



June 16, 2015

Hon. Steve Santarsiero  
105A East Wing  
PO Box 202031  
Harrisburg, PA 17120

Dear Rep. Santarsiero:

As civil and human rights organizations committed to upholding the rights of individuals to express their political beliefs without being silenced, we write to convey our serious concerns with H.B. 1018, a bill that would prohibit state funding to institutions of higher education that engage in boycotts of or divestment from Israel. Regardless of one's views on the Israeli-Palestinian question, this bill targets core political speech and infringes on the freedom of individuals and institutions of higher education to express their political beliefs.

H.B. 1018 is unconstitutional and violates basic American values and democratic principles. We urge you to oppose it.

#### **A. H.B. 1018 Targets Core Political Speech in Violation of Fundamental First Amendment Principles**

H.B. 1018 attempts to stifle constitutionally-protected speech by denying state aid to colleges and universities that boycott or divest from Israel. But government restrictions and regulations cannot be based on the desire to punish First Amendment activities that aim to influence public opinion on a nation's policies and actions.

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."<sup>1</sup> Boycotts "to bring about political, social and economic change" through speech, association, assembly, and petition are unquestionably protected under the First Amendment.<sup>2</sup> This is no accident and, in fact, Pennsylvania played a critical role in this country's long history of protecting boycotts as political speech. On October 20, 1774, the First Continental Congress, meeting in Philadelphia, issued a boycott against British, Irish, and West Indian goods in an effort to avoid war, persuade British lawmakers, and influence British public opinion.<sup>3</sup> Since then, our country has had a long

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<sup>1</sup>*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982).

<sup>2</sup> *Id.*

<sup>3</sup> Cong. Journal, 1st Cont'l Cong., 1st Sess. (Oct. 20, 1774), reprinted in 1 *Journals of the Cont'l Congress* 75-81 (Worthington C. Ford et al. eds., 1903)); see also David Ammerman, *In the Common Cause: American Response to the Coercive Acts of 1774* (1974).

tradition of boycotts, from pre-Civil War protests against slavery to the Montgomery bus boycott led by Dr. Martin Luther King, Jr., to the boycott of Apartheid South Africa.

This bill was introduced at a time when Palestinian human rights activists in the United States, particularly on college and university campuses, have embraced boycotts and divestment initiatives 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. The movement to boycott and divest from Israel is core political speech and thus deserves the “special protection” afforded by the First Amendment. Indeed, H.B. 1018 expressly targets “politically motivated” actions to boycott and divest from Israel.

Regardless of whether one agrees or disagrees with the cause the boycott and divestment movement promotes, it is undisputed that colleges and universities may boycott and divest in response to issues of public concern, as some have done historically from Apartheid South Africa and currently from fossil fuel companies, for example. Moves to boycott and divest from Israel cannot be differentiated from these and other historical examples of boycotts noted above 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 Funding, Where Motivated By a Desire to Suppress Speech, Violates the First Amendment**

A public official’s denial of funding, where motivated by a desire to suppress speech, is prohibited by the First Amendment.<sup>4</sup> The United States Supreme Court has repeatedly affirmed that government officials’ determinations about what views are acceptable for others to express cannot infringe on individuals’ First Amendment rights to freely express their political views.<sup>5</sup> Thus, courts have found “where the denial of a benefit, subsidy or contract is motivated by a desire to suppress speech in violation of the First Amendment, that denial [of funding] will be enjoined.”<sup>6</sup>

Indeed:

Although the government is under no obligation to provide various kinds of benefits, it may not deny them if the reason for the denial would require a choice between exercising First Amendment rights and obtaining the benefit . . . [T]he government cannot avoid the reach of the First Amendment by acting indirectly rather than directly.<sup>7</sup>

It is important to distinguish H.B. 1018 from the situation in which the government offers funding for a particular purpose, but places restrictions on the grantee to be sure the funding is not directed to other purposes. H.B. 1018 would cut off general funds – for capital improvements, for aid to needy students, and for the development and expansion of programs and research that benefit the Commonwealth as a whole. The government may offer these types

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<sup>4</sup>*West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 640 (1943).

<sup>5</sup> *Barnette*, 319 U.S. at 642 (“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.”)

<sup>6</sup> *Brooklyn Institute*, 64 F. Supp. 2d 184, 200 (E.D.N.Y. 1999).

<sup>7</sup> *Id.*

of support or not, but it cannot condition such funds on the adoption of the politics of the majority of legislators.

State Representative Steve Santarsiero's website states that H.B. 1018, "seeks to counter politically motivated pressure on colleges and universities to boycott or divest from Israel's commercial interests by barring state funds to any Pennsylvania school that bows to such demands." Rep. Santarsiero is also quoted as saying, "[u]nfortunately, there is a growing – and alarming – trend on some college and university campuses to launch politically motivated attacks with the intent of pressuring these institutions to engage in boycotts against or divestment from Israel... it is in the interest of this commonwealth to promote America's close ties with Israel."<sup>8</sup>

This bill is therefore exactly the type of action by public officials who dislike the content of certain speech activities that courts have recognized as violating the First Amendment. If passed, it would be subject to constitutional challenge.

### **C. Threatened Cuts in State Aid Will Have a Chilling Effect on Protected Speech Activities**

H.B. 1018 infringes on protected First Amendment activities of colleges, universities, students, and academics by subjecting their political positions to government approval and penalty. This bill will chill the free speech rights of colleges and universities by effectively dictating what position they must take regarding a human rights issue. These institutions will refrain from considering or debating the costs and benefits of boycotting and divesting from Israel – a matter of public concern – if administrators know that such measures will result in a financial penalty from the state.

In addition, this bill will also discourage and make obsolete student and faculty participation in advocacy efforts to convince colleges and universities to endorse boycotts of and divestment from Israel. While the bill does not directly prohibit such advocacy, it would effectively chill advocates' voices by exacting a heavy toll on their goal, and stigmatizing their speech.

It is important to emphasize that courts have long recognized that just because a party continues to exercise its First Amendment rights "does not mean that it was not being chilled into engaging in less speech than it otherwise would have."<sup>9</sup> Even if expressive activity, such as passing student government resolutions urging university administrations to boycott and divest from Israel, are not prohibited by the state's withholding of aid, the speech activities of individual students, student groups, and academics that support such resolutions and otherwise advocate for Palestinian human rights are likely to be chilled by this legislation. This concern is not hypothetical; in fact it is the stated intention of the bill.

### **D. Conclusion**

We are committed to upholding the First Amendment rights of those challenging orthodox views. H.B. 1018 would punish colleges and universities that use an honored American

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<sup>8</sup> News Release, Rep. Steve Santarsiero, Santarsiero Outlines effort to protect Israeli investments with Pa. House bill (May 2015) <http://www.pahouse.com/Santarsiero/InTheNews/NewsRelease/?id=66392>.

<sup>9</sup> *Housing Works, Inc. v. City of New York*, 72 F. Supp. 2d 402, 421 (S.D.N.Y. 1999).

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 necessitate a legal challenge in order to protect the right of any individual, organization, or institution 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,

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Cc: Hon. Stan Saylor  
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