



TESTIMONY OF
VIGNESH GANAPATHY
POLICY DIRECTOR, AMERICAN CIVIL LIBERTIES UNION OF KANSAS
IN OPPOSITION TO HB 2778
KANSAS HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE

MARCH 16, 2018

Thank you, Chair Barker, and members of the Federal and State Affairs Committee for affording us the opportunity to provide testimony on HB 2778.

The American Civil Liberties Union (ACLU) of Kansas is a non-partisan, non-political membership organization dedicated to preserving and strengthening the constitutional liberties afforded to every resident of Kansas. We work to preserve and strengthen our constitutional rights and freedoms through policy advocacy, litigation, and education. We proudly serve over 30,000 supporters in Kansas and represent more than 1.6 million supporters nationwide.

The ACLU of Kansas strongly opposes HB 2778. This bill would infringe on the freedom of organizations to express their political beliefs by prohibiting state governmental entities from contracting with an organization engaged in “a boycott of Israel,” if that organization is conducting over \$100,000 worth of business in aggregate goods and services on behalf of the state. We take no position on the question of the boycotting practice itself, as it falls outside of our purview. However, we strongly support the constitutionally protected right to protest and boycott. This bill would have broad, harmful implications for those who wish to express political stances and engage in constitutionally-protected activity, making this bill vulnerable to a legal challenge.

This bill appears intended to skirt litigation against the state challenging last year’s HB 2409 without addressing the underlying constitutional issue. **The ACLU has won a preliminary injunction against the state for this unconstitutional legislation.** This bill continues to problematically discriminate against a particular viewpoint, and further does so only for contracts for business valued at over \$100,000 without justification. We urge this committee to reject this solution in search of a problem.

Specifically, the ACLU of Kansas opposes HB 2778 because:

- **The bill attempts to punish and chill Kansans’ First Amendment rights of speech and association.** According to the United States Supreme Court, “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection,” and nonviolent political boycotts have consistently been held as core political speech, unquestionably protected under the First Amendment.¹ The threat of government investigation into business motives may dissuade a business from adopting ethical political stances or making ethical business decisions, as they may result in the denial of state contracts or an inquiry into that

conduct. Furthermore, HB 2778 would chill and potentially silence those that seek to express their legitimate viewpoints, even if they are not presently seeking to contract with state governmental entities. The Supreme Court has clearly stated: “If the government could deny a benefit to a person because of his constitutionally protected speech or associations, [that] exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly. Such interference with constitutional rights is impermissible.”ⁱⁱ The law should not be used as a hammer to coerce speech or silence. By withholding state governmental contracts from organizations engaged in a boycott against a specific entity, HB 2778 would compel silence from those doing business in Kansas.

- **HB 2778 would unconstitutionally discriminate on the basis of viewpoint.** Anti-discrimination requirements for contractors cannot be applied in a manner that would prohibit protected boycott activity. This bill specifically mentions “a boycott of Israel,” but this language could set a precedent justifying governmental discrimination against any business’s viewpoint or political activity.
- **The Constitution prohibits government from conditioning eligibility for public contracts upon the political affiliation.** Government contractors are protected against unconstitutional conditions placed on the exercise of constitutional rights, including coercion of political association and, as here, coercion of non-association. The U.S. Supreme Court most recently upheld the unconstitutional conditions doctrine four years ago, holding that the United States could not condition receipt of funding to combat HIV and AIDS in Africa on requiring NGOs to adopt viewpoint-specific policies.ⁱⁱⁱ

Therefore, we urge this committee to support First Amendment rights and vote “No” on HB 2778.

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

ⁱⁱ *O’Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996).

ⁱⁱⁱ *Agency for International Development v. Alliance for Open Society International, Inc.*, 133 S.Ct. 2321 (2013).