



October 24, 2016

Hon. Jake Corman
Majority Leader, Pennsylvania State Senate
350 Main Capitol
Harrisburg, PA 17120

Re: HB 2107 threatens First Amendment-protected speech and must be vetoed

Dear Sen. Corman:

As civil and human rights organizations committed to upholding the rights of individuals to express their political beliefs without fear of government retaliation or retribution,¹ we write to convey our strong opposition to HB 2107. HB 2107 inaccurately depicts an international human rights movement as motivated by discrimination, and its intent is to target a particular political viewpoint for differential treatment by the state merely because the bill's sponsors disagree with that viewpoint. Because HB 2107 would suppress, chill, and possibly punish First Amendment-protected speech and activity, we call on you to withdraw this bill.

On its face, the bill prohibits state departments from contracting with companies unless they certify – under penalty of enormous civil sanction of \$250,000 or twice the amount of the contract – that they are not engaged in boycotts based on enumerated protected classes (in addition to “national affiliation,” which is vague and not a protected class). But the legislation's declared purpose and the sponsor's official memorandum in support of the bill are clear that its intent is to target boycotts against Israel. Boycotts against Israel because of its violations of international law are constitutionally protected and do not target persons or entities based on their national origin, religion, or other protected class. Further, “national affiliation,” a vague term that is not a legal term of art, could be used as a proxy for viewpoint discrimination.

The bill's stated purpose of targeting boycotts of Israel, its vagueness, its enormous financial penalty, and its potential for misuse will chill and suppress speech protected by the United States Constitution.

A. Understanding boycott, divestment, and sanctions campaigns for Palestinian rights

One tactic of the global movement for Palestinian rights is to boycott, divest from, and sanction (BDS) Israel until it complies with international law and respects Palestinian rights, a call initiated by Palestinian civil society in 2005, following the example of the struggle against apartheid South Africa. BDS is a peaceful strategy that allows people of conscience to play an

¹ Palestine Legal (www.palestinelegal.org) is dedicated to protecting the civil and constitutional rights of people in the U.S. who speak out for Palestinian freedom. The Center for Constitutional Rights (www.ccrjustice.org) is dedicated to advancing and protecting the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights. The National Lawyers Guild (www.nlg.org) unites lawyers, law students, legal workers, and jailhouse lawyers who recognize the importance of safeguarding and extending the rights of workers, women, LGBTQ people, farmers, people with disabilities, and people of color.

effective role in the Palestinian struggle for freedom, justice and equality in their homeland when all other diplomatic efforts have failed to achieve their rights.

The Palestinian-led call for BDS urges nonviolent pressure on Israel until it complies with international law by meeting three demands: first, ending its occupation and colonization of all Arab lands and dismantling the Wall; second, recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality; and third, respecting, protecting, and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN resolution 194.²

Supporters of BDS include South African rights activist Archbishop Desmond Tutu and “The Color Purple” author Alice Walker, among many others.³ Religious institutions, including the United Church of Christ⁴ and the Presbyterian Church (USA), have embraced BDS,⁵ as have many racial justice activists,⁶ labor organizations,⁷ and a growing number of everyday Americans.⁸

BDS campaigns do not target individuals based on their Israeli nationality; rather, they target Israeli institutions because of their ties to state policy, or corporations for their complicity in human rights violations. Similarly, BDS campaigns do not target institutions or individuals based on Jewish identity. In fact, proponents of BDS campaigns often express their opposition to all forms of racism, which includes anti-Semitism and anti-Arab racism.⁹

B. The goal of HB 2107 is to punish, suppress, and chill BDS campaigns for Palestinian freedom

HB 2107’s wording raises more questions than answers, and suggests a fundamental misunderstanding of BDS campaigns. It is clear that the goal of HB 2107 is to counter BDS campaigns for Palestinian rights. The bill’s “declaration of purpose” states that “Israel is America’s dependable, democratic ally in the Middle East” and that “it is in the interest of the United States and the Commonwealth to stand with Israel and other countries by promoting trade and commercial activities and to discourage policies that disregard that interest.” The sponsor’s

² Read more about BDS at www.bdsmovement.net.

