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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

KAREN FISS,

PLAINTIFF,

v.

CALIFORNIA COLLEGE OF THE ARTS,

DEFENDANT.

Case No. 4:24-cv-03415-HSG

The Honorable Haywood S
Gilliam, Jr.

**BRIEF OF *AMICUS CURIAE* ZACHOR LEGAL INSTITUTE IN SUPPORT
OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

Dated: November 11, 2024

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I. STATEMENT OF INTEREST OF *AMICUS CURIAE* ZACHOR LEGAL INSTITUTE

Amicus is a non-profit civil rights legal organization combating antisemitism in the United States. *Amicus* is not only active in researching and publishing scholarship on statutory and constitutional law matters as they relate to antisemitism, it has responded to countless reports of antisemitism, especially in the wake of the Hamas terror attack on Israel on October 7, 2023 (the “October 7 Terror Attack”) and has responded to numerous reports of antisemitism on K-12 as well as university campuses.¹ While not all reports of campus antisemitism can be tracked to antisemitic pro-Palestinian Arab groups, the great majority of reports since October 7 are directly related to pro-Palestinian student activism such as that which is the subject of Plaintiff’s complaint. Jewish students and faculty are being harassed, intimidated, subjected to violence and even deprived of constitutional and federal rights at the hands of pro-Palestinian Arab activists.

The rights of individuals and groups to rely upon the protections of federal antidiscrimination laws at issue in this case in light of the horrific rise in antisemitism in the wake of the October 7 Terror Attack is at the heart of Zachor Legal Institute’s interests.

II. ARGUMENT

A. SUMMARY OF ARGUMENT

¹ No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

This *amicus* brief is meant to address the arguments of the parties with regard to Plaintiff's claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). In the 2020 case *Bostock v. Clayton County*, 140 S. Ct. 1731, 590 U.S. 644 (2020), the Supreme Court concluded that discrimination based on either sexual orientation or gender identity inherently involves treating individuals differently because of their sex in violation of Title VII, notwithstanding the fact that neither is listed as characteristics protected by Title VII. While *Bostock* dealt with Title VII's prohibition on discrimination "because of sex", sex is only one protected characteristic under Title VII. In addition to sex, Title VII prohibits employment discrimination with regard to race, color, religion and national origin.

It is well-settled law that discrimination against Jews violates Title VII's prohibition on discrimination because of religion, but the open question, prior to *Bostock*, and directly relevant to the issues in the instant case, is whether discrimination against Zionists, who are Jews that believe in, and act in support of Jewish self-determination in the historic Jewish homeland of Israel, is a form of discrimination "because of religion" as well as national origin.²

² The United State Equal Opportunity Commission, the government entity that enforces Title VII, has determined that national origin encompasses ethnicity. See *Enforcement Guidance on National Origin Discrimination* U.S. EQUAL OPPORTUNITY COMM'N (11/18/2016), https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination#_Toc451518799 ("Title VII also prohibits employment discrimination against individuals because of their national origin group. A 'national origin group,' or an 'ethnic group,' is a group of people sharing a

Amicus recently completed an exhaustive review of the *Bostock* decision to answer this question and the law review article that resulted, *Trading Places: The Intersection of LGBTQ Rights and Zionist Rights Under Federal Civil Rights Laws*³ (“*Trading Places*”) provides an important and, to *amicus*’ knowledge, first of its kind discussion of how *Bostock* compels this Court to treat anti-Zionism as a form of discrimination “because of religion” under Title VII. This brief is derived from the research conducted for and material presented in *Trading Places*.

B. ARGUMENT: IN LIGHT OF BOSTOCK, TITLE VII MUST BE INTERPRETED TO PROHIBIT ANTI-ZIONIST DISCRIMINATION.

1) BOSTOCK’S INCLUSIVE FRAMEWORK WARRANTS THE PROTECTION OF ZIONISM AS AN INTRINSIC ASPECT OF JEWISH IDENTITY UNDER TITLE VII.

The Supreme Court’s landmark decision in *Bostock* affirmed that discrimination based on characteristics “inextricably bound” to protected categories under Title VII is prohibited even if those characteristics are not explicitly listed in the text of Title VII. This precedential interpretive framework is crucial for understanding why those discriminated against because they are Zionists must be

common language, culture, ancestry, race, and/or other social characteristics.”) As discussed herein, Jews are an ethnic group as well as a religion, making anti-Zionism a form of both religious discrimination and national origin discrimination under Title VII.

