



February 4, 2022

## H.B. 1161 Is Unconstitutional and Must Be Opposed

Dear Members of the Committee on General Laws:

H.B. 1161 is a McCarthyite political litmus test for individuals, companies, and nonprofits that want to enter into a contract with the Commonwealth of Virginia. The bill would require prospective contractors to certify in writing that they will not “engage in a boycott of Israel, its instrumentalities, or any of its territories.”<sup>1</sup> This requirement would violate the First Amendment and invite legal challenges. In fact, similar laws have been found unconstitutional by federal judges in Arizona, Arkansas, Georgia, Kansas, and Texas.<sup>2</sup>

Because H.B. 1161 attacks core political speech and the freedom to express political beliefs, in violation of the U.S. Constitution and basic democratic principles, we urge you to oppose it.

### A. Context: Suppressing Human Rights Activism to Shield Israel from Criticism

For decades, Palestinians have been demanding freedom, justice, and equality in the face of discriminatory Israeli policies. Israeli state violence continues to dispossess Palestinians of their land, livelihoods, dignity, and agency. In the past year alone, Israel forcibly displaced Palestinian

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<sup>1</sup> H.B. 1161, 2022 Gen. Assemb., Reg. Sess. (Va. 2022), available at <https://lis.virginia.gov/cgi-bin/legp604.exe?221+ful+HB1161+pdf>.

<sup>2</sup> A & R Eng'g & Testing, Inc. v. City of Hous., No. 4:21-CV-03577, 2022 U.S. Dist. LEXIS 16097 \*1 (S.D. Tex. 2022); Martin v. Wrigley, Inc. 1:20-CV-596-MHC, 2021 U.S. Dist. LEXIS 99307 (N.D. Ga. 2021); Arkansas Times LP v. Waldrip, 988 F.3d 453, 466 (8th Cir. 2021), *vacated and reh'g granted en banc*, No. 18-cv-00914 (8th Cir. June 10, 2021); Amawi v. Pflugerville Indep. Sch. Dist, 373 F. Supp. 3d 717 (W.D. Tex. 2019), *vacated and remanded sub nom. Amawi v. Paxton*, 956 F.3d 816 (5th Cir. 2020); Jordahl v. Brnovich, 336 F. Supp. 3d 1016 (D. Ariz. 2018), *vacated and remanded*, 789 F. App'x 589 (9th Cir. 2020); Koontz v. Watson, 283 F. Supp. 3d 1007 (D. Kan. 2018).

families from their Jerusalem homes and engaged in an 11-day bombing campaign in the Gaza Strip that killed 260 Palestinians, injured more than 1,900 others, and destroyed already-scarce housing units and critical infrastructure.<sup>3</sup> Prominent human rights groups have concluded that Israel has committed crimes against humanity and established an apartheid regime.<sup>4</sup>

Frustrated by the impunity enjoyed by Israel for its abuses of Palestinians, increasing numbers of people around the world are heeding the 2005 call by Palestinian civil society to use boycotts, divestment, and sanctions (BDS) as tactics to pressure Israel to respect Palestinian rights and to comply with international law.<sup>5</sup>

In response to growing support for boycott campaigns in the U.S. and around the world, Israel and its supporters have worked to suppress such collective action to hold Israel accountable. In the U.S., people who speak out for Palestinian rights are routinely censored, punished, and falsely accused of antisemitism or support for terrorism based solely on their criticism of Israeli government policies and support for Palestinian rights.<sup>6</sup> Alongside this private repression, lawmakers have also advanced legislation, often at the urging of the Israeli government and Israel advocacy groups,<sup>7</sup> that stifles First Amendment-protected boycotts for Palestinian rights in order to shield Israel from criticism. In the past eight years, thirty-three states have enacted such anti-boycott laws, despite strong opposition from civil liberties groups that argue that political boycotts are constitutionally protected.<sup>8</sup> None of these laws have been upheld on their merits when challenged.

## **B. H.B. 1161 targets core political speech in violation of the First Amendment**

H.B. 1161 seeks to stifle a human rights movement by targeting individuals, companies, and nonprofits that decide for ethical and political reasons to support boycotts for Palestinian rights.

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<sup>3</sup> Sarah Bahr, *Inside Gaza: Capturing the Toll of War*, N.Y. TIMES (Aug. 10, 2021), <https://www.nytimes.com/2021/08/10/insider/gaza-airstrikes-video.html>; *Gaza: Apparent War Crimes During May Fighting*, HUMAN RIGHTS WATCH (July 27, 2021), <https://www.hrw.org/news/2021/07/27/gaza-apparent-war-crimes-during-may-fighting>.

