI complaint that had been brought by the Zionist Organization of America against Rutgers University. See Erica L. Green, *Education Dept. Reopens Rutgers Case Charging Discrimination Against Jewish Students*, N.Y. TIMES (Sept. 11, 2018), <https://www.nytimes.com/2018/09/11/us/politics/rutgers-jewish-education-civil-rights.html>; Jonathan S. Tobin, *Trump's Effort to Fight Campus Anti-Semitism Is No War on Free Speech*, NAT'L REV. (Dec. 13, 2019, 1:01 PM), <https://www.nationalreview.com/2019/12/trumps-effort-to-fight-campus-anti-semitism-is-no-war-on-free-speech>.

⁴⁷ See Dion J. Pierre, *Biden Administration Delays Civil Rights Protections Against Antisemitism to December; Palestinian Group Lauds Move*, ALGEMEINER (Jan. 4, 2023), <https://www.algemeiner.com/2023/01/04/biden-administration-again-delays-civil-rights-protections-against-antisemitism-to-december>. For Assistant Secretary Catherine Lhamon's full statement, see *Statement from U.S. Assistant Secretary for Civil Rights on Title VI Protection from Discrimination Based on Shared Ancestry or Ethnic Characteristics*, BRANDEIS CTR. (Jan. 4, 2023), <https://brandeiscenter.com/statement-from-u-s-assistant-secretary-for-civil-rights-on-title-vi-protection-from-discrimination-based-on-shared-ancestry-or-ethnic-characteristics>.

Colleague Letter, which reminds institutions of higher education that OCR's associated guidance for compliance with Title VI remains in place.⁴⁸

Over the last several years, in response to the defeat of the AAA, more than half of U.S. states have enacted legislation, executive orders, or resolutions that embrace the IHRA Definition.⁴⁹ South Carolina was the first, adopting an appropriations restriction based on a substantially similar predecessor version of the IHRA Definition drafted before IHRA had adopted it.⁵⁰ Other states have followed South Carolina's lead at a rapid clip, especially over the last two years. Some have done so by legislation, others through gubernatorial orders, and still others through appropriations language.⁵¹ While some of the states have adopted the Definition for educational purposes only, or for internal governmental reporting purposes,⁵² others have made it legally binding in certain important—if carefully constrained—respects.⁵³

As the European Commission observed in 2020, worldwide implementation of the IHRA Definition is “in its early stage,”⁵⁴ but its implementation is expanding and developing quite rapidly. While European countries have arguably been moving at a faster pace,⁵⁵ the U.S. federal government and most of the states have begun to catch up.

⁴⁸ WHITE HOUSE, THE U.S. NATIONAL STRATEGY TO COUNTER ANTISEMITISM 13, 41 (2023); *see also* Letter from Catherine E. Lhamon, Assistant Sec'y for C.R., Off. for C.R., U.S. Dep't of Educ., to Colleague (May 25, 2023). The U.S. National Strategy also mentions the Nexus Document; however, the Nexus Document is not incorporated in any E.O., regulation, guidance, or any other regulatory material. This leaves the IHRA definition as the only definition of anti-Semitism with legal effect in federal education policy.

⁴⁹ Zvika Klein, *More Than 1,000 Global Entities Adopted IHRA Definition of Antisemitism*, JERUSALEM POST (Jan. 17, 2023, 1:51 PM), <https://www.jpost.com/diaspora/antisemitism/article-728773>.

⁵⁰ *See* H.R. 4950, 122d Gen. Assemb., Reg. Sess. § 11.23 (S.C. 2018). Bills had previously been filed in the legislatures of Virginia and Tennessee but had not yet passed.

⁵¹ *See* discussion *infra* Section III.C.

⁵² The Arizona anti-semitism statute, for example, mandates the use of the IHRA Definition for hate crime reporting purposes. H.R. 2675, 55th Leg., 2d Reg. Sess. (Ariz. 2022).

⁵³ *See, e.g.*, Iowa Code § 216F.3(1) (2022) (“In reviewing, investigating, or deciding whether there has been a violation of any relevant policy, law, or regulation prohibiting discriminatory acts, the state shall take into consideration the definition of antisemitism set forth in this chapter [i.e., the IHRA Working Definition, including its examples] for purposes of determining whether the alleged act was motivated by discriminatory antisemitic intent.”).

⁵⁴ EUR. COMM'N, HANDBOOK FOR THE PRACTICAL USE OF THE IHRA WORKING DEFINITION OF ANTISEMITISM 18 (2020), https://www.jewishvirtuallibrary.org/jsource/antisemitism/IHRA_guide_EU.pdf [hereinafter EUR. COMM'N HANDBOOK].

⁵⁵ In 2021, the European Commission made the IHRA Definition the lynchpin of the European Union's landmark strategic plan on combating anti-Semitism and fostering Jewish life. *See* European Commission Press Release IP/21/4990, Commission Presents First-Ever EU Strategy on Combating Antisemitism and Fostering Jewish Life, (Oct. 5, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4990. The European Union's plan

III. THE FUNCTION OF IHRA LAWS

A. *The Reason That IHRA Is Called “Non-Legally Binding”*

When IHRA proclaimed its Definition to be non-binding, its meaning was clear: the Definition, or rather the proclamation announcing it, created no legal obligations upon its member states. IHRA said that the Definition was non-legally binding for a simple reason, and it has nothing to do with this particular definition: “[a]ll IHRA decisions are non-legally binding,” as IHRA concedes, because that is how the organization is structured.⁵⁶ In other words, IHRA is a non-treaty organization, and it is not authorized to legally bind its members.

An agreement may be considered legally binding if its parties are bound. In the international sphere, a multinational agreement is legally binding if the participating states *must* abide by its terms.⁵⁷ In describing the Definition as “non-legally binding,” IHRA merely indicated that its 31 then-member states were not bound by the actions of the 2016 plenary and could exercise their own discretion.⁵⁸ It did not purport to *prohibit* its member states (or any other state) from adopting its definition for legally binding purposes,⁵⁹ as many have done, and indeed the IHRA plenary would not have had the authority to do so.⁶⁰

Member states often adopt full or partial international “non-binding” agreements, even when they are not legally bound to. For example, the Universal Declaration of Human Rights (UDHR) published in 1948 was not itself binding but came to have a “substantial indirect effect on international law.”⁶¹ The UDHR in-

recognized that IHRA is “the benchmark” for a human rights-based approach to anti-Semitism. See EUR. PARL. DOC. (COM 615) 4–5 (2021), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52021DC0615>. The Commission has gone further, issuing an important handbook, which provides specific examples on how the IHRA Definition can best be used in the European context. See EUR. COMM’N HANDBOOK, *supra* note 54.

