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May 10, 2016

Rep. Tim W. Brown
Ohio House of Representatives
Committee on Government Oversight and Accountability

Via email

Dear Chairman Brown,

I am writing to you regarding your hearing today on H.B. 476, a bill regarding state contracting and investment in companies that boycott Israel. I write as a scholar of constitutional and international law, as well as someone who has been closely involved in the drafting of numerous such bills in states across the country. While I am unable to attend the hearing in person, I wish to address two objections raised by opponents of these bills – that they violate the First Amendment, and that they improperly extend to territories under Israeli jurisdiction. For the reasons I will briefly outline below, these strained objections have failed to convince legislators across the country, which is why more and more states continue to opt for such laws, and to do so by overwhelming and bipartisan majorities (such as 39-0 vote in New Jersey yesterday).

A word about my relevant qualifications. I am a professor of law and have closely studied these issues. I have published dozens of academic papers in the nation's leading law reviews and peer-reviewed scholarly journals; my scholarship has frequently been cited in leading foreign relations cases in federal courts; and I have testified repeatedly before Congress, as well as before the European Parliament. I have advised congressmen and senators, state legislators, and parliamentarians from numerous Western countries on issues of international law. I attach a brief biographical statement, as well as a CV with a bibliography.

Below, I briefly explain why objections to these types of bills are misguided. I would be delighted to discuss any of these points with you at greater length at your convenience.

I. The bill is entirely consistent with the First Amendment, widespread state practice, and Supreme Court precedent.

1) The bill does not ban or restrict any speech whatsoever. A business's decision to boycott Israeli companies is not itself protected speech. The First Amendment protects speech, not conduct. Certainly a business can engage in protected speech, such as making a political

movie.[1] However, that does not mean that every business activity is speech. Most are not: Citizens United, for example, involved an obvious case – a movie about a politician. Decisions about with whom to do business are not generally regarded as speech.

The Supreme Court unanimously held in *Rumsfeld v. FAIR* that the government could deny federal funding to universities that boycott military recruiters. To be sure, the boycott was based on political considerations – but even that did not make it speech. The Court rejected that argument that dealing with military recruiters sends a message of support for the military's policies or any other kind of message:[2]

> [T]he conduct regulated by the [law] is not inherently expressive. … These actions were expressive only because the law schools accompanied their conduct with speech explaining it. … The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection.

When companies do business or don't do business with other companies, it is not generally to send a message, but to make money. Even when it comes to Israel boycotts, the act of boycotting itself does not explain a company's motives, or express any political viewpoint. Companies may boycott Israel to prevent further harassment from the BDS movement; to curry favor with Arab states; out of mere anti-Semitism; or to protest particular policies of Israel's. Unless the company explains its actions, those actions have no message. That is why the action – refusal to do business – is not speech. Only the explanation is speech.

2) The law in no way affects a company's ability to engage in speech critical of Israel. A company could hang a "Down with Israel" sign from its headquarters and still contract with the state. It is discriminatory business practices that trigger the provisions of this bill.

3) State and federal governments have many laws that deny contracts and other government business to those engaged in what the state regards as improper and unreasonable boycotts. For example, the federal and many state governments deny contracts to companies that boycott LGBT individuals (even this goes beyond the requirements and protections of generally applicable non-discrimination law).

4) Moreover, the First Amendment allows states to place conditions on those companies that wish to do business with them.[3] In particular, the Supreme Court has repeatedly held that conditioning government monies on compliance with anti-discrimination rules does not violate the First Amendment, even when the state could not constitutionally impose

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[1] Citizens United v. Federal Election Commission, (558 U.S.310 (2010); Docket No. 08-205), available *at* http://www.supremecourtus.gov/opinions/09pdf/08-205.pdf.

[2] Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006), available at https://www.law.cornell.edu/supct/html/04-1152.ZO.html.

[3] Indeed, the Supreme Court has held that the government can expressly disfavor speech of certain kinds, like speech supportive of racial discrimination. See Bob Jones University vs. U.S. 461 U.S. 574 (1983). While boycott proponents claim otherwise, the state legislatures have determined that such boycotts are a form of nationality or national origin discrimination.

those anti-discrimination rules through direct legislation.[4] And discrimination – against gays, non-Christians, or other groups – is nothing but a boycott of those groups.