<sup>4</sup> AMNESTY INTERNATIONAL: ISRAEL'S APARTHEID AGAINST PALESTINIANS: A LOOK INTO DECADES OF OPPRESSION AND DOMINATION (2022); HUMAN RIGHTS WATCH, A THRESHOLD CROSSED: ISRAELI AUTHORITIES AND THE CRIMES OF APARTHEID AND PERSECUTION (2021); B'TSELEM, A REGIME OF JEWISH SUPREMACY FROM THE JORDAN RIVER TO THE MEDITERRANEAN SEA: THIS IS APARTHEID (2021).

<sup>5</sup> See, e.g., Nora Barrows-Friedman, *What were the top BDS victories of 2021?*, ELECTRONIC INTIFADA (Dec. 30, 2021), <https://electronicintifada.net/blogs/nora-barrows-friedman/what-were-top-bds-victories-2021>.

<sup>6</sup> Between 2014 and 2020, Palestine Legal responded to more than 1700 incidents of suppression of Palestine advocacy across the country. See, e.g., PALESTINE LEGAL, 2020 YEAR-IN-REVIEW (2021), [https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/6064bab349c5984a63275a53/1617214133195/PalLegal\\_EOYREPORT\\_2020\\_digital.pdf](https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/6064bab349c5984a63275a53/1617214133195/PalLegal_EOYREPORT_2020_digital.pdf); PALESTINE LEGAL & CTR. FOR CONSTITUTIONAL RIGHTS, THE PALESTINE EXCEPTION TO FREE SPEECH (2015), <https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/560c2e0ae4b083d9c363801d/1443638794172/Palestine+Exception+Report+Final.pdf>.

<sup>7</sup> Liz Essley White, *How a bill that seeks to shut down boycotts of Israel is spreading state-to-state*, CENTER FOR PUBLIC INTEGRITY (May 1, 2019), <https://publicintegrity.org/politics/state-politics/copy-paste-legislate/how-a-bill-that-seeks-to-shut-down-boycotts-of-israel-is-spreading-state-to-state/>.

<sup>8</sup> See Legislation, PALESTINE LEGAL, <https://legislation.palestinelegal.org/> (last visited Jan. 28, 2022).

Government actions and restrictions, however, cannot be based on the desire to punish First Amendment activities that aim to encourage social and political change. The Supreme Court has held that speech “on public issues ‘has always rested on the highest rung of the hierarchy of First Amendment values’” and is entitled to special protection.<sup>9</sup> In *NAACP v. Claiborne Hardware Co.*, the Court specifically held that boycotts “to bring about political, social and economic change”—like boycotts to achieve Palestinian rights—are unquestionably protected under the First Amendment.<sup>10</sup>

It is undisputed that individuals, organizations, 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, unfair working conditions for farm workers, or more recently, the fossil fuel and prison industries. Boycotts for Palestinian rights cannot be differentiated from these and other historical examples of boycotts simply because they may be unpopular with elected representatives or those who wish to shield Israel from criticism. Multiple courts have agreed. In blocking Arizona’s 2016 anti-boycott law, the district court stated: “A restriction of one’s ability to participate in collective calls to oppose Israel unquestionably burdens the protected expression of companies wishing to engage in such a boycott. The type of collective action targeted by the [Arizona law] specifically implicates the rights of assembly and association that Americans and Arizonans use ‘to bring about political, social, and economic change.’”<sup>11</sup> H.B. 1161 similarly implicates Virginians’ First Amendment rights.

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

The U.S. Supreme Court has repeatedly affirmed that government officials’ determinations about what views are acceptable cannot infringe on the right to freely express political views, however controversial or unpopular.<sup>12</sup> Moreover, the government may not penalize or deny a benefit to individuals for exercising their constitutional rights.<sup>13</sup> Thus, in blocking Kansas from enforcing its anti-boycott law, the district court stated, “[u]nder the First Amendment, states cannot retaliate or impose conditions on an independent contractor ‘on a basis that infringes his constitutionally protected freedom of speech.’”<sup>14</sup>

As introduced, H.B. 1161 purports to limit the scope of its application to “the contractor’s commercial activity pursuant to the terms of the contract.” However, the text of H.B.1161 fails to provide prospective contractors with any guidance as to which, if any, boycott activities would be permissible under the statute. As the Eighth Circuit recently found in assessing the constitutionality of Arkansas’ substantively similar anti-boycott law: “A contractor that does not

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<sup>9</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (citing *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

<sup>10</sup> *Claiborne*, 458 U.S. at 911.