³ See Palestinian BDS National Committee, Cultural Boycott, <https://bdsmovement.net/cultural-boycott>.

⁴ United Church of Christ, UCC votes for divestment, boycotts of companies that profit from occupation of Palestinian territories, June 30, 2015,

http://www.ucc.org/news_general_synod_israel_palestine_resolution_06302015.

⁵ Laurie Goodstein, Presbyterians vote to divest holdings to pressure Israel, New York Times, June 20, 2014, <http://www.nytimes.com/2014/06/21/us/presbyterians-debating-israeli-occupation-vote-to-divest-holdings.html>.

⁶ See, e.g., The Movement for Black Lives, A Vision for Black Lives: Policy Demands for Black Power, Freedom, and Justice: Invest-Divest, <https://policy.m4bl.org/invest-divest>.

⁷ See Vijay Prashad, America’s Labor Unions are Increasingly Standing with Palestine, Alternet, April 19, 2016, <http://www.alternet.org/labor/americas-labor-unions-are-increasingly-standing-palestine>.

⁸ Haaretz, Survey: One-third of Americans support boycotting Israel, May 30, 2016, <http://www.haaretz.com/israel-news/1.722327>.

⁹ See Palestine Legal (formerly Palestine Solidarity Legal Support), Boycott and Divestment, Frequently Asked Legal Questions, March 2015, <http://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/55a006a3e4b01f5eb3cfd32e/1436550819443/Legal+FAQ+BDS+March+2015.pdf>.

official memorandum accompanying the bill states that the intent of the bill is to “prohibit the Department of General Services (DGS) from entering into a contract with an entity that is engaging in an economic boycott against Israel.”¹⁰

However, if enacted, HB 2107 would prohibit Pennsylvania from contracting with companies, organizations, associations, and other entities that boycott another person or entity when the “action is based on race, color, religion, gender or national affiliation or origin of the targeted person or entity.” In other words, the bill would prevent the state from contracting with companies and other entities that engage in certain discriminatory practices.

While the unenforceable “declaration of purpose” and the public framing of HB 2107 make it clear that the bill’s purpose is to suppress, punish, and/or chill BDS campaigns, the bill’s text suggests otherwise. BDS campaigns are not motivated by or based on discrimination (national origin or otherwise). Rather, as described above, BDS campaigns are motivated by opposition to Israeli government policies and violations of international law.

If passed, the bill will create substantial confusion. Prospective contractors that support BDS could correctly certify that they are not engaged in boycotts as defined by the bill, because BDS campaigns are not based on race, color, religion, gender, or national origin (we separately address “national affiliation” below). Rather, BDS campaigns target Israeli institutions because of their ties to state policy, or corporations (including U.S. corporations) for their complicity in human rights violations.

But by requiring prospective contractors to certify that their political viewpoints are not based on discrimination, HB 2107 opens the floodgates for investigations by the Department of General Services and the Attorney General into the thoughts and beliefs motivating a prospective contractor’s support for Palestinian human rights.

Moreover, if a certification is determined to be false, the legislation imposes severe penalties of \$250,000 or twice the amount of the contract, whichever is greater. The potential for such a penalty and its overbroad and incorrect application would greatly compound the chill of constitutionally protected speech. Prospective contractors who take an ethical position to boycott companies or institutions complicit in Israeli human rights abuses, but who are not engaged in discriminatory conduct prohibited by HB 2107, may decide to halt their constitutionally-protected boycott, fearing an exorbitant financial penalty if HB 2107 is incorrectly interpreted.

C. HB 2107 targets core political speech in violation of the First Amendment

HB 2107, which requires prospective contractors to certify that they do not engage in boycotts targeting specified protected classes, is drafted as an anti-discrimination law. As addressed above, because BDS campaigns are not motivated by discrimination, HB 2107 should not actually govern BDS campaigns. However, the bill confuses its apparent anti-discrimination purpose by including among its list of protected classes the term “national affiliation.” National affiliation is not a pre-existing protected class, nor is it a legal term of art. Because of its

¹⁰ Rep. Matthew E. Baker, House Co-Sponsorship Memorandum: DGS Contract Reform, March 21, 2016, <http://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20150&cosponId=19907>. Moreover, Israel advocacy organizations have publicly described HB 2107 as an anti-BDS bill. *See, e.g.*, StandWithUs, Pennsylvania Senate Government Committee passes anti-BDS bill (HB 2107) by a unanimous vote on Sept. 27, 2016, <https://www.standwithus.com/news/article.asp?id=4908>.

vagueness – it is unclear what a boycott motivated by “national affiliation” is – it could be used to discriminate on the basis of viewpoint.

