

PUBLIC OPPONENTS' CRITIQUE OF HOUSE BILL 476

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TO: All Ohio Representatives and Senators, Ohio General Assembly

SUBJECT: Legal flaws permeate House Bill 476

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H.B. 476 Background And Synopsis

House Bill 476 is a response to the Boycott, Divestment and Sanctions (BDS) movement. While it is popular among Israel sympathizers, HB 476 runs counter to the core values of the U.S. and Ohio constitutions. In an attempt to suppress debate about the Palestinian crisis, the bill interferes with US foreign policy and rampantly violates Ohioans' speech-protective laws.

BDS is a nonviolent global grassroots campaign to advance fundamental human rights of Palestinians. The campaign aims to pressure the state of Israel to end its illegal occupation and to align with international law its policies toward, and treatment of, Palestinians. The BDS movement calls upon individuals and organizations of conscience, including businesses, unions, churches, universities, and academic associations, to express their opposition to current Israeli policy by divesting all funds from Israel, or from any company that is complicit in the violation of Palestinian rights. As a form of political and economic pressure, BDS calls for boycotts of Israeli goods and products.

The proponents of H.B. 476 equate the BDS movement with the Arab League boycott and an effort to isolate and "delegitimize" Israel.

H.B. 476 would prohibit a business from entering into or renewing a contract with the State of Ohio "for the acquisition or provision of supplies, equipment, or services, or for construction services." The broad use of "contracts" in the bill suggests that contracts for the provision of unemployment insurance, workers' compensation, court-appointed attorney fee payments, Medicare and Medicaid payments, food stamp acceptance, Ohio Lottery vending, *etc.* would be included. Hence every employer in Ohio, and hundreds of retail grocery businesses, would be required to declare opposition to, and refrain from, an economic boycott of Israel in order to have these state contracts.

H.B. 476 amounts to an oath to a foreign nation. Jeffrey Crowther, an attorney in Toledo and a veteran of the Vietnam war, who also served with the U.S. Department of State building legal systems in Iraq and Afghanistan, said this to the House's Government Accountability and Oversight Committee: "This bill is un-American and demands that I shift my sole allegiance from the United States of America to that of a foreign power. This bill demands treason on my part to continue employment as a Public Defender with Lucas County, Ohio."

H.B. 476 contains many likely legal defects. It impinges on foreign policy and relations, a task reserved for the Federal government. The State of Ohio proposes to punish businesses which hold the view that the settlements in Palestine are illegal; yet the U.S. Government for some 40 years has held that the settlements are illegitimate. Further, H.B. 476 inhibits the economic decisions of businesses. Such governmental interference with business investment decisions as well as practical issues in enforcing such legislation raise numerous serious due process

concerns.

H.B. 476 will effectively create a blacklist of individuals and companies who would be barred from contracting with the State. And it may make purchases using taxpayer funds more expensive: the Legislative Service Commission admits in its fiscal analysis that “the state could pay more if the low bidder on a contract for the procurement of goods and services is eliminated from consideration as a result of the bill's prohibition.”

The central vulnerability of H.B. 476 is its apparent repression of settled First Amendment free speech and association rights, in clear illustration of the “unconstitutional conditions” doctrine.

Existing Legal Authority Suggests That H.B. 476 Is Unlawful

1) Prohibits Congress and, through the Fourteenth Amendment, any state from abridging freedom of speech or of the press. U.S. Const., Amendments I and XIV.

2) Provides that “Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.” Ohio Const., Art. I, § 11. Also, that no “interference with the rights of conscience [shall] be permitted.” Ohio Const., Art. I, § 7.

3) Holds that a nonviolent boycott to bring about political, social, or economic change, even though it may cause economic disruption, is protected expression under the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

4) Holds, under the unconstitutional conditions doctrine, that the government cannot condition a benefit on the requirement that a person forgo a constitutional right, and, as a necessary corollary, that the government may not deny a benefit to a person because he or she exercises a constitutional right. *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 545 (1983), citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1958); *Speiser v. Randall*, 357 U.S. 513, 518-519 (1983); *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364 (1984); *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001); *Rumsfeld v. Forum for Academic and Institutional Rights*, 574 U.S. 47, 59 (2006); *O'Hare Truck Service Inc. v. City of Northlake*, 518 U.S. 712, 716-720, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996); *Sherbert v. Verner*, 374 U.S. 398, 403-406, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); *Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 674-675, 685, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996).

Is A State Contract A Privilege?

Proponents of the bill suggest that H.B. 476 does not violate the First Amendment because it would not prohibit anyone from engaging in a boycott; it would only provide that those who do so would forgo the *privilege*, not the *right*, to seek a government contract. This view is precluded by the “unconstitutional conditions” doctrine. The doctrine is especially relevant when the constitutional right is one of the “preferred rights” of the First Amendment. Since a government cannot prohibit speech directly, and the Supreme Court, in *Claiborne Hardware*, held a peaceful boycott to be protected speech, government cannot withhold a government benefit to achieve that unconstitutional end indirectly.

H.B 476 Is A Bad Idea Which Is Legally Doomed

However sympathetic one may be to providing support for Israel, the constitutional rights to free speech cannot depend on whether the content of the speech is admired or abhorred. Nor can any governmental right to speak in aid of its interests outweigh the individual right of its people to disagree. Since the bill is motivated by opposition to the political beliefs and motives of the BDS movement and its critical stance on Israel, it is clearly a content-based, if not viewpoint-based, infringement on free speech rights. Just as the government may not exercise its sovereign power against its people in retaliation for their political speech, it cannot deprive them of valuable financial benefits to chill their speech on matters of public concern without a compelling governmental interest – and unquestionably not because it prefers another view.

To uphold the right to engage in a boycott is not necessarily to support its aims or objectives – just as to uphold freedom of speech is not to endorse the ideas expressed. But free speech and association rights trump any perceived benefit which would be attained via this legislative proposal.

Respectfully submitted,

The Center for Constitutional Rights

666 Broadway, 7th Floor
New York, NY 10012

The National Lawyers Guild International Committee

132 Nassau St., Rm 922
New York, N.Y. 10038

The American-Arab Anti-Discrimination Committee

1990 M Street, NW, Suite 610
Washington DC, 20036

Palestine Legal

637 S. Dearborn St., 3rd Floor
Chicago, IL 60605

Benjamin G. Davis

Professor of Law
University of Toledo College of Law (for identification purposes only)

John B. Quigley

Columbus, Ohio

/s/ Linda Mansour-Ismail, Esq.
Linda Mansour-Ismail Co.,LPA
2909 West Central Ave.
Toledo, Ohio 43606
419-535-7100

lindamansour@gmail.com

Representing Free Speech Ohio Coalition, Northwest Ohio Free Speech Alliance, and Jane and John Does

/s/ Terry J. Lodge, Esq.
Terry J. Lodge
316 N. Michigan St., Suite 520
Toledo, OH 43604-5627
(419) 255-7552

tjlodge50@yahoo.com

Representing Free Speech Ohio Coalition, Northwest Ohio Free Speech Alliance, and Jane and John Does

/s/ Reem Subei, Esq.
Reem Subei
2909 West Central Ave.
Toledo, OH 43606
419-405-6061

reemsubei@gmail.com

Representing Free Speech Ohio Coalition, Northwest Ohio Free Speech Alliance, and Jane and John Does