<sup>11</sup> *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1043 (D. Ariz. 2018), *vacated and remanded*, 789 F. App’x 589 (9th Cir. 2020).

<sup>12</sup> *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.”).

<sup>13</sup> *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *O’Hare Truck Service v. City of Northlake*, 518 U.S. 712, 717-18 (1996).

<sup>14</sup> *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1020 (D. Kan. 2018).

want to risk violating the terms of its contract would likely refrain even from activity that is constitutionally protected.”<sup>15</sup>

By denying public contracts to individuals and businesses because they support boycotts for Palestinian rights, H.B. 1161 seeks to penalize and inhibit protected speech. The Supreme Court has held that “[s]uch interference with constitutional rights is impermissible.”<sup>16</sup> This Virginia bill represents an action by public officials to thwart or penalize speech activities because of officials’ disapproval of the viewpoint expressed, and therefore is exactly the type of action that courts have recognized violates the First Amendment. If such a law is passed, it will very likely be subject to constitutional challenge, diverting state resources to costly litigation.

#### **D. Penalizing companies that support boycotts for Palestinian rights chills protected speech and bolsters efforts to silence other social justice movements**

If enacted, H.B. 1161 will chill free speech rights by effectively dictating that a position supporting human rights is unacceptable. The bill will intimidate individuals and businesses from adopting ethical political stances regarding Israel and Palestine—a matter of public concern—if they know that making decisions based on human rights concerns could result in the denial of a contract with the state. The Supreme Court has said that this chilling effect on protected speech violates the First Amendment, finding that “the threat of sanctions may deter . . . almost as potently as the actual application of sanctions.”<sup>17</sup>

Although H.B. 1161 applies only to public contracts, if enacted, it will likely chill other expressive activity. Similar laws have been invoked in order to chill student and community activism in support of Palestinian human rights, prevent public talks at universities,<sup>18</sup> censor schoolteachers,<sup>19</sup> and cancel cultural events,<sup>20</sup> none of which were activities proscribed by the laws. Even where these censorship efforts failed, confusion over the scope or deliberate misapplication of these anti-boycott laws did chill, punish, or attempt to punish speakers supporting Palestinian rights. 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.”<sup>21</sup>

The impact of legislation targeting Israel boycotts goes far beyond chilling advocacy for Palestinian rights. Anti-Israel boycott laws have become a model for other types of anti-boycott

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<sup>15</sup> *Arkansas Times LP v. Waldrip*, 988 F.3d 453, 466 (8th Cir. 2021), *vacated and reh’g granted en banc*, No. 18-cv-00914 (8th Cir. June 10, 2021).

<sup>16</sup> *O’Hare Truck Service*, 518 U.S. at 717.

<sup>17</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967) (internal quotations and citations omitted).

<sup>18</sup> PALESTINE LEGAL, 2018 YEAR IN REVIEW 8 (2019),

[https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/5cd0505af9619a517dd07ddc/1557155938694/PalLegal\\_EoYReport2018\\_fin.pdf](https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/5cd0505af9619a517dd07ddc/1557155938694/PalLegal_EoYReport2018_fin.pdf) (“While individuals directly affected by anti-boycott laws have so far been successful in challenging them, the laws have repeatedly been invoked to chill pro-Palestinian speech more broadly.”).

<sup>19</sup> *NYC Department of Education: Stop Censoring Pro-Palestine Educator*, PALESTINE LEGAL, Dec. 2, 2019, <https://palestinelegal.org/news/2019/12/2/nyc-department-of-education-stop-censoring-pro-palestine-educator>.

<sup>20</sup> See, e.g., Jake Offenhartz, *Roger Waters Shows Will Go On Despite Nassau County Anti-BDS Law*, GOTHAMIST (Sept. 13, 2017), [http://gothamist.com/2017/09/13/roger\\_waters\\_nassau.php](http://gothamist.com/2017/09/13/roger_waters_nassau.php).

<sup>21</sup> *Housing Works, Inc. v. City of New York*, 72 F. Supp. 2d 402, 421 (S.D.N.Y. 1999).

legislation targeting protest in support of other social justice issues. A dozen states have introduced or passed anti-boycott legislation targeting efforts to address climate change, gun violence, and even a global pandemic.<sup>22</sup>

## **E. Multiple Courts Have Blocked Similar Laws Over Constitutional Concerns**

Substantively similar anti-boycott laws have been challenged in federal court. To date, not a single anti-boycott law has been upheld on the merits. Instead, courts have blocked state laws that prohibit contracts with entities that boycott Israel due to constitutional concerns and ruled that boycotts for Palestinian rights are protected by the First Amendment. In response, state legislatures have amended the laws to exclude the plaintiffs and moot the lawsuits, but these measures fail to remedy the constitutional defects identified by the courts.