Indeed, analogous anti-discrimination restrictions on government contractors are commonplace. While the First Amendment may protects a potential contractor's expression of a belief that homosexuality is wicked behavior, when the belief translates into business exclusion – in short, boycotts – the state need not do business with that contractor. As President Obama said when signing the executive order prohibiting such discrimination in government contracts, the federal government is not required to "subsidize discrimination."[5]

To take another example, state contracting laws frequently require contractors to engage in affirmative action.[6] This, despite the fact that there are sharp 14th Amendment limits on a state's ability to engage in affirmative action itself. Moreover, many contractors may oppose affirmative action politically; a natural way to show such opposition is not to practice affirmative action. Yet such an expression of political views by a business would in no way limit the state's ability to refuse to contract with that business as a result.

5) Critics of these laws are wont to cite *NAACP v. Claiborne Hardware,* where the Supreme Court found the state infringed on a constitutional right to boycott. But that case did not involve conditions on state funding, but rather a "complete prohibition" on the advocacy for, and participation in, a consumer boycott.

The Court found that a state could not ban "political meetings and organization, picketing, and speeches by multiple citizens" involved in a consumer boycott. The law being considered here, H.B. 476, does not deal with any such speech by businesses. A business could call for a boycott of Israel and organize rallies to that effect and not be affected by this bill. This bill does not affect any political speech. Nor does it ban any activity whatsoever. Rather, it is a condition on contracting, a practice that has been repeatedly upheld by the Courts and is generally uncontroversial when applied to more politically favored causes.

6) The constitutionality of this bill is further demonstrated by comparing it to existing federal anti-boycott legislation. In 1977, Congress passed a law prohibiting companies and

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[4] Grove City College v. Bell, 465 U.S. 555, 575-76 (1984); Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010).

[5] Executive Order 13672 (2012) available at https://www.whitehouse.gov/the-press-office/2014/07/21/executive-order-further-amendments-executive-order-11478-equal-employmen. Crucially, the conditions imposed by the Order go beyond anything required by generally applicable federal law – that it, it conditions contracts on companies not engaging in otherwise lawful conduct.

[6] See for example Christy Mallory and Brad Sears, *An Evaluation of Local Laws Requiring Government Contractors to Adopt Non-Discrimination and Affirmative Action Policies to Protect LGBT Employees,* The Williams Institute (February 2012) available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Govt-Contractors-Non-Discrim-Feb-2012.pdf.

individuals from participating in boycotts "fostered" by foreign countries.[7] The law was aimed primarily at boycotts of Israeli entities. These laws are far harsher than the current state bills: they actually prohibit boycott participation and punish it with fines and, under certain circumstances, up to 10 years in jail. These state contracting and pension laws prohibit nothing and punish nothing. The constitutionality of the federal law has gone largely unquestioned, and courts have upheld it in the few cases raising First Amendment challenges.[8]

7) That critics of these types of bills would have the state adopt a supposed First Amendment principle that would invalidate most state anti-discrimination protections in contracting – simply to prevent the state from extending them to the kind of discrimination dealt with by this bill – is a sign of how far out of the mainstream they are.[9]

II. The bill merely follows the overwhelmingly bipartisan decisions of Congress and most states in its definition of boycotts of Israel.

1) Congress has legislated a federal policy opposing Israel boycotts; and in two laws, passed just in the last year, it has defined boycotts of Israel as including those directed to "Israeli-controlled territories."[10] Given that federal law now contains a clear and consistent definition of boycotts of Israel,[11] it would raise serious questions of state interference in foreign affairs for the states to come up with their own territorial parameters, distinct from Congress's. Moreover, the federal laws barring private participation in boycotts of Israel and other countries also make no distinction based on the location of the boycotted company.[12] To introduce such a distinction in state law would be incongruous and improper.

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[7] See 50 U.S.C. Appendix § 2407.

[8] See *Karen Mar. Ltd. v. Omar Int'l, Inc.*, 322 F. Supp. 2d 224, 227 (E.D.N.Y. 2004) ("Section 2407 is a constitutional statute.") See also *Gen. Elec. Co. v. New York State Assembly Comm. on Governmental Operations*, 425 F. Supp. 909, 916 (N.D.N.Y. 1975) (holding that New York State legislative investigation and subpoena into companies' participation in boycott of Israel does not violate Fist Amendment).

[9] For further discussion of why such bills do not encroach on the First Amendment see, Marc Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, forthcoming in the Cardozo Law Review, available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2676307; also see Eugene Kontorovich, *Can States Fund BDS? Is Banning the use of public money to support companies that boycott Israel unconstitutional and illegal?*, Tablet Magazine (July 13, 2015), available at http://www.tabletmag.com/jewish-news-and-politics/192110/can-states-fund-bds.

