



US Campaign for Palestinian Rights



S.B. 849 and H.B. 2179 Are Unconstitutional and Must Be Opposed

S.B. 849 and H.B. 2179 would require prospective state contractors in Missouri to certify in writing that they have not and will not engage in First Amendment protected boycotts for Palestinian rights. By imposing a McCarthyite political litmus test on any company or nonprofit organization that wants to enter into a contract with the state, these bills violate First Amendment rights and will invite legal challenges. Indeed, a nearly-identical law was recently blocked on First Amendment grounds by a federal judge in Kansas, and a federal court in Arizona is considering a constitutional challenge to a similar law in that state.

Because S.B. 849 and H.B. 2179 attack 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 withdraw them.¹

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

For decades, Palestinians have been continuously dispossessed of their land, livelihoods, dignity, and agency due to Israeli government policies that have sought to entrench through military force and institutional discrimination the establishment of a state that privileges Jewish people from around the world at the expense of the civil, social and political rights of

¹ This memorandum is endorsed by the following organizations: American Muslims for Palestine (www.ampalestine.org); Center for Constitutional Rights (www.ccrjustice.org); Citizens for Justice in the Middle East (<http://www.cjme.org>); CAIR-Missouri (www.cair-mo.org); Defending Rights and Dissent (www.rightsanddissent.org); Friends of Sabeel North America (www.fosna.org); Jewish Voice for Peace (www.jewishvoiceforpeace.org) and St. Louis Jewish Voice for Peace (www.facebook.com/stljvp); Mid-Missourians for Justice in Palestine (<https://www.facebook.com/JusticeinPalestine>); Mid-Missouri Fellowship of Reconciliation; Missouri Right to Boycott (<https://www.facebook.com/MissouriRighttoBoycott>); National Lawyers Guild – Palestine Subcommittee (<https://www.nlg.org/tag/palestine-subcommittee>); Palestine Legal (www.palestinelegal.org); St. Louis Palestine Solidarity Committee (<https://www.stl-psc.org>); US Campaign for Palestinian Rights (www.uscpr.org); and US Palestinian Community Network (www.uspcn.org).

Palestinians who have lived there for generations. Frustrated with the U.S. government's unconditional support for Israel's abuses of Palestinian rights – most recently illustrated by the Trump Administration's unilateral recognition of Jerusalem as the capital of Israel, in addition to the over 3 billion dollars in military aid the U.S. gives to Israel annually – increasing numbers of people across the U.S. are responding to 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, as stipulated in UN Resolution 194.²

In response to growing support for boycott campaigns in the U.S. and around the world, Israel and its supporters have stepped up efforts 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 based solely on their criticism of Israeli government policies and support for Palestinian rights.³ University administrators face pressure from Israeli advocacy organizations to condemn and punish students and faculty who advocate for Palestinian rights. And lawmakers across the country face pressure to enact laws aimed at stifling First Amendment-protected boycotts for Palestinian rights.⁴ In the past three years, twenty-four states have enacted such anti-boycott laws, despite strong opposition from civil liberties groups that argue that this method of effecting political change is constitutionally protected. And now the courts are weighing in.

B. Laws similar to S.B. 849 and H.B. 2179 are being challenged in court

Kansas

In October 2017, the ACLU filed a lawsuit challenging Kansas' anti-boycott law. That law, which went into effect in July 2017, requires 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 and member of the Mennonite Church USA who had been chosen to participate in a teacher training program in Kansas. Pursuant to Kansas' anti-boycott law, Ms. Koontz was asked to certify in writing that she was "not currently engaged in a boycott of Israel" in order to be compensated for her work. Ms. Koontz refused to sign the form. 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."⁵

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

² Advocates for boycotts call on Israel to respect Palestinian rights by doing the following to comply with international law: dismantling Israel's separation wall and ending the occupation of Palestinian and other Arab lands; granting equal rights to Palestinian citizens of Israel; and recognizing the right of return for Palestinian refugees who were expelled from their homes by Israel.

³ Palestine Legal responds to and documents incidents of suppression of Palestine advocacy across the country. Between 2014 and 2017, Palestine Legal responded to nearly one thousand such incidents. For more information, visit: www.palestinelegal.org/the-palestine-exception and <https://palestinelegal.org/2017-report>.

⁴ See www.righttoboycott.org.

⁵ See <https://www.aclu.org/blog/free-speech/kansas-wont-let-me-train-math-teachers-because-i-boycott-israel>.

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.”⁶

Arizona

In December, **the ACLU filed a second lawsuit challenging a nearly-identical law in Arizona.** The Arizona law, like the Kansas law and the proposed Missouri bills, require prospective contractors in that state to certify in writing that they are not engaged in a boycott of Israel. The Arizona lawsuit was filed on behalf of attorney Mikkell Jordhal and his one-person law office. Mr. Jordhal’s firm has contracted with Arizona for twelve years to provide legal services to incarcerated individuals. In order to renew his contract, Mr. Jordhal has been asked by Arizona, pursuant to the state’s anti-boycott law, to certify in writing that his firm “is not currently engaged in a boycott of Israel.” But pursuant to his political beliefs, Mr. Jordhal is, in fact, engaged in a consumer boycott: he refuses to purchase goods from businesses supporting Israel’s occupation of Palestinian territories. He wishes to extend his boycott to his law practice. Mr. Jordhal 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.”⁷

The Kansas and Arizona laws being challenged are nearly identical to S.B. 849 and H.B. 2179. If enacted, S.B. 849 and H.B. 2179 will affect lawyers, teachers, churches, businesses, union members, and others 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 S.B. 849 and H.B. 2179 will unconstitutionally infringe on Missourians’ core political speech, in violation of the First Amendment, they will likely expose the state to a costly defense of a shameful law in the face of legal challenges brought by Missourians seeking to enforce their constitutional rights.