³ Marc A. Greendorfer, *Trading Places: The Intersection of LGBTQ Rights and Zionist Rights Under Federal Civil Rights Laws*, 40 *TOURO L. REV.* (forthcoming 2024).

provided with the same protections under Title VII as is now provided to those who have been discriminated against because of gender identity or sexual orientation.

In *Bostock*, individuals who were discriminated against because of their gender identities and sexual orientation sued the respective employers under Title VII, alleging that Title VII's prohibition on discrimination "because of sex" included discrimination based on gender identity or sexual orientation. Justice Gorsuch, writing for the majority in *Bostock*, noted that while Title VII's prohibition on discrimination because of sex did not explicitly include discrimination based on gender identity or sexual orientation, the explicit prohibition on discrimination because of sex necessarily encompasses situations in which an individual's identity cannot be separated from a protected category.⁴

Under this precedent, Title VII's protections must apply to all characteristics that are inseparable from Title VII's listed protected characteristics (race, color, religion, sex and national origin), even when such characteristics are not explicitly listed. Justice Gorsuch dismissed the idea that statutory interpretation should rely solely on explicit textual references, rejecting the "donut holes" canon—the notion that the law's silence on specific scenarios implies their exclusion from its protections. Instead, he reasoned that "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule."⁵

⁴ *Bostock* at 660.

⁵ *Id.* at 669.

This reasoning requires this Court to find that Zionism—an inseparable element of Jewish religious, cultural, and ethnic identity—warrants similar protection under Title VII.

Like gender identity in *Bostock*, Zionism is deeply embedded in the identity of Jewish people worldwide. While Title VII does not explicitly reference Zionism it does include religion as well as national origin. Just as sexual orientation and gender identity were recognized under the umbrella of “sex” in *Bostock*, Zionism—being an inseparable part of Jewish identity—must likewise be safeguarded under Title VII’s provisions against religious and ethnic discrimination. To deny protections for Zionist Jews would disregard the explicit guidance of *Bostock* and undermine the foundational principles of federal anti-discrimination laws.⁶

Of particular importance for this case, *Bostock* established a clear precedent for recognizing characteristics that are closely intertwined with a protected class, even when some variation in belief or identification exists within the group.

In *Bostock*, individuals received protection against discrimination based on gender identity or sexual orientation despite internal differences within groups having such characteristics on certain issues (e.g., not all those who are attracted to individuals of the same sex support transgender rights). Similarly, Jewish individuals should receive Title VII protections for their Zionist identity even though it is true that a small number of Jews reject Zionism. This parallels how federal protections shield Jews who observe practices such as keeping kosher or

⁶ See, generally, *Trading Places*.

observing the Sabbath from religious discrimination even though not all Jews follow these practices.

The core message of *Bostock* is clear: discrimination based on a characteristic that is intimately intertwined with a protected category inherently involves proscribed discrimination under Title VII. Discrimination against Zionists, like discrimination based on sexual orientation or gender identity, is discrimination on the basis of religion and ethnicity⁷ and as such, warrants protection under Title VII.

2) ZIONISM IS AN INTEGRAL ELEMENT OF JEWISH RELIGIOUS AND ETHNIC IDENTITY.

Zionism is not a political stance; it represents a core component of being Jewish and practicing Judaism, which is the realization of self-determination within the historical and religious Jewish homeland of Israel. This connection, deeply ingrained in Jewish religious, ethnic, and cultural identity, spans thousands of years and constitutes an integral component of Jewish heritage. Thus, discrimination against Jewish individuals based on their Zionist beliefs undermines their identity at its core.⁸

The land of Israel holds a unique and near-universal significance within Jewish belief and identity, serving as the ancestral homeland for the Jewish people.

⁷ Though outside the scope of this brief, Judaism is a religion and Jews are an ethnicity. See Marc A. Greendorfer, *The True History and Legal Meaning of Colonialism in the Holy Land: The 2042 B.C.E. Project*, INT'L J. L. ETHICS TECH. 2 (2022) (“*Colonialism in the Holy Land*”).

⁸ See generally, TRADING PLACES.

