



via e-mail

December 6, 2016

Hon. David Leland
77 S. High Street, 11th Floor
Columbus, OH 43215

Re: First Amendment concerns with H.B. 476

Dear Rep. Leland,

As civil and human rights organizations committed to upholding the rights of individuals and entities to express their political beliefs without fear of government retaliation or retribution, we write to convey our strong opposition to H.B. 476. This bill would prohibit the state from contracting with for-profit entities that boycott Israel or disinvest from Israel as an “expression of protest against the policies of the government of Israel.” Regardless of one’s views on Israel and Palestine, H.B. 476 targets core political speech and infringes on the freedom to express political beliefs.

Because H.B. 476 is unconstitutional and violates basic American values and democratic principles, we urge you to withdraw it.

A. H.B. 476 targets core political speech in violation of the First Amendment

H.B. 476 was introduced at a time when Palestinian human rights activists in the United States and elsewhere have embraced boycotts as a way to peacefully pressure Israel to respect the human rights of Palestinians and to influence public opinion in the United States in favor of Palestinian rights. This bill seeks to stifle this human rights movement by targeting for-profit entities that decide for ethical reasons to boycott Israel because of its human rights abuses, and denying such companies the opportunity to enter into contracts with any state entity.

But government actions and restrictions cannot be based on the desire to punish First Amendment activities that aim to encourage social and political change in a nation’s policies. The Supreme Court has held that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”¹ The Court has specifically held that boycotts “to bring about political, social and economic change,” like human rights boycotts of Israel, are unquestionably protected under the First Amendment.²

It is undisputed that individuals, institutions, and companies may boycott in response to issues of public concern, as some have done historically to challenge racial segregation in the U.S., the apartheid regime in South Africa, and currently, fossil fuel companies. Moves to boycott Israel cannot be differentiated from these and other historical examples of boycotts

¹*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (citing *Carey v. Brown*, [447 U. S. 455](#)).

² *Id.*

simply because they may be unpopular with elected representatives today. Such a differentiation would constitute viewpoint discrimination prohibited by the First Amendment.

B. Denial of public contracts, where motivated by a desire to suppress speech, violates the First Amendment

The United States Supreme Court has repeatedly affirmed that government officials' determinations about what views are acceptable cannot infringe on the First Amendment-protected right to freely express political views – however controversial or unpopular.³ Thus, in deciding that the government could not punish public contractors in retaliation for political beliefs, the Supreme Court stated, “[i]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.”⁴

Yet this is precisely what H.B. 476 would do. By denying public contracts to businesses because they boycott Israel, H.B. 476 seeks to penalize and inhibit protected speech. “Such interference with constitutional rights,” the Court stated, “is impermissible.”⁵ This bill represents an action by public officials to thwart or penalize speech activities because of the officials' disapproval of the viewpoint expressed, and therefore is exactly the type of action that courts have recognized violates the First Amendment. If passed, it could be subject to constitutional challenge.

C. Penalizing entities that boycott or disinvest from Israel will have a chilling effect on protected speech

H.B. 476 also infringes on protected First Amendment activities by subjecting political positions to government approval and penalty. This bill will chill the free speech rights of individuals and businesses by effectively dictating that a position supporting human rights is unacceptable. These individuals and businesses may refrain from adopting ethical political stances regarding Israel/Palestine – a matter of public concern – if they know that making business decisions based on human rights concerns could result in the denial of a contract with the state.

In addition, this bill would also discourage grassroots human rights advocacy aimed at pressuring companies to boycott Israel. While the bill does not directly prohibit such advocacy, it would effectively chill advocates' voices by undermining their goal of influencing companies to take ethical political stances, and by stigmatizing their speech. Notably, courts have long recognized that even if a party continues to exercise its First Amendment rights, it “does not mean that it was not being chilled into engaging in less speech than it otherwise would have.”⁶ Even if other expressive activity, such as student and community activism urging companies to boycott Israel and respect Palestinian human rights, is not prohibited by this bill, such speech activities are likely to be chilled by this legislation.

³ *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”)

⁴ *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996).

⁵ *Id.*

⁶ *Housing Works, Inc. v. City of New York*, 72 F. Supp. 2d 402, 421 (S.D.N.Y. 1999).

D. Conclusion

We are committed to upholding the First Amendment rights of those opposing complicity in human rights abuses, and ensuring that they are able to challenge orthodox views on a sensitive political issue like Israel/Palestine without government obstruction. H.B. 476 would punish individuals and companies that use an honored American tactic to effect political change, solely because public officials disagree with that tactic in this context. This bill is constitutionally indefensible, and its passage would invite a legal challenge in order to protect the right of any individual or company to engage in speech activities such as boycotts intended to effect social, political and economic change. Allowing this bill to stand would threaten a crucial vehicle by which individuals and groups can make their collective voices heard.

Sincerely,

Rahul Saksena
Staff Attorney, Palestine Legal

Maria LaHood
Deputy Legal Director, Center for Constitutional Rights