



Info@ZachorLegal.org

March 16, 2018

State of Kansas, House Committee on Federal and State Affairs

Re.: House Bill No. 2778

On behalf of Zachor Legal Institute (“**Zachor**”), the undersigned asks the House Committee on Federal and State Affairs to support House Bill No. 2778 (“**HB 2778**”).

By way of background, Zachor has been active in legal issues relating to civil liberties and the Constitution and has an active United States Supreme Court practice. The founder of Zachor is the author of a number of legal papers analyzing constitutional issues with an emphasis on anti-discrimination laws and the First Amendment. In particular, Zachor’s scholarship on the so-called “BDS Movement” has been instrumental in the reviews by state and federal authorities on the legality of laws limiting participation in the BDS Movement and has been cited by numerous scholars and advocacy organizations.

Relevant for the purpose of this letter are Zachor’s founder’s papers “The BDS Movement: That Which We Call A Foreign Boycott, By Any Other Name, Is Still Illegal” (the “**RWU Paper**”, published in the Roger Williams Law Review and available for download at https://docs.rwu.edu/rwu_LR/vol22/iss1/2/), “The Inapplicability Of First Amendment Protections To BDS Movement Boycotts” (the “**Cardozo Paper**”, published in the Cardozo Law Review and available for download at <http://www.cardozolawreview.com/content/denovo/GREENDORFER.denovo.37.pdf>) and “Boycotting The Boycotters: Turnabout Is Fair Play Under The Commerce Clause And The Unconstitutional Conditions Doctrine” (the “**Campbell Paper**”, published in the Campbell Law Review and available for download at <http://campbelllawreview.com/boycotting-boycotters-turnabout-fair-play-commerce-clause-unconstitutional-conditions-doctrine/>).

Like the existing Kansas law that HB 2778 will amend, HB 2778 is a response to the spread of a discriminatory hate movement that targets a specific country and those of a specific national origin. The BDS Movement is not a legitimate peace and rights movement. The BDS Movement was formed by radical extremists who also are affiliated with groups that are

designated terrorist organizations, such as Hamas and the Popular Front for the Liberation of Palestine.¹

While BDS organizations often claim that their activities are protected by the First Amendment, this claim is false. HB 2778 addresses a discriminatory foreign movement that attempts to inject foreign conflicts in American commerce and policy. In particular, the bill, like many others adopted by other states, focuses on ensuring that the State of Kansas will not enter into contracts with business entities who engage in discriminatory activity, including, but not limited to, unlawful boycotts of Israeli businesses and Americans of Israeli origin that are currently being promoted by certain groups. As the Campbell Paper demonstrates, laws of this nature are in full compliance with relevant constitutional standards. HB 2778 does not limit the individual right of free expression and Kansans will continue to have unfettered rights to speak out on any topic, including opposition to Israel. The only thing HB 2778 does is allow the state to not enter into contracts with businesses that participate in discriminatory activities.

As an initial matter, Zachor respectfully notes that the litigation that prompted the introduction of HB 2778 has been misconstrued and the federal district court did not follow precedent in issuing a preliminary injunction in *Koontz v. Watson*, Case No. 17-4099-DDC-KGS (D. Kan., Jan. 30, 2018). In *Koontz*, existing Kansas law (K.S.A. 2017 Supp. 75-3740e and 75-3740f) was challenged on First Amendment grounds. In responding to the *Koontz* plaintiff's motion for a preliminary injunction, however, the Attorney General of the State of Kansas chose to defer its arguments on the infirmities with the *Koontz* plaintiff's First Amendment arguments and instead responded solely with procedural arguments. The *Koontz* plaintiff even noted this anomaly in its reply to the State of Kansas' response. As a result, the *Koontz* court was briefed only on the *Koontz* plaintiff's interpretation of First Amendment caselaw. The *Koontz* plaintiff's brief provided a distorted and legally indefensible interpretation of relevant caselaw. As a result, the *Koontz* court was not properly briefed. That court granted the *Koontz* plaintiff's motion for preliminary injunction in reliance on the Plaintiff's uncontested and erroneous First Amendment arguments. The *Koontz* memorandum and order, therefore, should be seen by the Kansas Legislature as akin to a default judgment and that court's wholesale adoption of the *Koontz* plaintiff's First Amendment theories should be disregarded by the Kansas Legislature. For a counterpoint to the *Koontz* court's misapplication of First Amendment precedent, see the Cardozo Paper.