⁵⁶ *IHRA Working Definitions and Charters: Guidance on Key Issues*, INT’L HOLOCAUST REMEMBRANCE ALL., <https://www.holocaustremembrance.com/resources/ihra-working-definitions-and-charters> (last visited Nov. 21, 2023).

⁵⁷ Vienna Convention on the Law of Treaties, art. 2, 26, May 23, 1969, 1155 U.N.T.S. 331.

⁵⁸ EUR. COMM’N HANDBOOK, *supra* note 54, at 6–7.

⁵⁹ On the contrary, IHRA Chairman-in-office Mihnea Constantinescu expressed at the time his hope that the IHRA’s action would inspire other entities “to take action on a legally binding working definition.” *IHRA Adopts Working Definition of Antisemitism*, EMBASSY OF ROM. TO THE U.S., <http://washington.mae.ro/en/romania-news/6706> (last visited Nov. 21, 2023).

⁶⁰ Under international law, a state is permitted to take an action unless there is a rule of international law binding upon it which prohibits it from doing so. See S.S. “*Lotus*,” (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 19 (Sept. 7). I am indebted to Arthur Traldi for this point.

⁶¹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734–35, 735 n.23 (2004).

spired more than 70 human rights treaties, many of which utilized the same language and principles of the non-binding agreement.⁶² In other words, the UDHR was non-legally binding until, and to the extent that, states made its principles binding through subsequent actions. Other United Nations declarations, like the Declaration on the Rights of Indigenous Peoples, are “generally not legally binding; however, they represent the dynamic development of international legal norms and reflect the commitment of states to move in certain directions, abiding by certain principles.”⁶³

IHRA is not unique in disclaiming the legally binding effect of its decisions. Its sister agency, the OSCE, similarly stipulates that its decisions are taken by consensus on a politically, but not legally binding, basis.⁶⁴ Some commentators argue that OSCE materials are specifically designed to be non-legally binding, while others claim that they cannot be legally binding.⁶⁵ Interestingly, however, this is not the end of the story—either for OSCE or for IHRA. Regardless of OSCE’s disclaimers, for example, OSCE decisions, may be taken “as evidence of *opinio juris*” and may even “qualify as customary international law.”⁶⁶

The limited “non-binding” character of IHRA’s decisions can be seen in the way that the actions of its participating states are described. For example, when Romania decided to include the IHRA Definition in a law that limits, *inter alia*, the distribution of anti-Semitic materials, the European Commission noted that “Romania was not required to do so.” That is to say, IHRA has not imposed a legal obligation on Romania to include the IHRA Definition.⁶⁷ This does not diminish in any way the binding character, *vel non*, of Romania’s adoption. While Romania was not bound to use the IHRA Definition in its laws, its laws once enacted must be obeyed within its jurisdiction. In the same way, the United States is not bound by the IHRA Definition, except to the extent that it chooses to bind itself. This does not reduce the binding character of actions that the President, Congress, and the states have taken with respect to the Definition.

⁶² G.A. Res. 217 (III), at 72 (Dec. 10, 1948).

⁶³ U.N. Under-Secretary-General for Econ. and Soc. Affs., Frequently Asked Questions, Declaration on the Rights of Indigenous Peoples (Aug. 2007), <https://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf>.

⁶⁴ Marcus Wenig, *The Status of the OSCE Under International Law – Current Status and Outlook*, 1997 OSCE Y.B. 367, 383 (1998). The United States concedes that OSCE decisions are politically, even if not legally, binding. See *About the OSCE*, U.S. MISSION TO THE OSCE, <https://osce.usmission.gov/our-relationship/about-osce> (last visited Nov. 21, 2023).

⁶⁵ Eric Manton, *The OSCE Human Dimension Process and the Process of Customary International Law Formation*, 2005 OSCE Y.B. 195, 199 (2006).

⁶⁶ *Id.*

⁶⁷ EUR. COMM’N HANDBOOK, *supra* note 54, at 7.

B. The International Context

In some respects, the United States has lagged behind many of its Western democratic allies in embracing the IHRA Definition, especially with respect to the application of the Definition in higher education. As early as 2010, The Ottawa Protocol on Combating Antisemitism, promulgated by an assembly of parliamentarians from around the world, urged colleges and universities to make copious use of the Definition's EUMC predecessor:

[U]niversities should be invited to define antisemitism clearly, provide specific examples, and enforce conduct codes firmly, while ensuring compliance with freedom of speech and the principle of academic freedom. Universities should use the EUMC Working Definition of Antisemitism as a basis for education, training and orientation.⁶⁸

The European Union now boasts that 25 European Union member states have “adopted or endorsed” the IHRA Definition.⁶⁹ In 2017, the European Parliament adopted a resolution on combating anti-Semitism which called on “Member States and the Union institutions and agencies to adopt and apply the working definition of anti-Semitism . . . in order to support the judicial and law enforcement authorities in their efforts to identify and prosecute anti-Semitic attacks more efficiently and effectively[.]”⁷⁰ In 2018, the Council of the European Union also called on member states who had not already done so to “endorse the non-legally binding working definition of antisemitism . . . as a useful guidance tool in education and training, including for law enforcement authorities in their efforts to identify and investigate antisemitic attacks more efficiently and effectively[.]”⁷¹

In the United Kingdom, the government adopted the IHRA Definition in 2016.⁷² Then-Prime Minister Theresa May stated, “There will be one definition of anti-Semitism—in essence, language or behaviour that displays hatred towards Jews

⁶⁸ The Inter-Parliamentary Coalition for Combating Antisemitism, *Ottawa Protocol on Combating Antisemitism* (2011), https://antisemitism.org.uk/icca_publications/the-ottawa-protocol-on-combating-antisemitism.

⁶⁹ EUROPEAN COMM'N, *supra* note 16 (“The Commission recommends the IHRA definition as a useful tool, in particular for education and training purposes for teachers, NGOs, state authorities and the media in line with the 2022 Council Conclusions on combating racism and antisemitism.”).

⁷⁰ EUR. PARL. DOC. 2017/2692(RSP) (2017).

