



July 11, 2017

Dear Hon. Members of Joint Committee on State Administration and Regulatory Oversight,

The undersigned organizations are writing to express our strong opposition to S.1689/H.1685. If enacted, this bill would require prospective state contractors to certify, under penalty of perjury, that they are in compliance with pre-existing state anti-discrimination laws and that they “do not currently, and will not during the duration of the contract, refuse, fail, or cease to do business” with others based on enumerated protected categories.

While we strongly support anti-discrimination laws, S.1689/H.1685 will add no new civil rights protections. Instead, as its supporters have made clear, S.1689/H.1685 is aimed at countering Boycott, Divestment, and Sanctions (BDS) campaigns for Palestinian rights, which use First Amendment protected nonviolent tactics to promote human rights. Regardless of your personal opinion of BDS campaigns or their methods, goals, or central claims, BDS campaigns employ First Amendment protected speech activities. A state legislature cannot try to suppress First Amendment protected speech.

Although human rights boycotts, such as boycott campaigns for Palestinian rights, do not constitute any type of discrimination, this bill is packaged as anti-discriminatory. In reality, however, the bill has serious First Amendment implications: if enacted, it could be misapplied to penalize those making ethical business decisions in line with BDS principles, and would create a chilling effect on those considering such positions.

S.1689/H.1685 specifically targets BDS campaigns

S.1689/H.1685 does not on its face appear to impact BDS campaigns. It makes no mention of BDS, Palestine, or Israel. Instead, the bill purports to address discrimination in violation of Massachusetts state law. For reasons explained below, BDS campaigns are not discriminatory.

A number of the bill's supporters, however, both inside and outside the legislature, have expressed animus towards BDS along with an acknowledgement that the intent of S.1689/H.1685 is to target BDS campaigns.

For example, in a press release authored by the Jewish Community Relations Council of Greater Boston (JCRC), Anti-Defamation League (ADL), Committee for Accuracy in Middle East Reporting (CAMERA), and other groups supporting the bill, Representative Steven Howitt, a co-sponsor of the bill, was quoted as saying: "This bill clarifies to businesses that either support BDS or who boycott Israeli-owned businesses and products that the Commonwealth of Massachusetts will not engage in commerce with them."¹

A regional representative of the ADL was quoted as saying, "This legislation recognizes and rejects the insidious and destructive nature of BDS campaigns."²

¹ The press release, titled *We Stand Together*, was released on January 20, 2017 and can be found at <https://www.jcrcboston.org/bds-we-stand-together-against-discrimination/>

² See *Ibid*.

In a JCRC action alert asking supporters to contact their legislators to express support for this bill, JCRC claims, “This bill echoes similar anti-BDS laws passed in several other states as well as an executive order in New York and underscores the strength of the Massachusetts-Israel relationship.”³

This bill offers no new civil rights protections. It creates no new protected classes, instead duplicating an existing requirement that state contractors certify under penalty of perjury that they are not engaged in discrimination.

Given that this law is redundant, that it creates no new civil rights protections, and that its supporters have been clear that its purpose is to combat BDS campaigns, we believe that it is intended to punish and chill the speech of advocates for Palestinian human rights.

BDS campaigns employ boycotts to effect political, economic, or social change, and thus constitute Constitutionally protected speech activities

Because BDS campaigns are not a form of unlawful discrimination, the bill as written should not apply to BDS. However, if enacted and enforced against BDS campaigns, it would be unconstitutional.

In 1982, the Supreme Court ruled that boycotts to “bring about political, social, and economic change” are a form of political speech, association and assembly protected by the First Amendment.⁴ Political speech receives the maximum protection afforded by the First Amendment. BDS campaigns are a response to a 2005 call from Palestinian civil society for nonviolent boycotts to be used as a tactic to pressure Israel to comply with its obligations under international law to recognize the rights of the Palestinian people. The call demands that Israel “fully [comply] with the precepts of international law by::

³ This action alert, entitled *Support Israel: Urge the Massachusetts Committee on State Administration and Regulatory Oversight to support Anti-Discrimination Language* can be found at <https://www.jcrcboston.org/jcrc-action-alert-discrimination/>.