C. S.B. 849 and H.B. 2179 target core political speech in violation of the First Amendment

S.B. 849 and H.B. 2179 seek to stifle a human rights movement by targeting companies and non-profit organizations that decide for ethical and political reasons to support boycotts for Palestinian rights, and denying such companies and organizations the opportunity to enter into contracts with state agencies.

Government actions and restrictions, however, cannot be based on the desire to punish 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 ‘has always rested on the highest rung of the hierarchy of First Amendment values’” and is entitled to special protection.⁸ In the 1982 case *NAACP v. Claiborne Hardware Co.*, the Court specifically held that boycotts

⁶ *Koontz v. Watson*, 2018 U.S. Dist. LEXIS 14260.

⁷ A preliminary injunction request is currently pending in the Arizona lawsuit. See <https://www.aclu.org/cases/jordahl-v-brnovich-challenge-arizona-law-targeting-boycotts-israel>.

⁸ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (citing *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

“to bring about political, social and economic change,” like boycotts to achieve Palestinian rights, are unquestionably protected under the First Amendment.⁹

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, and currently, 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 supporters of Israel’s human rights abuses. Such a differentiation would constitute viewpoint discrimination prohibited by the First Amendment. Indeed, **the federal district court judge who blocked Kansas’ anti-boycott law affirmed that boycotts for Palestinian rights are political boycotts protected by the First Amendment.** He wrote:

The conduct prohibited by the Kansas Law is protected for the same reason as the boycotters’ conduct in *Claiborne* was protected. Ms. Koontz, other members of the Mennonite Church, and others have “banded together” to express, collectively, their dissatisfaction with Israel and to influence governmental action. Namely, its organizers have banded together to express collectively their dissatisfaction with the injustice and violence they perceive, as experienced both by Palestinians and Israeli citizens. She and others participating in this boycott of Israel seek to amplify their voices to influence change, as did the boycotters in *Claiborne*.¹⁰

D. Denial of public contracts, 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.¹¹ Thus, 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 [or her] constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.”¹²

In blocking Kansas from enforcing its anti-boycott law the federal court in Kansas similarly 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.’”¹³

⁹ *Id.*

¹⁰ *Koontz* at 24.

¹¹ *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.”).

¹² *O’Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996).

¹³ *Koontz* at 22 (citing *Bd. of Cty. Comm’rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 674 (1996)).

Yet this is precisely what S.B. 849 and H.B. 2179 would do. By denying public contracts to businesses because they support boycotts for Palestinian rights, S.B. 849 and H.B. 2179 seek to penalize and inhibit protected speech. “Such interference with constitutional rights,” the Kansas Court stated, “is impermissible.”¹⁴ These bills represent an action by public officials to thwart or penalize speech activities because of officials’ disapproval¹⁵ 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.

E. Penalizing companies that support boycotts for Palestinian rights will have a chilling effect on protected speech

S.B. 849 and H.B. 2179 also infringe on protected First Amendment activities by subjecting First Amendment activities to government approval and penalty. If enacted, these bills will chill free speech rights by effectively dictating that a position supporting human rights is unacceptable. The bills’ intended purpose is to intimidate non-profit organizations and businesses from adopting ethical political stances regarding Israel and Palestine—a matter of public concern—if they know that making business decisions based on human rights concerns could result in the denial of a contract with the state.

The federal court in Kansas recognized the chilling effect that the state’s anti-boycott law has on the plaintiff in that case, as well as other prospective contractors: “Plaintiff’s harm stems not from her decision to refuse to sign the certification, but rather from the plainly unconstitutional choice the Kansas Law forces plaintiff to make: She either can contract with the state or she can support a boycott of Israel. Her harm is ongoing because the Kansas Law is currently chilling plaintiff’s and other putative state contractors’ speech rights.”¹⁶

In addition, these bills would also discourage grassroots human rights advocacy aimed at pressuring companies to boycott Israel. While the bills do not directly prohibit such advocacy, they 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.”¹⁷ 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 this bill, such speech activities are likely to be chilled by this legislation.

F. Conclusion

We are committed to upholding the First Amendment rights of those standing up against human rights abuses, and ensuring that they are able to challenge orthodox views on a sensitive

¹⁴ *Id.*

¹⁵ See, for example, statements made by Missouri lawmakers and supporters of SB 849 and HB2179: http://www.stljewishlight.com/opinion/editorial/article_37e3d0de-0131-11e8-bf37-ef40cf84039e.html.

¹⁶ *Koontz* at 37.

¹⁷ *Housing Works, Inc. v. City of New York*, 72 F. Supp. 2d 402, 421 (S.D.N.Y. 1999).

political issue like Israel and Palestine without government obstruction. S.B. 849 and H.B. 2179 would punish use of an honored American tactic to effect political change solely because public officials wish to shield Israel from scrutiny. These bills are constitutionally indefensible, and their passage would 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 these bills to stand would threaten a crucial vehicle by which individuals and groups can make their collective voices heard. These bills must be withdrawn.