⁷¹ Council Resolution No. 15213/18 of 6 December 2018, Council Declaration on the Fight Against Antisemitism and the Development of a Common Security Approach to Better Protect Jewish Communities and Institutions in Europe, <https://data.consilium.europa.eu/doc/document/ST-15213-2018-INIT/en/pdf>.

⁷² David Torrance, Insight, *U.K. Government's Adoption of the IHRA Definition of Antisemitism*, U.K. PARLIAMENT (Oct. 4, 2018), <https://commonslibrary.parliament.uk/uk-governments-adoption-of-the-ihra-definition-of-antisemitism>.

because they are Jews—and anyone guilty of that will be called out on it.”⁷³ Since then, U.K. governmental officials have required universities to adopt the IHRA Definition, and most post-secondary educational institutions have also done so.⁷⁴ In 2020, Education Secretary Gavin Williamson warned the remaining institutions to adopt the IHRA Definition and threatened to suspend funding if they failed to do so.⁷⁵

The United States has consistently applied the Definition in its foreign policy during every administration, of both parties, since the Bush-Cheney administration, when the EUMC predecessor version of the Definition was first devised.⁷⁶ Prior to the Trump-Pence administration, however, the United States was slower to apply the Definition to the actions of its own domestic institutions, leaving it vulnerable to the charge of hypocrisy: the U.S. government was in a position where it would label certain activities as anti-Semitic if conducted abroad, but not if conducted domestically.⁷⁷

C. U.S. Federal Domestic Adoption

1. Executive Order 13899

In the United States, the general response to the AAA, E.O. 13899, OCR guidance, and state laws and orders has been to direct public officials to use the Definition to discern whether unlawful conduct was motivated by anti-Semitic intent. In this respect, the Definition is binding, at a minimum, on these officials. But it is also binding, to a not inconsiderable extent, on regulated entities and others. For

⁷³ *Id.*

⁷⁴ Chris Parr, *Eighteen Universities Yet to Adopt IHRA Antisemitism Definition*, RSCH. PRO. NEWS (Nov. 11, 2021), <https://www.researchprofessionalnews.com/rr-news-uk-universities-2021-11-eighteen-universities-yet-to-adopt-ihra-antisemitism-definition>. See, e.g., Lee Harpin, *Oxford University Adopts IHRA Definition of Antisemitism*, JEWISH CHRON. (Dec. 24, 2020, 5:33 PM), <https://www.thejc.com/news/uk/oxford-university-adopts-ihra-definition-of-antisemitism-1.510137>; *The University of Cambridge Has Formally Adopted the IHRA Definition of Antisemitism*, UNIV. OF CAMBRIDGE (Nov. 6, 2020), <https://www.cam.ac.uk/news/the-university-of-cambridge-has-formally-adopted-the-ihra-definition-of-antisemitism>.

⁷⁵ *Education Secretary Praises 160 Per Cent Rise in Universities Adopting IHRA*, JEWISH CHRON. (Sept. 10, 2021, 2:44 PM), <https://www.thejc.com/news/uk/education-secretary-praises-160-per-cent-rise-in-universities-adopting-ihra-1.520339>.

⁷⁶ Goldfeder, *Codifying Antisemitism*, *supra* note 5, at 411–12.

⁷⁷ The reason is that the Definition had been adopted by the State Department, which has an international mandate, but not yet by agencies such as the Education Department, which have domestic mandates. Even today, the State Department would be able to use the IHRA Definition to assess international workplace discrimination, but the Equal Employment Opportunity Commission has not yet adopted the Definition to assess its domestic equivalents.

example, schools are affirmatively required to *proactively* consider the Definition when formulating policies to create a non-discriminatory environment on campus.⁷⁸

Laws adopting the IHRA Definition require government officials to consider the Definition to determine whether potentially unlawful conduct was motivated by anti-Semitic animus.⁷⁹ The requirement of governmental consideration, although not spelled out in the existing legislation, clearly requires an evaluation of potential applicability to case-by-case circumstances that is neither arbitrary nor capricious.⁸⁰ It must be, in other words, a reasonable evaluation; any decision not to employ the Definition in an anti-Semitism case should be justified by responsible officials in a reasoned written opinion.

President Donald Trump's Executive Order on Combating Anti-Semitism, which noted that the Definition is "non-legally binding,"⁸¹ nevertheless proceeds to give it binding effect—specifically, by directing that agencies with Title VI responsibilities "shall" consider the Definition, including its examples relating to Israel, when useful, as evidence of intent:⁸²

In enforcing Title VI, and identifying evidence of discrimination based on race, color, or national origin, all executive departments and agencies (agencies) charged with enforcing Title VI shall consider the following:

- (i) the non-legally binding working definition of anti-Semitism adopted on May 26, 2016, by the International Holocaust Remembrance Alliance (IHRA), which states, "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"; and

⁷⁸ "As a condition of receiving federal financial assistance, a school corporation gives the DOE 'an assurance that the program will be conducted . . . in compliance with all requirements imposed by or pursuant to this part.' This imposes an affirmative obligation to provide an equal opportunity." Ivan E. Bodensteiner, *Peer Harassment—Interference with an Equal Educational Opportunity in Elementary and Secondary Schools*, 79 NEB. L. REV. 1, 24 (2000) (citing 34 C.F.R. § 100.4(a) (1999)).

⁷⁹ Goldfeder, *Codifying Antisemitism*, *supra* note 5, at 406–07.

⁸⁰ For a general discussion of the substantive requirements of formal "consideration," see George La Noue & Kenneth L. Marcus, "Serious Consideration" of Race-Neutral Alternatives in Higher Education, 57 CATH. U. L. REV. 991 (2008).

⁸¹ Exec. Order No. 13,899, 84 Fed. Reg. 68,779 (Dec. 11, 2019). Notably, E.O. 13899 uses the term "non-legally binding" more as part of the Definition's title than as a description or evaluation of its status.

⁸² *Id.*

(ii) the “Contemporary Examples of Anti-Semitism” identified by the IHRA, to the extent that any examples might be useful as evidence of discriminatory intent.⁸³

That is to say, E.O. 13899 legally binds several U.S. executive federal agencies, including the U.S. Department of Education, to give formal, if circumscribed, consideration of the Definition.⁸⁴ Significantly, no one describes E.O. 13899 as non-legally binding. Technically, it is neither the Definition nor the E.O., but rather the statute, Title VI, which is legally binding. Nevertheless, the Definition, like E.O. 13899, provides an authoritative basis for interpreting the statute. In that sense, the Definition is precisely as authoritative as the executive order because it is part of the executive order.