⁴ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

1. *Ending its occupation and colonization of all Arab lands and dismantling the Wall;*
2. *Recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality;*
and
3. *Respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN resolution 194.*⁵

Regardless of what one thinks of these demands, they are undeniably demands for political change, as are boycotts seeking Israel's compliance with them. Indeed, BDS was inspired by similar boycott campaigns that helped end racial segregation in the U.S. and Apartheid in South Africa.

While the state has broad procurement powers and there is no right to receive a public benefit, the Supreme Court has for decades articulated what is known as the "unconstitutional conditions doctrine." According to this doctrine, even if someone does not have a right to receive a public benefit, they cannot be denied one due to their exercise of First Amendment protected speech.⁶

In the 1950s, the state of California required individuals to sign a loyalty oath in order to receive a tax benefit for veterans. California argued that this was not an infringement of the First Amendment, as the tax benefit was a privilege rather than a right. However, the Supreme Court stated that "[t]o deny an exemption to claimants who engage in certain forms of speech is, in effect, to penalize them for such speech. Its deterrent effect is the same as if the State were to

⁵ Please See "Palestinian Civil Society Calls for Boycott, Divestment and Sanctions against Israel Until it Complies with International Law and Universal Principles of Human Rights" (July 9, 2005). Available at <https://bdsmovement.net/call>

⁶ See *Speiser v. Randall*, 357 U.S. 513 (1958), *Perry v. Sindermann*, 408 U.S. 593 (1972); *USAID v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2332 (2013)).

fine them for this speech.”⁷

This principle has been applied far beyond the provision of tax benefits; it has been applied to any public benefit. The Supreme Court has found that the government cannot elect not to renew an employee’s contract because of their First Amendment protected speech, nor can the government require that recipients of funding to fight HIV/AIDS state their opposition to the legalization of sex work.⁸ Government contracts are a public benefit and thus cannot be denied on the basis of political views. The Supreme Court has explicitly ruled that the government cannot penalize its contractors based on their First Amendment protected political beliefs, associations, and activities.⁹ The state’s procurement powers are not exempt from the First Amendment's protection of free speech.

A Human Rights Boycott is Not National Origin Discrimination

A human rights boycott does not constitute national origin discrimination. Such boycotts do not target individuals due to national origin, but instead target a state because of human rights abuses, as well companies and institutions because of their complicity in those abuses. The intent of such boycotts is not to discriminate, but to change the political policies of a government. This concept is illustrated by the fact that in the past, Massachusetts has divested its pension funds either partially or completely from companies doing business in Sudan, Iran, Northern Ireland, and South Africa. Additionally, Massachusetts passed a law restricting state entities from buying goods from companies doing business with Burma.¹⁰

⁷ See *Speiser v. Randall*, 357 U.S. 513 (1958).

⁸ See *Perry v. Sindermann*, 408 U.S. 593 (1972); *USAID v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2332 (2013)).

⁹ See *O’Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996).

¹⁰ Shira Schoenberg, “Pension politics: The history of divestment in Massachusetts,” *Masslive* (May 8, 2014). Available at http://www.masslive.com/politics/index.ssf/2014/05/the_history_of_divestment_in_m.html

These boycotts did not discriminate against individuals because of their national origin, but attempted to influence the human rights policies of the respective nations. Similarly, those who participate in or support BDS campaigns seek to change Israeli policies that violate the human rights of the Palestinian people by boycotting institutions and companies that are complicit in or profit from these policies.

Additionally, while it is permissible for the state to boycott or divest from companies as part of a human rights boycott, this is fundamentally different from denying contracts to or investment in individuals or companies for participating in boycotts for political, social, or economic change. While the former seeks to change the policies of a foreign government, the latter seeks to deny a public benefit based on the exercise of First Amendment protected speech. Such denial violates the unconstitutional conditions doctrine, as outlined above.