“Zionism is, at its core, the right of Jews to exercise self-determination in their historic homeland of Israel.”⁹ It is not only the epicenter of Jewish history but also the focal point for numerous aspects of Jewish religious life and community identity. Many Jewish holidays, prayers, and rituals center on celebrating Jewish life in Israel, reflecting a collective anticipation and longing for redemption in the land. Some Jewish religious obligations are so deeply tied to Israel that they can only be fulfilled there. For the overwhelming majority of Jews, this connection translates into a deep religious and ethnic connection to the modern state of Israel.¹⁰

Indeed, the prophet Jeremiah wrote in Psalm 137:5 about the exiled Jewish people’s eternal connection to Israel in the sixth century B.C.E.:¹¹

*By the rivers of Babylon, there we sat, we also wept when we remembered Zion.
On willows in its midst we hung our harps.
For there our captors asked us for words of song and our tormentors [asked of us] mirth, "Sing for us of the song of Zion."
"How shall we sing the song of the Lord on foreign soil?"
If I forget you, O Jerusalem, may my right hand forget [its skill].
May my tongue cling to my palate, if I do not remember you, if I do not bring up Jerusalem at the beginning of my joy.*

Zionism is not only a core component of Jewish identity for religious reasons, but courts are also increasingly acknowledging that Zionism is essential to Jewish

⁹ *Id.*

¹⁰ *Id.*

¹¹ Contained in *The Complete Jewish Bible with Rashi Commentary*, CHABAD.ORG, https://www.chabad.org/library/bible_cdo/aid/16358/jewish/Chapter-137.htm#lt=primary.

identity.¹² This understanding resonates with the lived experience of most American Jews, who feel a profound attachment to Israel. According to a Pew Research Center study,¹³

80% of American Jews say caring about the state of Israel is an essential or important part of what being Jewish means to them; nearly 60% say they personally feel an emotional attachment to Israel and follow news about Israel at least somewhat closely; and nearly half of American Jewish adults have visited Israel. These figures include a substantial number of American Jews who consider themselves only ethnically, but not religiously, Jewish.”¹⁴

Such findings underscore the need for our legal system to recognize Zionism as a fundamental aspect of Jewish identity.

Legal scholar Alyza Lewin illustrates this point, stating that “Zionism is as integral a part of Jewish identity as observing the Jewish Sabbath or adhering to kosher dietary rules.”¹⁵ Just as not all Jews observe the Sabbath or eat kosher, not all Jews identify as Zionists. However, for those who do, identifying with and supporting the Jewish homeland is an expression of their Judaism. Lewin further emphasizes that “harassing, marginalizing or discriminating against Jews for expressing this Zionist component of their Jewish identity is similarly

¹² This principle was notably underscored in *Frankel*, discussed below.

¹³ *Jewish Americans in 2020*, PEW RSCH. CTR (May 11, 2021), <https://www.pewresearch.org/religion/2021/05/11/u-s-jews-connections-with-andattitudes-toward-israel/>.

¹⁴ *Antisemitism and Jewish Identity in the Workplace*, THE BRANDEIS CENTER FOR HUMAN RIGHTS UNDER LAW, <https://brandeiscenter.com/wp-content/uploads/2023/10/Anti-Semitism-and-Jewish-Identity-in-the-Workplace.pdf>

¹⁵ Rory Lancman, *Antizionism Getting the Poor Treatment It Deserves in Campus Anti-Semitism Cases*, N.Y. L. J. (Sept. 2, 2024), <https://brandeiscenter.com/anti-zionism-getting-the-poor-treatment-it-deserves-in-campus-anti-semitism-cases/>.

antisemitic,"¹⁶ as it targets a fundamental aspect of their faith and cultural heritage.

As *Bostock* confirms, federal protections must encompass crucial aspects of identity even if they are not universally embraced within a protected group. The *Bostock* court underscored that “discrimination against an individual is as much a violation of Title VII as discrimination against a group.”¹⁷ This is why the Supreme Court’s ruling in *Bostock* is instructive in this case. In *Bostock*, the Court recognized that sexual orientation and gender identity are inseparable aspects of individual identity, warranting protection under Title VII. Similarly, for Jews, Zionism is inseparable from their identity, embodying a connection to both their religious and ethnic heritages.

In short, across history and regions, for the vast majority of Jewish people, the connection to Israel is “an integral component of Jewish identity”¹⁸ This connection is both religious and ethnic. Beyond religious obligations, Israel serves as a unifying link among most Jews, connecting them to their ancestral homeland, to each other, and to their collective heritage. For the majority of Jews, Israel represents a core part of their Jewish identity. In modern times, this connection is

¹⁶ Alyza D. Lewin, *Zionism – The Integral Component of Jewish Identity that Jews are Historically Pressured to Shed*, ISRAEL AFFAIRS 26(3), 330–347 (2020), <https://doi.org/10.1080/13537121.2020.1754577>

¹⁷ *Bostock* at 662; see, generally, *Trading Places*.