But government actions and restrictions cannot be based on the desire to punish or suppress First Amendment activities that aim to encourage social and political change in a nation’s policies. 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.”¹¹ The Court has specifically held that boycotts “to bring about political, social and economic change,” like human rights boycotts of Israel, are unquestionably protected under the First Amendment.¹²

Further, government officials’ determinations about what views are acceptable cannot infringe on the First Amendment-protected right to freely express political views – however controversial or unpopular.¹³ In deciding that the government could not punish public contractors in retaliation for political beliefs, the Supreme Court stated, “[i]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.”¹⁴

It is undisputed that individuals, institutions, and companies may boycott in response to issues of public concern, as many have done historically to challenge racial segregation in the U.S., poor labor standards for farm workers in California, the apartheid regime in South Africa, and, currently, fossil fuel companies and the prison industry. BDS campaigns for Palestinian rights cannot be differentiated from these and other historical examples of boycotts simply because they may be unpopular with elected representatives today. Such a differentiation would constitute viewpoint discrimination prohibited by the First Amendment.

This bill represents an action by public officials to thwart or penalize protected speech activities because of the officials’ disapproval of the viewpoint expressed. There is no question that the bill is aimed at suppressing and punishing BDS campaigns, as discussed above. “Such interference with constitutional rights,” the Court has stated, “is impermissible.”¹⁵

D. Subjecting to scrutiny those that boycott Israel will have a chilling effect on protected speech

HB 2107 infringes on protected First Amendment activities by subjecting political positions to government suspicion, investigation, approval, and penalty. If enacted, this bill will chill the free speech rights of individuals and businesses by effectively casting a shadow of suspicion over their position on a pressing human rights issue. Further, the vagueness of “national affiliation” – and the uncertainty that results from this vagueness – could deter prospective contractors from engaging in constitutionally-protected activity. Whether or not actual imposition of the bill’s newly created civil penalty ensues, the specter of government investigation into the motivation behind one’s support for BDS campaigns is likely to chill protected speech and conduct. Individuals and businesses may refrain from adopting ethical political stances or making ethical business decisions if they know that decisions based on

¹¹ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (citing *Carey v. Brown*, 447 U. S. 455).

¹² *Id.*

¹³ *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.”).

¹⁴ *O’Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996).

¹⁵ *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

human rights concerns could result in the denial of state contracts and/or an inquiry into their motivations, possibly leading to a colossal penalty.

In addition, this bill would discourage grassroots human rights advocacy aimed at pressuring companies to boycott Israel. It would effectively chill advocates' voices by undermining their goal of influencing companies to take ethical political stances, and by stigmatizing their speech. Notably, 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."¹⁶

E. Conclusion

We are committed to upholding the First Amendment rights of those advocating for compliance with international law and on behalf of human rights, and ensuring that they are able to challenge orthodox views on a sensitive political issue like Israel/Palestine without government obstruction, investigation, and penalty. HB 2107 could be used to punish individuals and companies that use an honored American tactic to effect political change, solely because public officials disagree with that tactic in this context. This bill is constitutionally indefensible, and its enactment could invite a legal challenge in order to protect the right to engage in speech activities such as boycotts intended to effect social, political, and economic change.

Allowing HB 2107 to pass would threaten a crucial vehicle by which individuals and groups can make their collective voices heard. We call on you to withdraw it.

Sincerely,



Maria LaHood
Deputy Legal Director
Center for Constitutional Rights



Rahul Saksena
Staff Attorney
Palestine Legal



Natasha Lycia Ora Bannan
President
National Lawyers Guild

Cc: Members of the Pennsylvania State Senate, Rep. Matt Baker

¹⁶ *Housing Works, Inc. v. City of New York*, 72 F. Supp. 2d 402, 421 (S.D.N.Y. 1999).