The requirement of “consideration,” as contained in E.O. 13899, implies a reasonable evaluation, rather than one that is arbitrary and capricious.⁸⁵ An executive branch official need not apply the IHRA Definition in every case involving allegations of anti-Semitism, since the formal requirement is one of “consideration,” rather than automatic or unthinking utilization. The reason for this is that there is an enormous range of anti-Semitic activity, and it is impossible for all of it to be fully encompassed within any one workable and concise definition. There will unavoidably be cases in which the Definition is not dispositive. Nevertheless, there are no cases involving allegations of anti-Semitism in which federal officials, bound by E.O. 13899, may disregard the Definition or fail to provide it with the requisite degree of attention. This entails, at a minimum, a detailed written evaluation of the Definition’s applicability, *vel non*, to a particular set of facts, including a reasoned explanation of a decision not to apply the Definition in any case involving allegations of anti-Semitic activity. Anything less may be subject to claims of arbitrariness.

2. U.S. Department of Education Guidance

The Education Department treated the Definition in the same manner in its formal guidance implementing E.O. 13899. On January 19, 2021, OCR issued formal guidance clarifying E.O. 13899, known as the “Questions and Answers on Executive Order 13899 (Combating Anti-Semitism) and OCR’s Enforcement of Title VI of the Civil Rights Act of 1964” (OCR’s Q & As).⁸⁶ That guidance, which

⁸³ *Id.*

⁸⁴ Press Release, U.S. Dep’t of Educ., Questions and Answers on Executive Order 13899 (Combating Anti-Semitism) and OCR’s Enforcement of Title VI of the Civil Rights Act of 1964 (Jan. 19, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-anti-semitism-20210119.pdf>.

⁸⁵ See *Nat. Res. Def. Council, Inc. v. U.S. EPA*, 966 F.2d 1292, 1297 (9th Cir. 1992); *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

⁸⁶ Press Release, U.S. Dep’t of Educ., *supra* note 84.

crucially remains in the portal of OCR's active policy documents,⁸⁷ notes various binding aspects of the Executive Order:

The Executive Order reaffirms the long-standing principle that anti-Semitism and discrimination against Jews based on an individual's race, color, or national origin may violate Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d *et seq.*; directs the federal government to enforce Title VI against prohibited forms of discrimination rooted in anti-Semitism as vigorously as against all other forms of discrimination prohibited by Title VI; and requires federal agencies to consider the International Holocaust Remembrance Alliance's (IHRA) working definition of anti-Semitism and the IHRA's contemporary examples of anti-Semitism in enforcing Title VI.⁸⁸

Crucially, by incorporating E.O. 13899 into its policy guidance, the Q&A notified recipients of federal education funds—including most colleges and universities, as well as public schools—that OCR considers the Definition when evaluating anti-Semitism claims. In this way, OCR placed regulated entities on notice that OCR would use the IHRA Definition to evaluate their conduct in cases which allege unlawful anti-Semitic activity. Every college, university, and public school should understand what this means: whether they have expressly adopted the IHRA Definition or not, the Definition provides the standard under which their actions will be evaluated in legal proceedings before their regulatory agency.

3. *Institutional Certifications or Grant Assurances*

Moreover, educational institutions routinely certify to the U.S. Department of Education that they will, as a condition of receiving federal financial assistance, comply with applicable federal laws.⁸⁹ More specifically, applicants for discretionary federal funds must sign forms “binding [their] organizations to abide by the federal

⁸⁷ For a discussion of the continuing vitality of E.O. 13899 during the Biden administration, see Kenneth L. Marcus, Opinion, *Biden Is Failing to Deliver in the Fight Against Antisemitism*, NEWSWEEK (Jan. 9, 2023, 10:45 AM), <https://www.newsweek.com/biden-failing-deliver-fight-against-antisemitism-opinion-1772379> (“In the Biden administration’s first public embrace of IHRA within a domestic context, Lhamon wrote that Trump-era guidance (prepared under my direction) ‘affirms OCR’s commitment to complying with Executive Order 13899 on Combating Antisemitism’ and remains available on OCR’s online compendium of active policy documents. In other words, Lhamon has commendably indicated that this administration continues to view the Trump order as an active component of Biden civil rights policy—and emphasizes OCR’s ‘commitment to complying’ with it. This includes, significantly, the IHRA definition and its guiding examples relative to Israel.”).

⁸⁸ Press Release, U.S. Dep’t of Educ., *supra* note 84.

⁸⁹ ALEXANDRA HEGJI, CONG. RSCH. SERV. R43159, INSTITUTIONAL ELIGIBILITY FOR PARTICIPATION IN TITLE IV STUDENT FINANCIAL AID PROGRAMS (2023), <https://sgp.fas.org/crs/misc/R43159.pdf>.

statutes, regulations, and *executive orders* that apply to grantees.”⁹⁰ Moreover, the Department’s grantees provide OCR with signed, written assurance that they will comply with Title VI, as well as other civil rights statutes, and “[a]ll regulations, guidelines, and standards issued by the Department under any of these statutes.”⁹¹ In this way, educational institutions agree to be bound by executive orders such as E.O. 13899, as well as the Education Department’s “guidelines and standards,” which would include OCR Q&As. An institution that fails to comply with its assurances may be subject to “a variety of sanctions and corrective actions,”⁹² including withholding of funds.⁹³

Notably, the civil rights certification is a condition “of obtaining Federal grants, loans, contracts (except contracts of insurance or guaranty), property, discounts, funds made available through the U.S. Department of Education, or other Federal financial assistance from the Department.”⁹⁴ For this reason, institutions that fail to abide by their certifications may also be subject to investigation by the Department’s Inspector General for false claims and related fraudulent activities.

In these respects, U.S. post-secondary institutions, as well as state and local educational agencies, have entered into agreements under which the IHRA Definition is legally binding upon them. There is some irony to this because many institutions debate whether to adopt the Definition. The Definition has been adopted, in various forms, by Western Washington University, Florida State University, New York University, the Georgia Institute of Technology, and other higher education institutions—although they would be bound by it regardless.⁹⁵ Numerous university student governments have also adopted the IHRA Definition.⁹⁶ A formal adoption may have important symbolic as well as educational significance. Nevertheless, the Definition is legally binding upon them, whether they adopt it or not, if they

⁹⁰ U.S. DEP’T OF EDUC., DISCRETIONARY GRANTMAKING AT ED: ANSWERS TO YOUR QUESTIONS ABOUT THE DISCRETIONARY GRANTS PROCESS 14 (2021), <https://www2.ed.gov/fund/grant/about/grantmaking/grantmaking421.pdf> (emphasis added).