¹⁸ See Lewin, *supra* note 16.

frequently expressed through Jewish identification as Zionists, Jews who actively work to maintain Jewish self-determination in the Jewish homeland.¹⁹

To dismiss anti-Zionist discrimination as merely political protest, as BDS activists often do, denies the deeply identity-based nature of Zionism. It has been recognized that in recent times anti-Semitism “is expressing itself in attempts to delegitimize the right of Israel to exist, including calls for its destruction, using the pretext of the situation in the Middle East to target Jews and Jewish symbols.”²⁰ To ignore this reality would be akin to claiming that discrimination against LGBTQ+ individuals is simply opposition to political positions on family values—both arguments disregard the integral nature of these identities. Anti-Zionist discrimination, therefore, is more than political disagreement; it is a form of identity-based discrimination that federal civil rights laws are designed to protect against.

Bostock and related federal precedents confirm that discrimination against a deeply-held belief integral to a protected identity is, in effect, discrimination against that identity itself. Consequently, Zionism, as an essential element of Jewish

¹⁹ See, e.g., Ahmed Shaheed, *Report of the Special Rapporteur on Freedom of Religion or Belief*, U.N. DOC. A/74/358 (Sept. 20, 2019), <https://documents.un.org/doc/undoc/gen/n19/289/00/pdf/n1928900.pdf>

²⁰ *Secretary-General's remarks to High-Level Event on the Power of Education for Countering Racism and Discrimination: The Case of anti-Semitism [as delivered]* U.N. (Sept. 26, 2018), <https://www.un.org/sg/en/content/sg/statement/2018-09-26/secretary-generals-remarks-high-level-event-the-power-of-education-for-countering-racism-and-discrimination-the-case-of-anti-semitism-delivered>.

identity, deserves the same federal protections under Title VII as other characteristics that are inextricably linked to a protected class.

3) FEDERAL POLICY RECOGNIZES ANTI-ZIONISM AS A FORM OF ANTI-SEMITISM.

The federal government has increasingly acknowledged that anti-Zionism can often serve as a manifestation of anti-Semitism, particularly when it targets Jews by challenging their right to self-determination. In 2018, the Department of Education’s Office of Civil Rights (“OCR”) clarified that “In determining whether students face discrimination on the basis of actual or perceived Jewish ancestry, we rely where appropriate upon widely established definitions of anti-Semitism. The International Holocaust Remembrance Alliance (“IHRA”) working definition is widely used by government agencies, including the U.S. Department of State, and is used by OCR as well.”²¹

This recognition is formalized through federal policies, most notably through the adoption of the IHRA definition of anti-Semitism incorporated into Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (“Title VI”) by Executive Order 13899²², explicitly stating that denying the Jewish people their right to self-

²¹ *Letter from Kenneth L. Marcus, Assistant Sec’y for Civ. Rts., to Susan B. Tuchman, Esq., Zionist Org. of Am.* (Aug. 27, 2018), <https://www.insidehighered.com/sites/default/files/media/Rutgers%20Appeal.pdf>.

²² *Executive Order on Combating Anti-Semitism*, WHITE HOUSE (Dec. 11, 2019), <https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-combating-anti-semitism/>.

determination can constitute anti-Semitism. While the IHRA clarifies that "criticism of Israel similar to that leveled against any other country cannot be regarded as anti-Semitic,"²³ it acknowledges that equating Zionism with racism or disputing Israel's legitimacy often serves as a pretext for anti-Jewish animus.

In a 2024 guidance letter, OCR²⁴ further reinforced this stance by clarifying that anti-Zionist behavior targeting Jewish students may constitute prohibited discrimination under Title VI, especially when rooted in shared ancestry or ethnic characteristics. For example, the letter provided an illustrative case of protesters preventing Jewish students from attending classes by declaring "no Zionists can pass through" and accusing students perceived to be Jewish of supporting genocide. OCR noted that such behavior could be construed as harassment based on race, color, or national origin, including shared ancestry or ethnic identity, and may therefore create a hostile environment if the conduct is "so severe or pervasive" as to limit or deny access to educational programs or activities.

