



**Bill of Rights Defense Committee &
Defending Dissent Foundation**

1100 G St NW Suite 500
Washington DC 20005

bordc.org

May 24, 2016

Dear Rep. Clifford A. Rosenberger Speaker of the Ohio House of Representatives;
Rep. Fred Strahorn, Minority Leader

CC: Honorable Members of the Ohio House Representatives

Letter of Opposition to HB 476

The Bill of Rights Defense Committee is a national organization that protects the right of political expression to strengthen participatory democracy, and seeks to fulfill the promise of the Bill of Rights for everyone. We have over 1,000 grassroots supporters in the Buckeye State, many of whom have already expressed opposition to this bill in their individual capacities.

As a civil liberties organization, we do not take positions on international issues, such as the ongoing crisis in the Middle East, or the desirability of the aims of the Boycotts, Divestment, and Sanctions (BDS) movement. However, as an organization dedicated to protecting the right of political expression we cannot support a bill that targets “expression[s] of protest against the policies of the government of Israel.”

HB 476 is not just bad policy, it violates the First and Fourteenth Amendments and is thus flagrantly unconstitutional.

HB 476 Violates the First Amendment

HB 476 violates the First Amendment of the United States Constitution for three reasons. First, boycotts against Israel are protected political speech under the First Amendment. Second, the bill would penalize individuals and businesses for their exercise of First Amendment protected activity by denying them a public benefit. Finally, the bill discriminates against a particular viewpoint, mainly those who are supportive of Palestinian human rights or critical of Israeli policy.

HB 476 requires that recipients of a contract with a state agency declare they are not boycotting or divesting from Israel or Israeli-controlled territory. Boycotts are a nonviolent form of social protest that have been used historically in the civil rights and anti-South African Apartheid movements, as well as more recently against the state of North Carolina for its anti-LGBT bill. Divestment is a form of boycott aimed at stocks, bonds, and investment funds. Divestment is a popular strategy amongst international human rights boycott proponents. For example, the anti-South African Apartheid boycott movement put a heavy focus on getting universities, churches, trade unions, and municipal and state governments to divest from apartheid South Africa. Boycotts against and

divestment from Israel have become a popular “expression of protest against the policies of the government of Israel” amongst many advocates for Palestinian human rights.

In 1982, the Supreme Court ruled that boycotts to “bring about political, social, and economic change” were a form of political speech.¹ Political speech receives the maximum protection afforded by the First Amendment.

Disturbingly, HB 476 includes in its definition of both boycotts and divestment, that such measures are “expression[s] of protest against the policies of the government of Israel.” While there is no question that boycotts are political speech, it is blatantly unconstitutional for any bill to try to penalize political expression and political protests.

HB 476 seeks to penalize political expression and political protest by using the state’s procurement powers to deny contracts to individuals and businesses boycotting Israel. The state’s procurement powers are not exempt from the First Amendment’s protection of free speech. Even when one does not have a right to receive a public benefit, a public benefit cannot be denied on the basis of an unconstitutional condition. Denying someone a public benefit, because of their political speech is such an unconstitutional condition.

In the 1950s the state of California required that in order for individuals to receive a tax benefit for veterans they sign an oath affirming that they did not advocate the overthrow of the government by force and would not side with a foreign power in the event of hostilities between said government and the United States. California argued that this was not an infringement of the First Amendment, as the tax benefit was privilege not a right. However, the Supreme Court stated that “To deny an exemption to claimants who engage in certain forms of speech is, in effect, to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.”²

This principle has been applied more broadly than just tax benefits; it has been applied to any public benefit. The Supreme Court has found that the state could not elect not to renew an employee’s contract because of their First Amendment protected speech nor could the government require that recipients of funding to fight HIV/AIDS to be opposed to the legalization of sex work.³ Government contracts are such a public benefit and thus cannot be denied on the basis of political views. The Supreme Court has explicitly ruled that one cannot be denied a government contract based on their First Amendment protected political views.⁴

HB 476 does just that; it denies a contract due to the political views of the individual. Boycotting Israel is an act intended to achieve political, social, or economic change, namely to change Israel’s human rights policies towards the Palestinian people. Such a boycott is a form of political speech. By conditioning a public contract on the recipient refraining from such boycotts, the state of Ohio would be imposing an unconstitutional condition, i.e., a condition that violates the recipient’s First Amendment rights.

The final reason that HB 476 violates the First Amendment is that it is not viewpoint neutral. Under the First Amendment, the government cannot discriminate against some points of view. This law

¹ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886

² See *Speiser v. Randall*, 357 U.S. 513 (1958).

³ See *Perry v. Sindermann*, 408 U.S. 593 (1972); *USAID v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2332 (2013)).³

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

only affects individuals who express a certain point of view, criticism of Israel, and thus is not viewpoint neutral.

HB 476 Violates the Fourteenth Amendment

Under the Fourteenth Amendment's Equal Protection Clause, when the state creates classifications that implicate a fundamental right, the government must have a compelling interest and the law must be narrowly tailored, i.e. it must pass "strict scrutiny."⁵ HB 476 creates classifications based on political speech and thus implicates a fundamental right. However, when a classification does not involve a fundamental right the Equal Protection Clause only requires the classification be rationally related to a legitimate government interest, i.e. it must pass rational basis review. A law based on animus fails to be rationally related to a legitimate government interest. A federal district court in Idaho struck down a law criminalizing certain speech in relationship to the agricultural industry as violating the Fourteenth Amendment's Equal Protection Clause, as it was "motivated in substantial part by animus" towards those with unpopular political views.⁶

HB 476 is substantially motivated in part by animus towards those who oppose Israeli policies or advocate for Palestinian human rights. This means that HB 476 could not even withstand the much lower threshold of rational basis review and by default could not pass the much more exacting standard of strict scrutiny.

Conclusion

Our democracy is dependent on all people being able to express their views freely without fear of government reprisal. The topic of Israeli policies towards the Palestinian people is immensely controversial. A matter of great controversy with national and international implications is exactly the type of topic that requires robust, unimpeded political discourse.

HB 476 seeks to legislate one point of view of an international issue into law by using the power of the state to punish the other point of view. This not only impedes discourse and hampers democracy, it is unconstitutional.

HB 476 violates the First and Fourteenth Amendments of the United States Constitution. Regardless of your personal views on the Middle East, we urge you to defend the Constitution by voting against HB 476.

Sincerely,

Sue Udry,
Executive Director
Bill of Rights Defense Committee/Defending Dissent Foundation

Chip Gibbons
Legal Fellow
Bill of Rights Defense Committee/Defending Dissent Foundation

⁵ *Massachusetts Bd. of Retirement v. Murgia* 427 U.S. 307 (1976)

⁶ *See Animal Legal Defense Fund, et al. v. Otter*, Case No. 1:14-cv-00104-BLW

Available online at <http://aldf.org/wp-content/uploads/2015/08/8-3-2015-ALDF-decision-ag-gag.pdf>