



May 9, 2017

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Dear Senator:

Earlier this week, the Senate Federal and State Affairs Committee adopted a committee report that recommends passage of HB 2409, a bill that would prohibit state governmental entities from contracting with those who are engaged in boycotts. The American Civil Liberties Union (ACLU) of Kansas wishes to take this opportunity to express our opposition to the bill, because it's limiting of political speech raises grave constitutional concerns and makes it vulnerable to legal challenge.

The 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 10,000 supporters in Kansas and represent more than 1 million supporters nationwide.

The ACLU of Kansas opposes HB 2409. HB 2409 would infringe on the freedom of individuals to express their political beliefs by prohibiting state governmental entities from contracting with a business engaged in "a boycott of Israel." 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. This makes it vulnerable to legal challenge.

The ACLU of Kansas specifically opposes HB 2409 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 2409 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.

¹ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982).

This would allow the government to produce a result which it could not command directly. Such interference with constitutional rights is impermissible.”² The law should not be used as a hammer to coerce speech or silence. By withholding state governmental contracts from business engaged in a boycott against a specific entity, HB 2409 would compel silence from Kansans and those doing business in Kansas.

- **HB 2409 would discriminate on the basis of viewpoint.** Although § 1(a)(1) appears to be facially neutral, 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.³

If HB 2409 comes before the full Senate, we urge you to defend First Amendment rights and oppose the bill.

Sincerely,



Micah W. Kubic
Executive Director

² *O’Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996).

³ *Agency for International Development v. Alliance for Open Society International, Inc.*, 133 S.Ct. 2321 (2013).