Further reinforcing these principles, the 2023 U.S. National Strategy to Counter Antisemitism underscores that "Jewish students and educators are targeted for derision and exclusion on college campuses, often because of their real or perceived views about the State of Israel. When Jews are targeted because of

²³ For a full discussion of the International Holocaust Remembrance Alliance's definition of antisemitism and its legal status, see Kenneth L. Marcus, *The Legally Binding Character of The International Holocaust Remembrance Alliance Working Definition of Anti-Semitism*, 27 LEWIS & CLARK L. REV. 1265 (2024).

²⁴ *Race, Color, or National Origin Discrimination*, U.S. DEPT OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html>.

their beliefs or identity, or when Israel is singled out because of anti-Jewish hatred, that is anti-Semitism —and it is unacceptable.”²⁵ This federal strategy aims to combat rising anti-Semitism across various domains, including educational settings, and stresses the necessity of robust protections against anti-Zionist discrimination, which frequently serves as a proxy for anti-Semitism hostility.

In the same vein, the Department of Labor’s guidance on its “Legal Protections for Religious Liberty in the Workplace”²⁶ regulations explicitly acknowledge the nexus between Jewish identity and a connection to Israel, highlighting protections for employees facing adverse actions based on religious beliefs tied to public policy positions. This includes cases where an applicant or employee suffers discrimination for holding beliefs others may find controversial, such as “supporting or opposing the State of Israel or opposing late-term abortion policies.”²⁷

These policy documents underscore the idea that anti-Zionist conduct, when directed at Jewish individuals, transcends mere political opinion and aligns with prohibited forms of discrimination that attack the core of Jewish identity. OCR’s explicit acknowledgment that anti-Zionist harassment could fall under Title VI protections highlights the federal government’s commitment to addressing this form

²⁵ *The U.S. National Strategy to Counter Antisemitism*, WHITE HOUSE (May 25, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/05/U.S.-National-Strategy-to-Counter-Antisemitism.pdf>

²⁶ *Legal Protections for Religious Liberty in the Workplace*, U.S. DEP’T OF LABOR, <https://www.dol.gov/agencies/ofccp/opinion-letters/ReligiousLiberty>

²⁷ *Id.*

of discrimination. This interpretation should arguably extend to Title VII enforcement as well, given that different sections of the same act should logically apply a consistent analysis to anti-Semitism claims.

4) JUDICIAL RECOGNITION OF ANTI-ZIONISM AS ANTI-SEMITIC DISCRIMINATION.

Federal courts have increasingly recognized that anti-Zionism can constitute a form of anti-Semitic discrimination. In *Frankel v. Regents of the Univ. of Cal.*, No. 2:24-cv-04702-MCS-PD, 2024 U.S. Dist. LEXIS 146433 (C.D. Cal. Aug. 13, 2024), the court acknowledged that anti-Zionist discrimination infringes upon Jewish religious identity and therefore warrants federal protection. Addressing the situation where campus anti-Israel protests targeted Jewish students for harassment and discrimination, the *Frankel* court stated, “[i]n the year 2024, in the United States of America, in the State of California, in the City of Los Angeles, Jewish students were excluded from portions of the UCLA campus because they refused to denounce their faith.”²⁸ This not only shows that courts understand that anti-Zionism almost always is rooted in anti-Semitism, it is judicial acknowledgment of the fact that being Zionist is inextricably bound to being Jewish.

III. CONCLUSION

²⁸ *Frankel* at *2-3.

The overarching purpose of Title VII is to prevent identity-based discrimination and safeguard individuals against marginalization due to fundamental aspects of their identity. The Supreme Court's *Bostock* decision reinforced that federal protections should extend to deeply intertwined identity markers even if they are not explicitly enumerated. The logic in *Bostock* should apply equally to the protection of Zionism as an inseparable part of Jewish identity, affirming that Title VII protections should encompass this essential component of Jewish faith, culture, ethnicity and heritage.

Federal policy, particularly under Title VI and the IHRA definition of anti-Semitism, recognizes anti-Zionism as a frequent guise for anti-Semitic hostility. This policy alignment is crucial for consistency, as anti-Zionist discrimination targets the collective identity of Jewish people and challenges their right to self-determination.

This court has a duty to interpret Title VII under the *Bostock* precedent as encompassing Zionist identity as a vital expression of Jewish religious and ethnic identity. Plaintiff has set forth a clear case of discrimination because of religion and national origin under Title VII.

Accordingly, *amicus* respectfully requests that this Court deny Defendant's Motion to Dismiss.

DATED, this 11th day of November, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2024, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will provide electronic notice and an electronic link to this document to all attorneys of record.

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DATED, this 11th day of November, 2024.