⁹¹ See U.S. DEP’T OF EDUC., OFF. FOR C.R., ASSURANCE OF COMPLIANCE—CIVIL RIGHTS CERTIFICATE, OMB APPROVAL NO. 1870-0503, <https://www2.ed.gov/about/offices/list/ocr/letters/boy-scouts-assurance-form.pdf>.

⁹² HEGJI, CONG. RSCH. SERV. R43159, *supra* note 89, at 17.

⁹³ *Id.* at 18.

⁹⁴ U.S. DEP’T OF EDUC., CIVIL RIGHTS CERTIFICATE, *supra* note 91.

⁹⁵ Kenneth L. Marcus, *Addressing Antisemitism Within and Through the Educational Systems in the United States*, INST. FOR NAT’L SEC. STUD. (Mar. 17, 2021), https://brandeiscenter.com/wp-content/uploads/2021/03/KLM_special-publication-140321-2.pdf.

⁹⁶ *Adopting the IHRA Definition to Combat Anti-Semitism: In Government, On Campus, and Beyond*, BRANDEIS CTR., <https://brandeiscenter.com/adopting-the-ihra-definition-to-combat-anti-semitism-in-government-on-campus-and-in-general> (last visited Nov. 22, 2023).

continue to accept federal funding and make the requisite certifications that are associated with federal educational support. Like federal antitrust and copyright law, the Definition applies to them whether they formally embrace it with fanfare or not.

While public conversation regarding these policies may have centered on educational institutions, E.O. 13899 also applies to all other federal agencies that receive federal financial assistance.⁹⁷ To this extent, the IHRA Definition may have a legally binding effect on hospitals funded by Health and Human Services, public housing projects funded by Housing and Urban Development, and airports funded by Transportation, to name just a few examples. That is to say, federal officials are required to consider the IHRA Definition when evaluating bias complaints against these institutions. To that extent, the IHRA Definition provides an authoritative interpretation of statutes that are binding upon them.

D. U.S. State Adoption

Beyond federal law, more than half of U.S. states have incorporated the IHRA Definition, or its substantially similar predecessor definition, including directives binding upon higher education institutions.⁹⁸ They did so, as their various “whereas” clauses indicate, in response to the global, national, and local increase in anti-Semitic incidents.⁹⁹ In some states, legislatures or governors have made the IHRA Definition binding for particular purposes. In other states, legislatures or governors have adopted the Definition for educational or commemorative purposes.¹⁰⁰ Even here, however, the effect of their resolutions or proclamations may be more than merely ceremonial or symbolic.

State legislatures have codified (or attempted to codify) the IHRA Definition in various ways in Arizona,¹⁰¹ Arkansas,¹⁰² Florida,¹⁰³ Iowa,¹⁰⁴ North Carolina,¹⁰⁵ Texas,¹⁰⁶ and Virginia.¹⁰⁷ While some of these states use the IHRA Definition for

⁹⁷ Press Release, U.S. Dep’t of Educ., *supra* note 84.

⁹⁸ This history is well-described in Goldfeder, *Codifying Antisemitism*, *supra* note 5, at 406–07.

⁹⁹ *Id.*; see, e.g., H.R. Con. Res. 5030, 2022 Leg., Reg. Sess. (Kan. 2022) (“WHEREAS, Incidents motivated by antisemitism are increasing at an alarming rate . . .”).

¹⁰⁰ See, e.g., H.D. 1606, 2023 Gen. Assemb., Reg. Sess. (Va. 2023).

¹⁰¹ H.R. 2675, 55th Leg., 2d Reg. Sess. (Ariz. 2022) (requiring the collection of hate crimes motivated by antisemitism).

¹⁰² S. 118, 94th Gen. Assemb., Reg. Sess. (Ark. 2023).

¹⁰³ H.R. 741, 2019 Leg., Reg. Sess. (Fla. 2019).

¹⁰⁴ IOWA CODE § 216F.1 (2023).

¹⁰⁵ S.B. 739, 2023 Gen. Assemb., Reg. Sess. (N.C. 2023).

¹⁰⁶ H.R. 3257, 87th Leg., Reg. Sess. (Tex. 2021) (using the IHRA Definition for purposes relating to the establishment of the Texas Holocaust, Genocide, and Antisemitism Advisory Commission).

¹⁰⁷ H.D. 1606, 2023 Gen. Assemb., Reg. Sess. (Va. 2023).

limited purposes, such as the establishment of state anti-Semitism commissions, others (especially Arkansas, Florida, and Iowa) use the Definition with greater impact. Iowa, for example, requires state agencies to use the IHRA Definition in applying Iowa state anti-discrimination law.¹⁰⁸ Florida requires public K-20 educational institutions to consider a definition of anti-Semitism substantially similar to the IHRA Definition.¹⁰⁹ Arkansas requires that when state officials are “reviewing, investigating, or *determining* whether there has been a violation of any relevant policy, law, or rule prohibiting discriminatory acts, the government shall take into consideration the [IHRA] definition of antisemitism . . . for purposes of determining whether the alleged act was motivated by discriminatory antisemitic intent.”¹¹⁰ Virginia adopts the IHRA Definition “exclusively as a tool and guide for training, education, recognizing, and combating antisemitic hate crimes or discrimination and for tracking and reporting antisemitic incidents in the Commonwealth.”¹¹¹ Similarly, some governors have decreed executive orders with significant legal impact. In Ohio, especially, Governor Mike DeWine achieved a broad effect through gubernatorial order.¹¹²

In such states, the IHRA Definition provides the authoritative interpretative gloss regarding the meaning of anti-Semitism in pertinent legislation, such as anti-discrimination law. Regulated entities, such as colleges and schools, will be bound in some states to comply with state laws for which IHRA provides the authoritative interpretation.¹¹³ In this sense, the state legislation and executive order place upon state institutions an additional requirement to comply with IHRA. In some states, this requirement applies to a broader range of officials, such as law enforcement officials, and a broader swath of activity, such as employment, housing, and public safety.¹¹⁴

Still other states have embraced the Definition in non-binding resolutions and decrees, which serve important educational purposes and establish the public policy of their respective states, but which do not purport to have legal effect. The state

¹⁰⁸ IOWA CODE § 216F.3(1) (2023) (“In reviewing, investigating, or deciding whether there has been a violation of any relevant policy, law, or regulation prohibiting discriminatory acts, the state shall take into consideration the definition of antisemitism set forth in this chapter [i.e., the IHRA Definition, including its examples] for purposes of determining whether the alleged act was motivated by discriminatory antisemitic intent.”).