[10] See, e.g. the Trade Facilitation and Trade Enforcement Act of 2015, sec. 608, available at https://www.congress.gov/bill/114th-congress/house-bill/1907/text.

[11] The effect of these provisions of the law was not in any way diminished, or purported to be diminished, by statements made by the president upon signing it. https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/25/obama-signs-israel-anti-boycott-provisions-into-law-settlements-and-all/

[12] See Amendments to the Export Administration Act of 1979, P.L. 99-64, 99th Congress (1985), available at http://uscode.house.gov/statutes/pl/99/64.pdf.

2) Not using this language would leave Ohio out of step with its fellow states and the federal government. In the last year, seven states have enacted laws dealing with Israel boycotts similar to the bill before this committee. Only one state has deviated from the "Israel and territories under its control" template, while states from Illinois, to Iowa, to Florida have used this language. In all the jurisdictions (just as it was in Congress), this language was adopted by overwhelmingly bipartisan votes. The pressure groups that are suggesting that this language is controversial or divisive are trying to politicize what has been an extraordinarily non-partisan and unifying wave of legislation. Indeed, just yesterday the New Jersey state senate *unanimously* passed a bill disallowing pension investments in companies that boycott "companies operating in Israel or Israeli-controlled territory"

3) The proposed bill does not, as its critics claim, lump together Israeli settlements with Israel proper. Indeed, it distinguishes sharply between them. The bill speaks of two distinct areas: "Israel" and "Israeli-controlled territories." That means that those "territories" are something different from "Israel." To be sure, the law opposes boycotts of both areas, but that is not conflating them any more than opposing sex or race discrimination by companies in both areas would be conflating them. In any case, it is not for the states to decide how to relate to the territories in question. Congress, which has the exclusive power over Foreign Commerce, has given these territories the same customs status as Israel.[13] It would be incongruous for the states to legislate different geographic parameters for Israel boycotts from those decided on by Congress.

4) Using the language "territories" is necessary, as it includes West Jerusalem, Israel's capital and very much not a settlement, within the scope of the state legislation. As a result of the Supreme Court's holding in *Zivotofsky v. Kerry*,[14] statutory references to Israel cannot be interpreted to include West Jerusalem. This does not mean U.S. statutes cannot apply to this area – only that they need to use different language, such as "territories under Israeli control," to achieve this. Without such language, the statute would effectively permit discriminatory boycotts of businesses operating in Israel's "pre-1967" borders.

5) This bill does not support settlements, nor does it confer legitimacy on them. The question of whether one opposes or supports settlements is distinct from what the rules dealing with economic activity there should be. These bills are not about settlements – places where people live. Rather, they are about companies in the region – places where people do business. One can have settlements without business activity and business activity without settlements. For example, most people living in the West Bank make their living inside the Green Line (within Israel's "pre-1967" borders); and there is much business activity outside of the Green Line that is done without settlements — many Israeli factories employ local Palestinians, or even Israelis who reside inside the Green Line.

[13] U.S.-Israel Free Trade Implementation Act, 1996 Amendments. Cited in my Columbia int'l law article

[14] See Zivotofsky v. Kerry, 135 S. Ct. 2076, 2095 (2015).

6) Business in these areas is entirely legal under international law,[15] as every court to consider the issue in recent years has clearly ruled.[16] Indeed, just a few months ago the European Court of Justice broadly ruled that international law does not restrict an occupying power's ability to conduct business in territory which it occupies, even when it conflicts with the self-determination of the local people.[17]

7) This bill is essentially an anti-discrimination provision. Boycotts of companies for their Israel-related activities share the fundamental flaw of discriminatory conduct: they seek to punish companies and people not based on their own conduct, but based on their national associations. Just as gender or sexual orientation discrimination by state contractors would be no more acceptable if it took place in a politically disputed territory, the discrimination manifest in Israel boycotts is not mitigated by its locus.

Thank you for your time.

Sincerely,

Professor Eugene Kontorovich

[15] See Eugene Kontorovich, *Economic Deals with Occupied Territories*, Columbia Journal of Transnational Law (Volume 53, Number 3) (2015) available at http://jtl.columbia.edu/economic-dealings-with-occupied-territories/.

[16] See, for example, Richardson v. Director of Public Prosecutions, [2014] UKSC 8 (Eng.).

[17] Case T-512/12 Fronte Polisario v. Council of the European Union [2015], available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=172870&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=164110.