Since BDS campaigns do not constitute national original discrimination, we do not regard this bill as applicable to BDS. If this bill were to be applied to BDS, it would be unconstitutional for the reasons outlined above.

Public Policy Concerns with S.1689

While the bill on its face should not limit the First Amendment rights of Palestinian human rights advocates, we are concerned that this bill will chill constitutionally protected speech, limit debate, and stifle dissent.

Robust debate strengthens our democracy and boycotts have often played a role in that debate, including boycotts of “allied nations.” In the past, the US considered the Apartheid regime in South Africa and the military junta of General Augusto Pinochet in Chile allies. Responding to calls from the African National Congress and the Worker’s United Center of Chile, respectively, international solidarity activists boycotted South Africa and Chile. In many cases, these boycotts became the main nexus of organizing solidarity campaigns. In the US,

grassroots solidarity movements played a role in altering U.S. foreign policy towards both Apartheid South Africa and the military junta of General Augusto Pinochet in Chile. And the history of boycotts is much older, both in the U.S. and around the world. During the colonial period, those seeking independence from Britain boycotted British goods. US abolitionists boycotted goods produced by slave labor. Opponents of the Japanese invasion of China boycotted stockings made from Japanese silk. Boycotts were of particular importance to the U.S. Civil Rights movement. As a result, these early boycotters are today remembered as human rights pioneers, which illustrates why the freedom to boycott US “allies” is vital to a robust democracy.

The importance of boycotts as a tactic is underscored by the fact that Massachusetts has, on five separate occasions, divested its pension fund from certain companies in order to promote social change. This is in addition to the state’s boycott of companies doing business with Burma.¹¹

The need for robust democratic debate is no less pressing with regard to Israel and Palestine. Yet, instead of promoting such a debate, S.1689/H.1685 will create substantial confusion. Prospective contractors that support, advocate for or engage in BDS could correctly assert that they are not discriminating or refusing to do business with anyone based on national origin. But if the law is incorrectly interpreted as applying to BDS activities, these contractors face rescission of their contracts or prosecution for perjury or felony. Fearful of these consequences, prospective contractors who take an ethical position to boycott companies or institutions complicit in human rights abuses may decide to halt their constitutionally protected boycotts.

¹¹ Shira Schoenberg, “Pension politics: The history of divestment in Massachusetts,” Masslive (May 8, 2014). Available at http://www.masslive.com/politics/index.ssf/2014/05/the_history_of_divestment_in_m.html.

We know that whenever the state takes measures to suppress a social movement, the effects of that suppression are felt beyond the immediate targets of the legislation in question. This bill may not on its face target BDS supporters, but the subtext is apparent to supporters of BDS and will, as a result, cast a wide chill over public discussion of the ongoing crisis in the Middle East. Support for BDS campaigns has gained significant traction in recent years, and churches, professional associations, labor unions and student governments have debated varying degrees of support for BDS. A confusing bill that is promulgated as anti-BDS will cause Massachusetts residents to think twice before speaking in favor of Palestinian rights or engaging in constitutionally-protected boycott campaigns.

Given the history of boycotts as a tool to advance human rights and social justice, and the unique role of boycotts in the U.S. and Massachusetts, the General Court should promote, protect, and defend the right to boycott, not seek to hamper it.

Conclusion

The undersigned groups are dedicated advocates of civil rights; we oppose S.1689/H.1685 precisely because it is antithetical to the promotion of civil and human rights. This bill offers no new civil rights protections, is rooted in substantial part in animus towards BDS campaigns for Palestinian rights, would violate the Constitution if applied to deny state contracts to persons or entities engaged in BDS, and will have a chilling impact on Constitutionally protected speech.

Sincerely,

Defending Rights & Dissent
Center for Constitutional Rights
National Lawyers Guild, Massachusetts Chapter
Palestine Legal