¹⁰⁹ H.R. 741, 2019 Leg., Reg. Sess. (Fla. 2019).

¹¹⁰ S. 118, 94th Gen. Assemb., Reg. Sess. (Ark. 2023). The Arkansas statute closely resembles Ohio Governor DeWine’s executive order, discussed *infra*.

¹¹¹ H.D. 1606, 2023 Gen. Assemb., Reg. Sess. (Va. 2023).

¹¹² Ohio Exec. Order No. 2022-06D (Apr. 14, 2022).

¹¹³ See, e.g., *id.*

¹¹⁴ See *id.*

legislatures of Kentucky,¹¹⁵ Kansas,¹¹⁶ Maine,¹¹⁷ and Massachusetts¹¹⁸ have adopted the Definition in resolutions that do not, on their face, appear to create or alter any binding legal obligations, although they may serve other important purposes.¹¹⁹ While no binding rights or obligations are created, even in these states the adoption of the IHRA Definition may be taken as persuasive authority that this Definition should be used in other instances in which agencies or courts need to understand the meaning of anti-Semitism for purposes of interpreting state law.

In addition, Governors have adopted the IHRA Definition by proclamation in several states, including Alabama,¹²⁰ Alaska,¹²¹ Connecticut,¹²² Idaho,¹²³

¹¹⁵ S. Res. 67, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021).

¹¹⁶ H.R. Con. Res. 5030, 2022 Leg., Reg. Sess. (Kan. 2022).

¹¹⁷ J. Res. SP0733, 129th Leg., Reg. Sess. (Me. 2020).

¹¹⁸ Proclamation No. 245 (Mass. Feb. 18, 2022), <https://archives.lib.state.ma.us/bitstream/handle/2452/855725/on1298290425.pdf?sequence=1&isAllowed=y>.

¹¹⁹ For an example of general educational language, see S. Res. 67, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021) (“This body acknowledges that anti-Semitism comes in many forms, and adopts the definition of anti-Semitism from the International Holocaust Remembrance Alliance: ‘Anti-Semitism is a certain perception of Jews, which may be expressed as hatred towards Jews. Rhetorical and physical manifestations of anti-Semitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.’”). For an example of how this can be used in a non-binding manner, see H.R. Con. Res. 5030, 2022 Leg., Reg. Sess. (Kan. 2022) (directing that “The Kansas Department of Administration shall ensure that the IHRA’s Working Definition of Antisemitism is made available as an educational resource for all state agencies . . .”).

¹²⁰ Proclamation on International Holocaust Remembrance Day (Ala. Jan. 5, 2022), <https://governor.alabama.gov/assets/2022/01/International-Holocaust-Remembrance-Day.pdf> (recommending that “use of this definition of antisemitism, although it is not to be taken as an exhaustive definition, will increase awareness and understanding of the parameters of contemporary anti-Jewish discrimination in certain circumscribed areas”).

¹²¹ Proclamation on Holocaust Remembrance Day (Alaska Apr. 28, 2022), <https://gov.alaska.gov/holocaust-remembrance-day> (using the IHRA Definition in a proclamation establishing Holocaust Remembrance Day).

¹²² See Official Statement on Shine a Light Week (Conn. Nov. 2021), <https://combatantisemitism.org/wp-content/uploads/2021/12/Connecticut-IHRA-Proclamation.pdf> (noting that “[t]he use of this [IHRA] definition of antisemitism—although it is not to be taken as an exhaustive definition—will increase awareness and understanding of the parameters of contemporary anti-Jewish discrimination in certain circumscribed areas” in the course of establishing “Shine a Light Week”).

¹²³ Proclamation on Holocaust Remembrance Day (Idaho Jan. 27, 2022), <https://combatantisemitism.org/wp-content/uploads/2022/05/Idaho-Holocaust-Remembrance-Day-Proclamation.pdf> (stating that “while there can be no exhaustive definition of antisemitism, as it can take many forms, the International Holocaust Remembrance Alliance (IHRA) Working Definition of Antisemitism, including its associated examples, has been an essential definitional tool used to determine contemporary manifestations of antisemitism, and includes useful examples of discriminatory anti-Israel acts that can cross the line into antisemitism” and observing

Montana,¹²⁴ Nebraska,¹²⁵ New Hampshire,¹²⁶ Oklahoma,¹²⁷ Rhode Island,¹²⁸ South Dakota,¹²⁹ Tennessee,¹³⁰ Utah,¹³¹ Vermont,¹³² West Virginia,¹³³ and

that “use of this definition of antisemitism, although it is not to be taken as an exhaustive definition, will increase awareness and understanding of the parameters of contemporary anti-Jewish discrimination in certain circumscribed areas[.]”.

¹²⁴ Proclamation on Shine a Light Week (Mont. Dec. 2021), https://governor.mt.gov/_docs/doc02588320211126150502.pdf (noting that “use of this definition of antisemitism, though it is not to be taken as an exhaustive definition, will increase awareness and understanding of the parameters of contemporary anti-Jewish discrimination in circumscribed areas” in the course of establishing Shine a Light Week).

¹²⁵ Proclamation on Jewish American Heritage Month (Neb. May 5, 2022), <https://combatantisemitism.org/wp-content/uploads/2022/02/Nebraskaproclamation.pdf> (noting that “[w]hile there can be no exhaustive definition of antisemitism in all its many forms, the International Holocaust Remembrance Alliance (IHRA) Working Definition of Antisemitism has been an essential definitional tool used to determine contemporary manifestations of antisemitism” in the course of establishing Jewish American Heritage Month).

¹²⁶ Proclamation on Holocaust Remembrance Day (N.H. Jan. 16, 2020), <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/holocaust-remembrance.pdf> (noting the IHRA Definition in the course of establishing Holocaust Remembrance Day).

¹²⁷ Proclamation on Holocaust Remembrance Day (Okla. Jan. 26, 2022) <https://www.sos.ok.gov/documents/proclamations/41410.pdf> (“adopting the IHRA definition of antisemitism” as a tool for “increas[ing] awareness and understanding of the parameters of contemporary anti-Jewish discrimination in certain circumscribed areas” in the course of observing Holocaust Remembrance Day).

