HB 89 and SB 134 are Unconstitutional and Must be Opposed

As civil and human rights organizations committed to upholding the rights of individuals and entities to express their political beliefs without fear of government retaliation or retribution, we write to convey our strong opposition to HB 89 and SB 134.[1] These bills would require Texas to create a blacklist of companies that boycott Israel and "Israeli controlled territory" and would prohibit Texas retirement funds and the University of Texas investment management company from investing in those companies. These bills would also prohibit Texas from entering into contracts with companies that boycott Israel and "Israeli controlled territory."

HB 89 and SB 134 target core political speech and infringe on the freedom to express political beliefs, in violation of the First Amendment to the U.S. Constitution. We urge you to oppose these bills.

A. HB 89 and SB 134 target core political speech in violation of the First Amendment

HB 89 and SB 134 have been introduced at a time when Palestinian human rights activists in Texas and across the country are embracing boycotts 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.

People in the U.S. are growing increasingly frustrated with the status quo in Israel and Palestine,[2] and with the U.S. government's complicity in perpetuating Israel's occupation of Palestinian lands, human rights abuses, and violations of international law. Boycott, divestment, and sanctions (BDS) tactics are modelled after the protest movement that helped end Apartheid in South Africa. BDS enables people of conscience across the U.S. to use First Amendment-protected tactics to collectively protest Israeli government policies.

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[1] This memorandum has been endorsed by the following organizations: Palestine Legal (www.palestinelegal.org), CAIR-Texas, Houston Chapter (www.cairtexas.com), the National Lawyers Guild – Palestine Subcommittee (http://www nlginternational.org/palestine-subcommittee), the Center for Constitutional Rights (www.ccrjustice.org), and the Bill of Rights Defense Committee and Defending Dissent Foundation (www.bordc.org).

[2] For example, recent polls indicate that nearly half of Americans support imposing sanctions on Israel to protest Israeli settlement policy. See Shibley Telhami, American attitudes on the Israeli-Palestinian conflict, Brookings Institution, Dec. 2, 2016, https://www.brookings.edu/research/american-attitudes-on-the-israeli-palestinian-conflict.

There are multiple reasons why companies might not do business with Israel, but these bills single out only those which do so to penalize or economically harm Israel or limit commercial relations specifically with Israel. For example, Company A, a boutique clothing shop in Austin may have no business relationships with Israel (or any foreign country) because it is a small, local store with no international business ambitions. Company B, a grocery store chain, boycotts Israeli-made products because Company B heeds the Palestinian call to boycott Israel. Companies A and B both limit commercial relations with Israel in some form. But Company A would be unaffected by these bills, while Company B would be targeted.

The difference in treatment between Company A and Company B is the expression of Company B's viewpoints in support of a political boycott. But government actions and restrictions cannot be based on the desire to punish First Amendment protected activities that either refrain from being complicit in or aim to discourage 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."[3] The Court has specifically held that boycotts "to bring about political, social and economic change," such as a boycott of Israel for its international law violations, are unquestionably protected by the First Amendment.[4]

It is undisputed that individuals, institutions, 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, abuse of farmworkers, and currently, fossil fuel companies. Boycott campaigns targeting Israel 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.

B. Denial of public contracts and public pension fund investment, where motivated by a desire to suppress speech, violates the First Amendment

The United States Supreme Court has repeatedly affirmed that 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.[5] Thus, under the 'unconstitutional conditions' doctrine, the government may not condition a benefit on the requirement that a person forgo a constitutional right. 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."[6]

Yet this is precisely what HB 89 and SB 134 would do. By denying public contracts to businesses that engage in boycotts to effect change in Israel's policies, these bills seek to penalize and inhibit protected speech. Similarly, prohibiting public retirement funds from investing in companies because they seek to uphold human rights would be tantamount to

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[3] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982).
[4] *Id.*
[5] *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."
[6] *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996).

denying a benefit because of constitutionally protected speech. "Such interference with constitutional rights," the Court stated, "is impermissible."[7] These bills represent an action by public officials to thwart or penalize speech activities because of the officials' disapproval of the content, and therefore are exactly the type of action that courts have recognized violate the First Amendment.

C. Establishing a blacklist and penalizing blacklisted companies will have a chilling effect on protected speech

These bills also infringe on protected First Amendment activities by subjecting political positions to government approval and penalty. These bills will chill the free speech rights of individuals and businesses by effectively dictating that a position supporting human rights is unacceptable. These individuals and businesses may refrain from adopting ethical political stances regarding Israel/Palestine – a matter of public concern – if they know that making business decisions based on human rights concerns could result in a financial penalty from the state.

In addition, these bills would also discourage grassroots human rights advocacy aimed at pressuring companies to boycott Israel. While they do not directly prohibit such advocacy, these bills would effectively chill advocates' voices by exacting a toll on their goal, 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."[8] Even if other expressive activity, such as student and community activism urging companies to boycott Israel and respect Palestinian human rights, is not prohibited by these bills, such speech activities are likely to be chilled by this legislation.

Strangely, despite the constitutional concerns raised above, the drafters of these bills included a provision – Section 808.004 – prohibiting lawsuits alleging constitutional violations and placing the burden of lawsuit costs and attorneys' fees on those bringing the challenge. The legislature cannot legislate away the judiciary's fundamental role in reviewing the constitutionality of statutes. Section 808.004 is bad law, bad policy, and, perhaps, an unintentional acknowledgement that the bill runs afoul of the U.S. Constitution.

D. Conclusion

We are committed to upholding the First Amendment rights of those opposing complicity in human rights abuses, and ensuring that they are able to challenge orthodox views on a sensitive political issue like Israel/Palestine without government interference. HB 89 and SB 134 would punish companies that use an honored American tactic to effect political change solely because public officials disagree with that tactic in this context. These bills are constitutionally indefensible, and their enactment would necessitate a legal challenge in order to protect the right of any individual or company to engage in speech activities such as boycotts intended to effect social, political and economic change. Allowing these bills to stand would threaten a crucial vehicle by which individuals and groups can make their collective voices heard.

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[7] *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972).
[8] *Housing Works, Inc. v. City of New York*, 72 F. Supp. 2d 402, 421 (S.D.N.Y. 1999).