### **a. Kansas**

In October 2017, the ACLU filed a lawsuit challenging Kansas' anti-boycott law, which required prospective state contractors to certify in writing that they are not engaged in a boycott of Israel. The lawsuit was filed on behalf of Esther Koontz, a veteran math teacher who had been chosen to participate in a teacher training program in Kansas. In order to participate in the program, Koontz was required to sign a certification that she does not boycott Israel. Koontz refused. She later wrote, "[a]s a member of the Mennonite Church USA, and a person concerned with the human rights of all people — and specifically the ongoing violations of Palestinians' human rights in Israel and Palestine — I choose to boycott consumer goods made by Israeli and international companies that profit from the violation of Palestinians' rights."<sup>23</sup>

On January 30, 2018, a federal judge issued a preliminary injunction blocking Kansas from enforcing the anti-boycott law, affirming that boycotts for Palestinian rights are protected by the First Amendment. The judge noted that

the conduct the Kansas Law aims to regulate is inherently expressive. It is easy enough to associate plaintiff's conduct with the message that the boycotters believe Israel should improve its treatment of Palestinians. And boycotts—like parades—have an expressive quality. Forcing plaintiff to disown her boycott is akin to forcing plaintiff to accommodate Kansas's message of support for Israel.<sup>24</sup>

### **b. Arizona**

In December 2017, the ACLU filed a second lawsuit challenging a nearly identical law in Arizona on behalf of attorney Mikkell Jordahl and his one-person law office. Jordahl's firm had contracted with the state of Arizona for twelve years to provide legal services to incarcerated

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<sup>22</sup> *Free Speech-Quashing Laws Based on Israel-Focused Anti-Boycott Laws*, FOUNDATION FOR MIDDLE EAST PEACE, <https://fmep.org/wp/wp-content/uploads/BDS-Laws-as-Template-for-Laws-on-Other-Issues.pdf> (last visited Feb. 2, 2022); Meg Cunningham, *Model legislation targets banks that divest from fossil fuel companies*, ABC NEWS (Dec. 22, 2021), <https://abcnews.go.com/Politics/model-legislation-targets-banks-divest-fossil-fuel-companies/story?id=81865813>; Erika Bolstad, *Boycotting the Boycotters: In Oil-Friendly States, New Bills Aim to Block Divestment from Fossil Fuels*, IN THESE TIMES (Mar. 19, 2021), <https://inthesetimes.com/article/fossil-fuel-divestment-ban-texas-north-dakota-oil>.

<sup>23</sup> See Esther Koontz, *Kansas Won't Let Me Train Math Teachers Because I Boycott Israel*, ACLU (Oct. 12, 2017), <https://www.aclu.org/blog/free-speech/kansas-wont-let-me-train-math-teachers-because-i-boycott-israel>.

<sup>24</sup> *Koontz v. Watson*, 283 F. Supp. 3d 1007, 1024 (D. Kan. 2018).

individuals. In order to renew his contract, Jordahl was asked to certify in writing that his firm was not engaging in a boycott of Israel. However, pursuant to his political beliefs, Jordahl was engaged in a consumer boycott: he refuses to purchase goods from businesses supporting Israel's occupation of Palestinian territories and wishes to extend his boycott to his law practice. Jordahl has said, "[w]hatever your stance on the boycott issue, everyone has a right to express their opinions on it and act accordingly. The state has no right to tell private companies how to act when it has nothing to do with state business."<sup>25</sup> The federal district court in Arizona blocked enforcement of the unconstitutional law, finding

A restriction of one's ability to participate in collective calls to oppose Israel unquestionably burdens the protected expression of companies wishing to engage in such a boycott. The type of collective action targeted by the Act specifically implicates the rights of assembly and association that Americans and Arizonans use "to bring about political, social, and economic change."<sup>26</sup>