¹²⁸ See Press Release, Consulate Gen. of Isr. to New Eng., Proclamation by RI Governor to Adopt IHRA (Jan. 27, 2020), <https://embassies.gov.il/boston/PressRoom/PressReleases/Pages/Proclamation-by-RI-Governor-to-adopt-January-27TH-as-Holocaust-Remembrance-Day.aspx>.

¹²⁹ Executive Proclamation on Shining a Light on Antisemitism Week (S.D. Nov. 26, 2021), <https://combatantisemitism.org/wp-content/uploads/2021/12/South-Dakota-IHRA-Proclamation.pdf> (noting that “identifying Antisemitism can be done by applying this [IHRA] definition and explanation to bring more awareness to the continued discrimination against Jewish people” in the course of establishing Shine a Light on Antisemitism Week in South Dakota).

¹³⁰ Proclamation on Holocaust Remembrance Day (Tenn. Jan. 25, 2022), <https://tnsos.net/publications/proclamations/files/2233.pdf> (using the IHRA Definition in the course of establishing Holocaust Remembrance Day).

¹³¹ Declaration on Holocaust Remembrance Day (Utah Apr. 18, 2023), <https://governor.utah.gov/declarations> (using the IHRA Definition in the course of recognizing Holocaust Remembrance Day in Utah).

¹³² Proclamation on Holocaust Remembrance Day (Vt. Jan. 27, 2020), <https://governor.vermont.gov/sites/scott/files/documents/20-004%20Holocaust%20Remembrance%20Day.pdf> (“recogniz[ing] the non-legally binding ‘working definition’ of anti-Semitism” in the course of proclaiming Holocaust Remembrance Day in Vermont).

¹³³ Proclamation on International Holocaust Remembrance Day (W. Va. Jan. 19, 2022), <https://apps.sos.wv.gov/adlaw/executivejournal/readpdf.aspx?DocID=91947> (recognizing that “while there can be no exhaustive definition of antisemitism, as it can take many forms, the International Holocaust Remembrance Alliance (IHRA) Working Definition of Antisemitism, including its associated examples, has been an essential definitional tool used to determine

Wyoming.¹³⁴ In many cases, these governors have embraced IHRA in the course of recognizing various commemorations, such as Holocaust Remembrance Day, Jewish American Heritage Month, or Shine a Light Week. Despite the commemorative character of these proclamations, the wording of some proclamations provides ample encouragement, if not binding legal effect, for state agencies to use the Definition in the ways specified by their governors or for analogous purposes.

E. Limitations on the Legal Effect of Associated Legal Instruments

To be sure, the Definition remains binding in only the respects described above. In other key respects, it remains educational or symbolic. In particular, the Definition is not binding on member states except to the extent that they voluntarily agree to be bound by it.¹³⁵ As states increasingly incorporate the Definition into their laws, the Definition is enforceable only to the extent provided in each state's operative instruments. In the United States, federal, state, and local authorities have generally been careful, in measures undertaken as of the date that this article was written, to provide guardrails to protect against infringements upon constitutionally protected rights, such as the right of free speech.¹³⁶

1. National Sovereignty

First, as explained above, the IHRA plenary that adopted the Definition in Bucharest in 2016 was not, through its action, making the Definition binding on IHRA's member states.¹³⁷ This was important to note because making the IHRA Definition legally binding on member states would have overstepped IHRA's authority and encroached upon the sovereignty of the states.

2. Limited Applicability

Second, the IHRA Definition is not binding in any respect not specifically established by applicable governmental authorities. That is to say, it does not generally ban, regulate, restrict, or punish all activities that may be described as anti-Semitic

contemporary manifestations of antisemitism, and includes useful examples of discriminatory anti-Israel acts that can cross the line into antisemitism" in the course of proclaiming International Holocaust Remembrance Day in West Virginia).

¹³⁴ Proclamation Reaffirming the Promise of Never Again (Wyo. Jan. 27, 2022), <https://combatantisemitism.org/wp-content/uploads/2022/05/Wyoming-IHRD-Proclamation.pdf> (proclaiming that the people of Wyoming will use the IHRA Definition "as a tool for identifying and speaking out against antisemitism" to the extent that it does not infringe upon constitutional or other protected rights).

¹³⁵ *About the IHRA Working Definition of Antisemitism*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/backgrounders/about-ihra-working-definition-antisemitism> (Feb. 19, 2021) (noting that "[t]he IHRA Definition is intended to be utilized as non-legally binding guidance and education for a range of stakeholders").

¹³⁶ Goldfeder, *Codifying Antisemitism*, *supra* note 5, at 429–33.

¹³⁷ See INT'L HOLOCAUST REMEMBRANCE ALL., *supra* note 4.

within the Definition's meaning. OCR's FAQs address this point explicitly in the context of Executive Order 13899:

Question 6: Does the Executive Order mean that any anti-Semitic incident violates Title VI?

Answer: No. An anti-Semitic incident does not violate Title VI merely because it is anti-Semitic, or because it involves an example of anti-Semitism contemplated by the IHRA. Rather, the Executive Order states that a 'detailed analysis' is required to determine if a particular act constitutes discrimination prohibited by Title VI, as is true 'with all other Title VI complaints.' Nor does the Executive Order 'alter the evidentiary requirements' for agencies for determining whether a recipient's conduct amounts to actionable discrimination. Thus, OCR, as required under the Executive Order, will consider the IHRA definition in handling complaints of anti-Semitism, and will continue to apply the Title VI statute, regulations, and established standards.¹³⁸

Significantly, Executive Order 13899, as interpreted by active OCR guidance, can identify unlawful anti-Semitic activity only to the extent that it is applied in conjunction with existing Title VI standards and evidentiary requirements.¹³⁹

Anti-Semitic activity, like racism or sexism, is only restricted to the extent indicated in applicable laws. Most racism, sexism, or anti-Semitism is not legally regulated, either because it does not occur within contexts that are subject to regulation, because it does not rise to applicable standards, or because it is protected by constitutional provisions such as the First Amendment. Iowa law, for example, is very specific on this point, specifying that "[a] court or other relevant authority shall apply the same legal standard as applicable to like claims of discrimination arising under laws of this state protecting civil rights"¹⁴⁰

This point is important to current debates surrounding the IHRA Definition because the term "non-legally binding" seems to have taken on an additional meaning in some colloquial discourse.¹⁴¹ Some advocates may use the term "non-legally binding" to indicate that the IHRA Definition does not, on its own, punish or prohibit the items listed in its guiding examples.¹⁴² Rather, it merely identifies those examples (depending upon context) as indicators of anti-Semitism. These advocates may find it important to emphasize this characteristic of the Definition in order to explain that it does not limit free speech because it does not (standing alone) punish or prohibit anything at all. It is just a definition. Just as a dictionary does not punish or prohibit anything, the IHRA Definition does not punish or prohibit anything either. It merely describes and labels anti-Semitism.