Zachor recently filed a brief in federal court in support of the State of Arizona's anti-BDS law (which was challenged on the same grounds as the Kansas law in *Koontz*, by the same counsel) and in that brief, we explained in detail the unsupportable legal conclusions contained in the *Koontz* memorandum and order. The amendments to existing Kansas law that will be implemented by the enactment of HB 2778 will bring Kansas law on the subject of BDS boycotts

¹ See the RWU Paper at 29–40. See, also, Congressional testimony of Dr. Jonathan Schanzer on April 19, 2016, outlining the ties between supporters of the BDS Movement and supporters of Hamas. <http://docs.house.gov/meetings/FA/FA18/20160419/104817/HHRG-114-FA18-Wstate-SchanzerJ-20160419.pdf> and an examination of ties between BDS and the Popular Front for the Liberation of Palestine by the Foundation for Defense of Democracies, <http://thehill.com/blogs/congress-blog/foreign-policy/303970-boycott-divestment-and-sanctions-movement-attracting>.

against Israel much closer to those of other states, including Arizona. A copy of Zachor's brief in the Arizona case can be obtained at <https://papers.ssrn.com/abstract=3127176>. Furthermore, the Attorney General of the State of Arizona responded to the lawsuit with a full constitutional defense of state anti-BDS laws that follows the arguments made in Zachor's scholarship.

While Zachor believes that existing Kansas law complies with all constitutional requirements, we also believe that HB 2778 will provide logical refinements to existing law to ensure that the rights of individuals to engage in valid political expression are not inadvertently affected by the state's anti-discrimination law.

It must, however, be noted that those who oppose existing Kansas law, and who likely will oppose HB 2778, do so based on a blatant misreading of the Supreme Court's holding in *NAACP v. Claiborne Hardware Co.*²

The claim that the *Claiborne* case stands for the legal principle that all boycotts are protected speech under the First Amendment is an utterly baseless distortion of *Claiborne*, as *Claiborne* did not provide blanket First Amendment protection for all boycott activity. Indeed, the *Claiborne* opinion spoke only to primary boycotts related to the assertion of independent Constitutional rights (14th Amendment rights, in particular). The *Claiborne* opinion **specifically excluded** other boycott activity from First Amendment protection, including secondary boycotts (which is precisely what anti-Israel boycotts are) and boycotts that are unrelated to the assertion of independent Constitutional rights. Whatever else may be said about the situation between Israel and the Palestinians, it is most certainly not a conflict to which the 14th Amendment, or any other provision of the Constitution, applies. Thus foreign-sourced boycotts of Israel that are promoted in the US are not protected by *Claiborne*.

Furthermore, a subsequent Supreme Court case, *International Longshoremen's Association, AFL-CIO v. Allied International, Inc.*³, dealing with a domestic boycott in reaction to a conflict involving a foreign nation, explicitly upheld the Constitutionality of laws that restrict boycott activity that was remarkably similar to BDS Movement boycotts

Additionally, under a long line of Supreme Court caselaw, it is well settled law that when a state is acting in commerce as a market participant, rather than a regulator, it may make commercial decisions that reflect the state/commonwealth's unique interests. This means that when acting as a consumer, a state or commonwealth can choose to not do business with a particular party/group for any number of reasons.

It is quite common for federal, state and local agencies to require that contract parties certify that they will abide by applicable anti-discrimination law.⁴

² 458 U.S. 886 (1982).

³ 456 U.S. 212 (1982).

⁴ See, e.g., U.S. Department of Labor contractors' requirements: <https://www.dol.gov/ofccp/regs/statutes/eo11246.htm> and the California State Contracting Manual at Section 7.65. <http://www.dgs.ca.gov/Portals/32/Users/141/25/3725/8%20Pages%20from%20SCM%20June%202017-3.pdf>.

By clarifying that the law only applies to business entities and narrowing the scope of the types of contracts that will require certifications, HB 2778 will remove any potential for misapplication of Kansas' anti-discrimination law and will also solidify its compliance with relevant constitutional standards.

Sincerely,

A handwritten signature in black ink, appearing to read "Marc Greendorfer". The signature is fluid and cursive, with the first name "Marc" written in a larger, more prominent script than the last name "Greendorfer".

Marc Greendorfer