

In the name of God, the Most Compassionate, the Most Merciful.
All praise and thanks belong to God, the Lord of the Worlds.
May peace and prayers be upon Prophet Muhammad and his family.



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TO: Members of the Virginia House of Delegates Committee on General Laws, Subcommittee #4

RE: CAIR Comments in Opposition to Unconstitutional, Anti-Free Speech Measure HB 1161

Dear Chairman Jeffrey Campbell and Member of the General Laws Subcommittee #4:

On behalf of the Council on American-Islamic Relations (CAIR), the nation's largest Muslim civil rights and advocacy organization, we write to submit these comments to Virginia House of Delegates Committee on General Laws, Subcommittee #4, regarding HB 1161 Virginia Public Procurement Act.

We strongly recommend that the committee oppose and vote "NO" on the advancement of this unconstitutional measure.

HB 1161 would place an unlawful burden on government contractors and their employees' freedom of speech by requiring many companies "to agree to," that they are not, or will not for the duration of their contract, engage in a boycott of Israel:

"The contractor will not, during the performance of the contract, engage in a boycott of Israel, its instrumentalities, or any of its territories."

Under HB 1161, a business owner could boycott any U.S. state, the federal government, Canada, or Mexico without any consequence. But a business owner's boycott of Israel would disqualify a person from doing business with Virginia. This kind of viewpoint-specific oath, designed for the benefit of a single foreign nation, is an obvious violation of the First Amendment.

HB 1161 Violates the Constitution of Virginia and the Constitution of the United States

The Constitution of Virginia, Article I. Bill of Rights, Section 12, Freedom of speech and of the press; right peaceably to assemble, and to petition, clearly states:

*“That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; **that any citizen may freely speak, write, and publish his sentiments on all subjects**, being responsible for the abuse of that right; **that the General Assembly shall not pass any law abridging the freedom of speech** or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.”*

HB 1161 ban on Virginia contractor’s right to boycott is a clear violation of the state of Virginia and U.S. Constitution’s free speech protections.

Similar anti-boycott measures have been enacted in more than 20 other states as part of an effort to block the growing Boycott, Divestment and Sanctions (BDS) movement. Modeled after the global South African anti-apartheid movement, the BDS movement’s stated goal is to pressure the Israeli government to end its illegal occupation of Palestinian territory.

CAIR, the American Civil Liberties Union, and other civil rights organizations have filed free speech lawsuits against anti-BDS laws in Georgia, Arkansas, Arizona, Maryland, and Texas, where we won a landmark legal victory in 2019.

A [federal court in Texas held](#) that the state’s anti-boycott law, which is similar to HB 1161, “threatens to suppress unpopular ideas” and “manipulate the public debate” on Israel and Palestine “through coercion rather than persuasion.” The Court concluded: “This the First Amendment does not allow.”¹ We believe that the Constitution of Virginia’s Bill of Rights would also not allow it.

HB 1161 is clearly designed to suppress Palestinian human rights activism within the state of Virginia by prohibiting government contractors from boycotting Israel, in violation of the First Amendment, which bars Virginia from using government contracts as a vehicle for content-based discrimination.

The First Amendment equally binds the State of Virginia through the incorporation doctrine of the Fourteenth Amendment.

State governments have “no power to restrict expression because of its message, its ideas, its subject matter, or its content.”² Government contractors “are [also] constitutionally protected from dismissal for refusing to take an oath regarding their political affiliation.”³

Under HB 1161 government contractors would remain free to boycott other countries in the Middle East, or elsewhere around the world, or to boycott any U.S. state, company, or cause.

¹ SEE: *Amawi v. Pflugerville Independent School District*, 373 F. Supp. 3d 717 (W.D. Tex. 2019)

² SEE: *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015)

³ SEE: See *Bd. of Cty. Comm’rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 674–75 (1996)

Should HB 1161 become law, it would only target anti-Israel boycotts. Such a content distinction would easily trigger strict scrutiny under the First Amendment.

Boycotting Israel is Free Speech, Not Anti-Semitism

The relationship between Israel and Palestine is an internationally significant political conflict. The merits of all perspectives on Israel and Palestine, including the United States' related political actions, are robustly and publicly debated by governments, politicians, academics, non-profit organizations, businesses, and media institutions in the United States and around the world.

The conflict between Israel and Palestine is a longstanding issue of considerable public concern and participating in boycotts of Israel to express objection over the government of Israel's discriminatory treatment of Palestinians is protected free speech, and not rooted in anti-Semitism.

The U.S. District Court of Kansas reaffirmed this point when it ruled on another anti-BDS law like HB 1161. There the court found that such protests seek to band individuals together "to express, collectively, their dissatisfaction with Israel and to influence governmental action...[They] and others participating in this boycott of Israel seek to amplify their voices to influence change, as did the boycotters in *Claiborne*."⁴

(See below for more information on *NAACP v. Claiborne Hardware Co.*)

HB 1161 Would Cost the State of Virginia Hundreds of Thousands of Dollars in Legal Fees

If adopted, HB 1161 would ultimately be challenged by a government contractor that supports the growing boycott movement of goods and services from Israel – costing the state of Virginia hundreds of thousands of dollars in legal fees, as the law would be found unconstitutional.

The state of Virginia would end up like the state of Texas, which is currently on appeal to avoid paying out the \$150,000 in legal fees that it owes.

Participating in Domestic and International Boycotts is American

The founding story of America, taught to elementary school students nationwide, begins with colonial boycotts protesting British taxes on tea. Boycotts have served critical expressive purposes at other times in American history.

During the Civil Rights Movement, black citizens in Mississippi "presented white elected officials with a list of particular demands for racial equality and integration."⁵ When those demands

⁴ SEE: *Koontz v. Watson*, 283 F. Supp. 3d at 1022 (enjoining Kansas anti-BDS law)

⁵ SEE: *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 889 (1982)

were not satisfied, the NAACP called for a complete boycott of the area's white merchants. "The boycott was supported by speeches and nonviolent picketing. Participants repeatedly encouraged others to join in its cause."⁶ In response, white merchants sued boycott participants to enjoin future boycotts and recover business losses.

The Supreme Court in *Claiborne* recognized that non-violent boycotts constitute "form[s] of speech or conduct that [are] ordinarily entitled to protection under the First and Fourteenth Amendments."⁷

The Supreme Court also held that a State's "broad power to regulate economic activity" simply does not extend to "prohibit[ing] peaceful political activity such as that found in [a] boycott" which expresses concern on critical public issues and showcases a desire for self-government."⁸ Such activity "rest[s] on the highest rung of the hierarchy of First Amendment values."

Other federal courts have relied on *Claiborne* to conclude that politically-motivated boycotts of Israel are fully protected expressive activity. "Collective boycotting activities undertaken to achieve social, political or economic ends is conduct that is protected by the First Amendment."⁹

Conclusion

For the reasons outlined above, we once again strongly recommend that the Virginia House of Delegates General Laws Subcommittee #4 oppose and vote "NO" on the advancement HB 1161. By opposing HB 1161, the committee would be upholding the freedom of speech rights enshrined in both the Constitution of Virginia and the Constitution of the United States.

For more information or resources on our written comments, please contact us at info@cair.com.

Sincerely,



Robert S. McCaw
CAIR Director of Government Affairs Department

⁶ Id. at 907

⁷ Id. at 907, 915

⁸ Id. at 913.

⁹ SEE: *Jordahl v. Brnovich*, 336 F. Supp. 3d at 1041 (D. Ariz. 2018) (enjoining Arizona anti-BDS law)