



Testimony for the House Government, Labor, and Elections Committee

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HB 1382 - State Procurement - Prohibited Certifications - Boycotts of Foreign Countries

FAVORABLE

OLIVIA SPACCASI
PUBLIC POLICY PROGRAM
ASSOCIATE

AMERICAN CIVIL
LIBERTIES UNION
OF MARYLAND

3600 CLIPPER MILL ROAD
SUITE 200
BALTIMORE, MD 21211
T/410-889-8555
or 240-274-5295
F/410-366-7838

WWW.ACLU-MD.ORG

OFFICERS AND DIRECTORS
COREY STOTTLEMYER
PRESIDENT

DANA VICKERS SHELLEY
EXECUTIVE DIRECTOR

ANDREW FREEMAN
GENERAL COUNSEL

The ACLU of Maryland urges a favorable report on HB 1382 which seeks to prohibit the State of Maryland from requiring companies that bid for state contracts to certify that they are not boycotting a foreign country.

In 2017, Governor Hogan issued an executive order prohibiting the awarding of government contracts to companies that engage in boycotts, divestment from, or sanctions against Israel.¹ This executive order is still in place. The ACLU of Maryland believes that this requirement is unconstitutional. HB 1382 would remove these arbitrary requirements, which have no bearing on whether a company is otherwise fit to fulfill their contractual obligations. Instead, the bill protects the First Amendment rights of companies seeking such contracts and ensures that they don't have to choose between economic opportunities and their constitutional rights.

While we take no position on boycotts of Israel or any other foreign country, we oppose the restrictions under the current executive order because they obstruct democratic principles protecting freedom of speech and political expression. By penalizing a point of view deemed unacceptable by government officials, the current order establishes a dangerous precedent. It paves the way for the state to act as a censor in matters of academic controversy and stifles open debate.

It is well-accepted that boycotts are fully protected speech under the First Amendment to the United States Constitution. In *NAACP v. Claiborne Hardware*, 458 U.S. 886, 907-915 (1982), the Supreme Court ruled that the NAACP's politically motivated boycott of white businesses was protected under the First Amendment and the NAACP was not liable for any damages their non-violent boycott had on those businesses. The current executive order remains in direct contention of this protection by essentially

¹ Exec. Order No. 01.01.2017.25, Prohibiting Discriminatory Boycotts of Israel in State Procurement, Md. Code Regs. 01.01.2017.25 (2017).



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commanding the state to retaliate against individuals and entities that participate in a boycott of Israel, simply because the state disagrees with the boycott.

Such directives conditioning government contracts on nonparticipation in unrelated, peaceful political activity are inapposite to the First Amendment. In *O’Hare Truck Svc. v. City of Northlake*, 518 U.S. 712, 717 (1996), the United States Supreme Court 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.” In *Elrod v. Burns*, 427 U.S. 347, 372-73 (1976), the Supreme Court ruled that non-policymaking government employees cannot be hired or fired based on political beliefs. In *Oscar Renda Contracting, Inc. v. City of Lubbock*, 463 F.3d 378 (5th Cir. 2006), the Fifth Circuit Court stated, “Since First Amendment rights have been afforded to individuals applying for employment with the government, no different result should be afforded to bidders.” This ruling confirms that bidders with no pre-existing contracts with a government are entitled to bring a claim of retaliation under the First Amendment. Recently, two federal courts have also agreed that anti-boycott laws can violate the First Amendment.²

In addressing the overbearing restrictions imposed by Governor Hogan’s executive order, HB 1382 seeks to resolve these constitutional concerns. 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 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 executive order weaponizes

² See *Jordahl v. Brnovich*, 336 F. Supp. 3d 1016 (D. Ariz. 2018) and *Koontz v. Watson*, 283 F. Supp. 3d 1007 (D. Kan. 2018).

³ *Agency for International Development v. Alliance for Open Society International, Inc.* United States Supreme Court 570 U.S. 205, 133 S. Ct. 2321 (2013)



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state contracts to punish businesses for their political views, using the state's economic leverage to suppress protected boycott activity.⁴

Opponents may argue that laws restricting participation in political protests against Israel (widely known as “anti-BDS laws”) are meant to prevent and disincentivize discrimination. However, this belief creates a false equivalency between two distinct types of policies. Anti-discrimination requirements for government contractors are meant to prevent the state from working with those who discriminate against people for who they are – such as race, religion, sex, sexual orientation, or sexual identity. Identity-based discrimination is not protected by the First Amendment. Instead, our society has an overriding interest in making sure that people are treated as equals in public accommodations. Refusing to purchase consumer goods or services to protest a country's actions does not deny anyone access to public accommodations based on who they are. Boycotts are classic form of protected political expression.

The current regime is one that forces contractors to choose between economic and professional growth and their constitutional rights. Such requirements are antithetical to Maryland's reputation as a haven for free expression. The General Assembly must take steps to ensure that this practice will not continue.

For the foregoing reasons, the ACLU of Maryland urges a favorable report on HB 1382.

⁴ This remains clear despite the Supreme Court's recent refusal to consider an appeal of an Eighth Circuit decision diverging from the aforementioned cases when considering an Arkansas anti-BDS law similar to Governor Hogan's executive order. See *Arkansas Times LP v. Waldrip*, 143 S. Ct. 774, 215 L. Ed. 2d 46 (2023) (denying cert.).