



*via e-mail*

Hon. Joe Negron  
412 Senate Office Building  
404 South Monroe Street  
Tallahassee, FL 32399

October 19, 2015

Re: First Amendment concerns with S.B. 86

Dear Senator Negron,

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 S.B. 86. This bill would create a blacklist of companies that boycott Israel and would prohibit public entities from contracting with those companies. This bill would also prohibit the Florida Retirement System pension plan from investing in blacklisted companies. Regardless of one's views on Israel and Palestine, S.B. 86 targets core political speech and infringes on the freedom to express political beliefs.

Because S.B. 86 is unconstitutional and violates basic American values and democratic principles, we urge you to withdraw it.

#### **A. S.B. 86 targets core political speech in violation of the First Amendment**

S.B. 86 was introduced at a time when Palestinian human rights activists in the United States and elsewhere have embraced boycotts as a way 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. This bill seeks to stifle this human rights movement by blacklisting companies that decide for ethical reasons to boycott Israel because of its human rights abuses, by denying such companies the right to enter into contracts with any state entity, and by requiring the state's pension funds to divest from blacklisted companies.

But government actions and restrictions 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 occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."<sup>1</sup> The Court has specifically held that boycotts "to bring about political, social and economic change," like the movement to boycott Israel, are unquestionably protected under the First Amendment.<sup>2</sup>

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

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<sup>1</sup>*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982).

<sup>2</sup> *Id.*

U.S., the apartheid regime in South Africa, and currently, fossil fuel companies. Moves to boycott 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.

It is important to differentiate S.B. 86 from actions Florida has already taken against companies that have “prohibited business operations” in Iran and Sudan.<sup>3</sup> Florida’s restrictions on certain Iran and Sudan-based companies arise from the fact that the U.S. State Department has designated those countries as state sponsors of terrorism.<sup>4</sup> This is very different than the goals of S.B. 86, which targets companies based on their core political speech.

### **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.<sup>5</sup> 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 constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.”<sup>6</sup>

Yet this is precisely what S.B. 86 would do. By denying public contracts to businesses that boycott Israel, S.B. 86 seeks to penalize and inhibit protected speech. Similarly, prohibiting pension funds from investing in companies because they seek to uphold human rights would be tantamount to denying a benefit because of constitutionally protected speech. “Such interference with constitutional rights,” the Court stated, “is impermissible.”<sup>7</sup>

This bill represents an action by public officials to thwart or penalize speech activities because of the officials’ disapproval of the content, and therefore is exactly the type of action that courts have recognized violates the First Amendment. If passed, it would be subject to constitutional challenge.

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

S.B. 86 also infringes on protected First Amendment activities by subjecting political positions to government approval and penalty. This bill 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.

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<sup>3</sup> Protecting Florida’s Investments Act, Chapter 2007-88, Laws of Florida; also, see Senate Bill 2142 (reg. session 2007).

<sup>4</sup> See U.S. Department of State, Diplomacy in Action, <http://www.state.gov/j/ct/list/c14151.htm>.

<sup>5</sup> *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.”)

<sup>6</sup> *O’Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996).

<sup>7</sup> *Id.*

In addition, this bill would also discourage grassroots human rights advocacy aimed at pressuring companies to boycott Israel. While the bill does not directly prohibit such advocacy, it 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."<sup>8</sup> 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.

#### **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. S.B. 86 would punish individuals and companies that use an honored American tactic to effect political change, solely because public officials disagree with that tactic in this context. This bill is constitutionally indefensible, and its passage 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 this bill to stand would threaten a crucial vehicle by which individuals and groups can make their collective voices heard.

Sincerely,

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Staff Attorney, Palestine Legal

Maria LaHood  
Deputy Legal Director, Center for Constitutional Rights

Mara Shlackman  
Vice President, South Florida Chapter, National Lawyers Guild

Laila Abdelaziz  
Legislative & Government Affairs Director, CAIR Florida

*Cc: Appropriations Subcommittee on General Government*

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<sup>8</sup> *Housing Works, Inc. v. City of New York*, 72 F. Supp. 2d 402, 421 (S.D.N.Y. 1999).