¹³⁸ Press Release, U.S. Dep't of Educ., *supra* note 84.

¹³⁹ *See id.*

¹⁴⁰ IOWA CODE § 216F.3(2) (2023).

¹⁴¹ Alyza D. Lewin helpfully suggested this point.

¹⁴² *See, e.g.,* Rich, *supra* note 12, at 12.

This issue is salient because anti-Semitism is so frequently whitewashed or denied. As an educational tool, the IHRA Definition can be used to address that denial. It provides carefully researched, broadly agreed-upon examples of anti-Semitism. While the way the IHRA Definition is applied will differ from state to state—including in international contexts that have differing protections for the freedom of speech—the IHRA Definition does not, on its own, mandate anything. It merely provides a tool for identifying what is and is not anti-Semitic.

3. *Freedom of Speech*

Those who worry about the IHRA Definition's legal effectiveness may be concerned that it will be applied in ways that limit free speech. In fact, its application has generally been designed in ways that apply careful guardrails. For example, E.O. 13899 does this in two ways.¹⁴³ The most important way that the E.O. protects free speech is by directing its usage only as a means of discerning intent. This usage aligns with the U.S. Supreme Court's holding in *Wisconsin v. Mitchell* that "[t]he First Amendment . . . does not prohibit the evidentiary use of speech . . . to prove motive or intent."¹⁴⁴

In addition, the E.O. contains an important provision emphasizing that it must be construed in ways that respect free speech:

In considering the materials described in subsections (a)(i) and (a)(ii) of this section, agencies shall not diminish or infringe upon any right protected under Federal law or under the First Amendment. As with all other Title VI complaints, the inquiry into whether a particular act constitutes discrimination prohibited by Title VI will require a detailed analysis of the allegations.¹⁴⁵

OCR tracks this language in its guidance, stating that "OCR will enforce all civil rights laws under its jurisdiction without restricting speech or expression protected by the U.S. Constitution, and has made clear that schools working to prevent discrimination must respect the free speech rights of students, faculty, and others."¹⁴⁶ This language is echoed in other legal instruments adopting the IHRA Definition, such as state laws and regulations.

¹⁴³ See Press Release, U.S. Dep't of Educ., *supra* note 84 (explaining the executive order's two guardrails that protect against encroachment on free speech, *i.e.*, its direction that agencies may not diminish or infringe on constitutional rights and its limitation to cases where useful in identifying discriminatory intent).

¹⁴⁴ 508 U.S. 476, 489 (1993); *see also* Goldfeder, *Defining Antisemitism*, *supra* note 5, at 161. For a more philosophical defense of IHRA against free speech objections, see Bernard Harrison & Lesley Klaff, *In Defence of the IHRA Definition*, in *IN DEFENCE OF THE IHRA WORKING DEFINITION OF ANTISEMITISM* 30–31 (Alan Johnson ed., 2021).

¹⁴⁵ Exec. Order No. 13,899, 84 Fed. Reg. 68,779 (Dec. 11, 2019).

¹⁴⁶ Press Release, U.S. Dep't of Educ., *supra* note 84 (citing, *inter alia*, Letter from Gerald A. Reynolds, Assistant Sec'y, Off. For Civil Rights, U.S. Dep't of Educ. to Colleague (July 28, 2003), <https://www2.ed.gov/print/about/offices/list/ocr/firstamend.html>).

Third, it should not need to be said, but no definition is legally binding in any respect that is not indicated by applicable law; it may provide an authoritative interpretive gloss on binding legal provisions, but it is those provisions rather than the definition itself that has an effect. In other words, people may use words however they like. Despite Prime Minister Theresa May's enthusiastic rhetoric,¹⁴⁷ Americans may use as many definitions as they choose and may continue to debate the meaning, manifestation, and etiology of anti-Semitism. It is only for purposes of interpreting certain federal and state laws that the IHRA Definition must be considered. Nevertheless, it is important to understand the extent and limitations of its legally binding character if the Definition is to fulfill its potential as the preeminent practical tool for identifying and addressing anti-Semitism.

Those governmental entities that have embraced the Definition have generally been careful to establish guardrails to avoid infringement of constitutionally guaranteed rights. Executive Order 13899, for example, mandates that "agencies shall not diminish or infringe upon any right protected under Federal law or under the First Amendment."¹⁴⁸ Governor DeWine's executive order also contains model language concerning its constitutional limits and avoidance of conflict: "Nothing in this order shall be construed to diminish or infringe upon any rights protected under the First Amendment to the United States Constitution, or the State Constitution. Nothing in this order shall be construed to conflict with local, federal, or state discrimination laws."¹⁴⁹

IV. CONCLUSION

IHRA's participating states, including the United States, retain their sovereign power to apply its definitions in ways that have legal effects within their respective jurisdictions. The IHRA Definition may be considered non-legally binding in the sense in which IHRA originally used the term, *viz.*, that IHRA's member states are not legally bound by treaty obligation to use the Definition. Nevertheless, some states have used it, and continue to do so, as the IHRA Definition rapidly solidifies its position as the sole internationally agreed-upon standard. In the United States, the Definition binds not only government officials but also a host of regulated entities, at both federal and state levels, including nearly all colleges and universities. The legal effect is not limitless: the Definition's application is limited by federal constitutional provisions, such as the First Amendment, and applicable only to the extent specified by law. In general, the Definition provides the authoritative means of construing important anti-discrimination laws, such as Title VI of the Civil Rights Act of 1964. Moreover, many institutions have voluntarily bound themselves

¹⁴⁷ See Torrance, *supra* note 72.

¹⁴⁸ Exec. Order No. 13,899, 84 Fed. Reg. 68,779 (Dec. 11, 2019).

¹⁴⁹ Ohio Exec. Order No. 2022-06D (Apr. 14, 2022).

to adhere to the Definition, through grant assurances and certifications, and their agreements are legally binding and subject to sanctions for noncompliance. While these institutions are free to debate whether they choose to adopt the Definition, just as they may debate whether they want to adopt state criminal law, they assume legal risk if they fail to comply with it.