

January 27, 2022

To: Members of the House of Delegates' Committee
on General Laws

Re: HB 1161, Virginia Public Procurement Act;
required contract provisions, prohibition

Dear Members of the Committee on General Laws:



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The ACLU of Virginia opposes HB 1161, legislation that prohibits state bodies from contracting or subcontracting with businesses that “engage in a boycott of Israel, its instrumentalities, or any of its territories.” As introduced, this bill targets core political speech and infringes on the freedom of business owners to express their political beliefs.

Government contract restrictions cannot be based on the desire to punish First Amendment activities that aim to influence public opinion on our nation’s policies. Accordingly, federal courts have repeatedly found that bills targeted at restricting boycotts of Israel—bills identical in substance to this one—violate the Constitution.¹

Violates Fundamental First Amendment Principles

The United States 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.”² Boycotts designed “to bring about political, social and economic change” through speech, association, and assembly are unquestionably protected by the First Amendment.³

The movement to boycott and divest from Israel is similar to other boycotts held throughout our nation’s history. For example, advocacy for economic action against Apartheid in South Africa, pre-Civil War protests against slavery, and the Montgomery bus boycott were all conducted to influence public policy and elected officials and to bring about social change. The boycotts that HB 1161 seeks to ban are core political speech and deserve the “special protection” afforded by the First Amendment. Governmental discrimination against participants

¹ See “Third Federal Court Blocks Anti-BDS Law As Unconstitutional,” ACLU (April 25, 2019), <https://www.aclu.org/press-releases/third-federal-court-blocks-anti-bds-law-unconstitutional>.

² *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982).

³ *Id.*

in boycotts simply because the cause is unpopular would constitute viewpoint discrimination prohibited by the First Amendment.

Denial of Government Contracts Based on Speech Violates the First Amendment

A public official's denial of funding, where motivated by a desire to suppress speech, is prohibited by the First Amendment.⁴ The United States Supreme Court has repeatedly affirmed that government officials' determinations about what views are acceptable for others to express cannot infringe on individuals' First Amendment rights to freely express their political views.⁵ Thus, courts have found "where the denial of a benefit, subsidy or contract is motivated by a desire to suppress speech in violation of the First Amendment, that denial will be enjoined."⁶

Although the government is under no obligation to provide various kinds of benefits, it may not deny them if the reason for the denial would require a choice between exercising First Amendment rights and obtaining the benefit. "[T]he government cannot avoid the reach of the First Amendment by acting indirectly rather than directly."⁷ As such, Virginia may not constitutionally prohibit public contracts to businesses where the animating motivation is the desire to suppress speech.

For all of these reasons, the ACLU of Virginia opposes HB 1161, and asks you to do so as well.

Very truly yours,



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⁴ *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943).

⁵ *Id.* at 642 ("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.").

⁶ *Brooklyn Inst. of Arts & Scis. v. City of New York*, 64 F. Supp. 2d 184, 200 (E.D.N.Y. 1999).

⁷ *Id.*



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FOUNDATION

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