### c. Texas

In April 2019, a federal district court blocked enforcement of the Texas anti-boycott law, finding that it unconstitutionally infringed on the plaintiffs' First Amendment rights. Bahia Amawi, a speech language pathologist who had worked with Arabic-speaking students in an Austin suburb since 2009, was told that she would have to certify that she would not boycott Israel in order to renew her contract with the school district. She refused because, "in conjunction with her family, she has made the household decision to refrain from purchasing goods from Israeli companies in support of the global boycott to end Israel's decades-long occupation of the West Bank and Gaza."<sup>27</sup> Other plaintiffs included two students who were told they had to sign pledges not to boycott Israel in order to judge high school debate tournaments, a reporter who was compelled to sign the certification to keep his job at a Texas A&M radio station, and a writer who lost two contracts as a translator and a speaker at the University of Houston for his refusal to sign the certification. The court found, "The statute threatens 'to suppress unpopular ideas' and 'manipulate the public debate through coercion rather than persuasion.' This the First Amendment does not allow."<sup>28</sup>

Even after the Texas legislature amended the law to narrow its application, in January 2022, a federal court blocked its enforcement against Palestinian-American contractor, Rasmy Hassouna, citing concerns that the law would violate the First Amendment.<sup>29</sup>

### d. Arkansas

In December 2018, the ACLU filed a lawsuit challenging the Arkansas anti-boycott law on behalf of The Arkansas Times. The newspaper lost substantial advertisement revenue after refusing to sign a certification that it will not engage in a boycott of Israel as a condition of its

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<sup>25</sup> Press Release, ACLU, *Free Speech Lawsuit Challenges Arizona Law Aimed at Anti-Israel Boycotts* (Dec. 7, 2017), <https://www.aclu.org/press-releases/free-speech-lawsuit-challenges-arizona-law-aimed-anti-israel-boycotts>.

<sup>26</sup> *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016, 1042-43 (D. Ariz. 2018), *vacated and remanded*, 789 F. App'x 589 (9th Cir. 2020).

<sup>27</sup> Glenn Greenwald, *A Texas Elementary School Speech Pathologist Refused to Sign a Pro-Israel Oath, Now Mandatory in Many States — so She Lost Her Job*, THE INTERCEPT (Dec. 17, 2018), <https://theintercept.com/2018/12/17/israel-texas-anti-bds-law/>.

<sup>28</sup> *Amawi v. Pflugerville Indep. Sch. Dist.*, 373 F. Supp. 3d 717, 763-64 (W.D. Tex. 2019).

<sup>29</sup> *A & R Eng'g & Testing, Inc.*, 2022 U.S. Dist. LEXIS 16097 at \*39-44.



contract with state advertisers. While the paper itself takes no position on boycotts for Palestinian rights, it argued there should be no compulsion to take a position against them either. Although in January 2019 the district court dismissed the case, the Eighth Circuit Court of Appeals reversed the decision in February 2021, with Judge Kelly writing in the majority opinion that “supporting or promoting boycotts of Israel is constitutionally protected” and yet the law required “government contractors to abstain from such constitutionally protected activity.”<sup>30</sup>

The anti-boycott laws blocked by the courts to date are identical in substance to H.B. 1161. If enacted, H.B. 1161 will affect individuals, businesses, and non-profits who wish to enter into contracts with the state but who support a growing international movement to hold Israel accountable for the decades of human rights abuses it has perpetrated with impunity. Because H.B. 1161 will unconstitutionally infringe on Virginians’ core political speech, in violation of the First Amendment, it will likely expose the state to a costly defense of a shameful law when Virginians stand up for their constitutional rights.

## **F. Conclusion**

At its core, the most fundamental guarantee of the First Amendment is the right to challenge orthodox views on a significant political issue like Israel and Palestine without government obstruction. H.B. 1161 would punish use of a time-honored American tactic to effect political change solely because public officials wish to shield Israel from scrutiny. Indeed, this bill is very similar to the 2016 anti-boycott bill, H.B. 1282, which was opposed by many civil liberties and advocacy groups on constitutional grounds and was eventually tabled. Passing H.B. 1161 would threaten a crucial, constitutionally protected tactic by which individuals and groups can make their collective voices heard. We urge you to oppose this bill.

Sincerely,

American-Arab Anti-Discrimination Committee (ADC)  
Center for Constitutional Rights  
Civil Liberties Defense Center (CLDC)  
Climate Defense Project  
Council on American-Islamic Relations (CAIR)  
Defending Rights and Dissent  
Palestine Legal  
Partnership for Civil Justice Fund (PCJF)  
Project South

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<sup>30</sup> *Arkansas Times LP v. Waldrup*, 988 F.3d 453, 467 (8th Cir. 2021), *vacated and reh’g granted en banc*, No. 18-cv-00914 (8th Cir. June 10, 2021).