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Testimony AGAINST House Concurrent Resolution 10

Chairman LaRose, Vice-Chairman Kunze, Ranking Member Schiavoni and Members of the Senate Transportation, Commerce and Workforce Committee:

I'm testifying in opposition to House Concurrent Resolution 10, which purports to address anti-Semitism in Ohio.

HCR 10 thrusts the Ohio General Assembly into the inappropriate role of choosing sides in a global debate over the occupation of Palestine by military forces and civilians from the nation of Israel. The recent passage by the General Assembly of House Bill 476 erected a system of illegal punishments for those who would seek contracts from the State of Ohio while lawfully opposing the takeover of Palestinian lands by Israel. HB 476 will ultimately be struck down because of the General Assembly's improper conflation of Judaism with Zionism.

Opposition to Israel's secular, expansionist policies - militaristic and brutal practices which destroy or oppress thousands of lives - is not the equivalent of opposing the followers of the religion known as Judaism. Opposing the illegal expansion of Israel into the Occupied Territories is a political decision that may legitimately be questioned. Indeed it is, by growing numbers of people around the globe.

By the passage of HCR 10, the General Assembly will repeat its mistaken condemnation. The sponsors of HCR 10 seek to eradicate the free speech rights of those advocating for a lawful, nonviolent boycott movement. Many of those advocates are students. The legislature's intervention on the side of suppressing constitutional free speech will not reduce conflicts on Ohio's college campuses. Indeed, it is in our academies where continuous, intelligent debate of ideas must be encouraged. Shielding our young from uncomfortable beliefs and positions is the antithesis both of freedom and learning.

Ironically, the distinction between Judaism, the religion, and Zionism, the political movement, is recognized in one of the "whereas" clauses of HCR 10,[1] but the Resolution nonetheless confuses Israel's secular, colonialistic politics with Israel's predominant religion.

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[1]"WHEREAS, Anti-Israel activities and activities promoting the Boycott, Divestment, and Sanctions movement against Israel are widespread in the State of Ohio, including on several university campuses and in other Ohio communities, and *contribute to anti-Semitic and anti-Zionistic* propaganda and threats to both American and Israeli Jewish students, and result in deliberate interference with the learning environment of all students, , , ,"

Anti-Zionism is not anti-Semitism. Opposing Israel's abusive use of militarized checkpoints, arbitrary public shootings, drone surveillance, air bombings of Palestinians, deliberate inducement of mass starvation and economic disarray in Gaza and the West Bank, and arbitrary imprisonment of thousands of Palestinians without trial for years in Israeli jails - none of this represents anti-Semitic beliefs. They are humanitarian and human rights crimes punishable under international law. Indeed, thousands of Jews globally abhor Israel's oppressions. In response, the government of Israel recently enacted a new policy to forbid Jews from traveling there if they express sympathy for the Boycott, Divestment and Sanctions movement.

In order to pass HCR 10, members of the General Assembly will have to violate their oath to uphold the Ohio and U.S. Constitutions. Despite the assertion in HCR 10 that defenders of the "inalienable right to free speech understand that the goals and activities of Boycott, Divestment, and Sanctions campaigns in Ohio are harmful," genuine defenders of free speech will courageously vote against HCR 10.

Article I, § 11 of the Ohio Constitution provides that "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right." Ohio courts consider that "the First Amendment [of the U.S. Constitution] is the proper basis for interpretation of Section 11, Article I of the Ohio Constitution." *Eastwood Mall, Inc. v. Slanco*, 68 Ohio St.3d 221, 222, 626 N.E.2d 59 (1994). Under § 11, opinions are recognized as constitutionally protected speech. *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 280-281, 649 N.E.2d 182 (1995).

In *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 910, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), the U.S. Supreme Court ruled that speech remains protected even when it is used to coerce others into action. *Claiborne Hardware* involved a years-long economic boycott of businesses in a Mississippi town, the purpose of which "was to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice." The "boycott was supported by speeches and nonviolent picketing," and "[p]articipants repeatedly encouraged others to join in its cause." *Id.* at 907. The Court ruled that each "of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments." *Id.* The justices further held that the speech used to further the aims of the boycott did "not lose its protected character, however, simply because it may embarrass others or coerce them into action." *Id.* at 910. Notably, the Court concluded that "[w]hile States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case." *Claiborne, supra*, 458 U.S. at 913. The Supreme Court prohibited any damages to be awarded to the businesses that suffered economic loss from the boycott because it was protected First Amendment political speech.

Israel is justifiably experiencing international disapproval of the mistreatment of the Palestinians. For the Ohio General Assembly to oppose BDS is unfortunate; but for the General Assembly to formally resolve that BDS is anti-Semitic and to demand retribution against students and other supporters crosses the line. HCR 10 provides cover to those who would destroy free speech rights, academic freedom and teaching careers.

The U.S. Supreme Court has frequently affirmed that speech on public issues occupies

the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection. *Connick v. Myers*, 461 U.S. 138, 145 (1983). In *Texas v. Johnson*, 109 Sup. Ct. 2533, 2544 (1989), the Court stated that "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." In *Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), the Court stated that "[i]f 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 or force citizens to confess by word or act their faith therein."

In *Ashton v. Kentucky*, 384 U.S. 195 (1966), the Supreme Court stated that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Id.*, 384 U.S. at 199-200.

The notion of "protecting" students from the "intimidation" of energized debate over BDS is a ploy. The boundaries of peaceful speech necessarily are broad:

> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

Torres v. White, 46 Fed. Appx. 738, 755 (6th Cir. 2002) (quoting Restatement (Second) of Torts § 46, comment (d) (1965).

The Ohio General Assembly may not prohibit expression simply because it disagrees with a message. Even if members of the Committee personally disagree with the aims and purposes of BDS, the passage of HCR 10 as a call for punishment of adherents to a nonviolent political movement seriously undermines the speech freedoms guaranteed by the Ohio and U.S. Constitutions. There cannot be freedom of speech for only some. By supporting HCR 10, you will disserve those who oppose BDS by offering "protection" from the rigors of intellectual inquiry and exchange. You will violate the oath you took to uphold those freedoms. All you can possibly accomplish is false retribution and more controversy. Please vote down HCR 10. Thank you.

Very truly yours,

March 20, 2018

/s/ Terry J. Lodge
Terry J. Lodge