AMERICAN CIVIL LIBERTIES UNION of MARYLAND

Testimony for the Senate Budget and Taxation Committee
March 1, 2017

SB 739 – Procurement and Pensions – State Sanctions – Boycott of Israel

OPPOSE

SB 739 would prohibit the state or any "public body" from entering into or renewing a contract with, among others, any person, governmental instrumentality, corporation, or non-profit organization that supports or promotes a boycott of Israel. The Bill would also require the State's pension plan to divest from any investment funds that include companies participating in or supporting a boycott of Israel. Finally, the Bill requires the State to create, and publish, a list of persons and organizations that participate in or support such a boycott.

While we take no position on the underlying boycott, we do oppose the bill, as it is inimical to democratic principles. The bill penalizes a point of view deemed unacceptable by government officials. It would allow the state to assume the role of censor in matters of political controversy.

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It is well-accepted that boycotts are fully protected speech under the First Amendment to the United States Constitution. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 907-915 (1982) (holding politically motivated boycott of white businesses to be constitutionally protected expressive conduct, and rejecting imposition of tort liability on organizers and participants). Yet SB 739 directs the state to retaliate against individuals and entities that participate in a boycott of Israel, simply because the state disagrees with the boycott.[1]

Such a directive by the state violates the First Amendment. The United States Supreme Court in *O'Hare Truck Svc. v. City of Northlake*, 518 U.S. 712, 717 (1996), held that the government is constitutionally prohibited from making political beliefs or affiliations a condition of receiving public contracts: "'[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. . . . Such interference with constitutional rights is impermissible.'" (Citations omitted). *See also Elrod v. Burns*, 427 U.S. 347, 372-73 (1976) (establishing a categorical rule that governments cannot discharge non-policymaking employees simply because of their political beliefs); *Oscar Renda Contracting, Inc. v. City of Lubbock*, 463 F.3d 378 (5th Cir. 2006) ("Since First Amendment rights have been afforded to individuals applying for employment with the government, no different result should be afforded to bidders.").[2]

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[1] As opposed to simply directing the institutions to refrain from participation, which would clearly violate the First Amendment, *see id*.; *Agency for Int'l Dev. v. Alliance for Open Society*, 133 S.Ct. 2321, 2327 (2013) (requirement that recipients of federal funding agree with government's opposition to prostitution and sex trafficking, "[w]ere it enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment.")).

[2] Multiple district courts have found unconstitutional limitations similar to those SB 739 seeks to create. *Del Valle Grp. v. P.R. Ports Auth.*, 756 F.Supp.2d 169, 181 (D.P.R. 2010); *Snodgrass v. Doral Dental*, No. 3:08-0107, 2008 WL 2718911, at *11 (M.D.

By explicitly making nonparticipation in a boycott a condition for receiving or continuing to receive a state contract, the Bill raises an unconstitutional conditions problem often seen in government spending cases. As recently as 2013, the Supreme Court clarified the rule governing statutes that create explicit speech-burdening conditions on the expenditure of government funds: "[T]he relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program . . . and conditions that seek to leverage funding to regulate speech outside the contours of the program itself."[3] *Id*. at 2328. In this case, it is hard to see how a company's decision to boycott a particular nation is related to its ability to perform a contract for which it bids. Instead, the Bill seeks to use the State's economic leverage to discourage protected boycott activity, entirely unrelated to the contract.

Finally, we note that those that would be blacklisted – and barred from providing state-contracted services or holding state investments – include the Presbyterian Church, the United Methodist Church, the United Church of Christ, Barclay's Bank, the American Anthropological Association and the United Electrical Workers.

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For the foregoing reasons, the ACLU of Maryland opposes SB 739 and urges an unfavorable report.

Tenn. July 10, 2008); *Yadin Co. v. City of Peoria*, No. CV-06-1317-PHX, 2007 WL 63611, at *4-5 (D. Ariz. Jan. 8, 2007).

[3] Accordingly, as the Court has held, while states may create a limited funding stream to be expended only on a specific type of speech, they may not retaliate against speakers with whom they disagree by denying them funding. *Compare Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that governments could choose to fund pregnancy prevention programs, but not abortion services) *with Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) (finding that the State could not withhold funding from a general fund to a publication because the publication was religious).