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Senate Majority Leader Loretta Weinberg
545 Cedar Lane
Teaneck, NJ 07666

Senator James Beach
1309 Route 70 West
Cherry Hill, NJ 08002

Assemblywoman Valerie Vainieri Huttle
1 Engle St., Suite 108
Englewood, NJ 07631

Assemblyman Gary Schaer
1 Howe Avenue, Suite 401
Passaic, NJ 07055

Re: ACLU-NJ Opposition to S1923/A925

Dear Senate Majority Leader Weinberg, Senator Beach, Assemblywoman Vainieri Huttle, and Assemblyman Schaer:

We write to express our opposition to S1923/A925. The legislation, which attempts to punish companies that support boycotts of Israel or Israeli businesses, would unconstitutionally penalize people for what they think and say. Troublingly, the legislation mandates that the government launch investigations to determine which people's political positions require their placement on a legislatively directed "blacklist." Assessing people's intent and political positions would necessarily include scrutiny of their speech and writings. History teaches that such inquiries by the government are destructive. Even the least invasive inquiries imaginable would result in people being punished for what they say about a political issue. Enactment of this legislation would set a dangerous precedent in our state for those who hold unpopular political opinions.

S1923/A925 Punishes Political Speech and Thus Raises Significant First Amendment Concerns

The bill stifles constitutionally protected speech by punishing unpopular political beliefs. The legislation singles out for pension divestment only those companies that both do not do business with Israel *and* indicate that their reasons for not investing in Israel are political in nature. The

government cannot institute regulations based on the desire to punish First Amendment activities intended to influence public opinion or public policy. The Supreme Court held in *NAACP v. Claiborne Hardware Co.* that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”¹

Our country has a long and proud tradition of boycotts, from pre-Civil War protests against slavery to the Montgomery bus boycott led by Dr. Martin Luther King, Jr., to the boycott of apartheid South Africa. Indeed, boycotts “to bring about political, social and economic change” through speech, association, assembly, and petition are unquestionably protected under the First Amendment.²

S1923/A925 Differs from Historical Pension Divestment Initiatives

Movements to compel pension funds to divest from socially controversial companies have a long lineage in the United States and even in New Jersey.³ But S1923/A925 prohibits something different. When the state pension fund divested from apartheid South Africa,⁴ Sudan⁵ or Iran,⁶ it penalized any firm *doing business* with the disfavored regime. That is, the state punished *actions*, regardless of motivation or speech. The pension fund made no distinction between companies that continued to do business with South Africa because they preferred South African gold and those who supported Apartheid. Simply put, we punished people for doing business with a regime that faced global condemnation for its racist segmentation of society.

S1923/A925, in stark contrast, does not seek to punish the act of investment. Instead, it punishes *some* companies who choose *not to invest*. Naturally, many – indeed, most – companies do not do business with Israel, simply because their business needs are met elsewhere. S1923/A925 requires the government to differentiate between those companies that do not do business with Israel for political reasons and those that do not do business with Israel for all other reasons. Where two similar companies do not invest in Israel, only the one whose leaders or employees have been outspoken about their motivations will be punished.

In other words, speech and opinions, not merely non-investment, are being punished.

Determining *why* a particular organization may not do business with Israel calls on the government to police the political viewpoints of companies, their executives, board members, and employees. The United States Supreme Court has repeatedly affirmed that government officials’ beliefs about what views are acceptable cannot infringe on individuals’ First

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

² *Id.*

³ See, e.g., John Reitmeyer, *Socially Responsible Investing for Public Employee Pension Fund?* NJ SPOTLIGHT, April 25, 2016, available at: <http://www.njspotlight.com/stories/16/04/24/a-new-strategy-for-nj-s-public-employee-pension-fund-socially-responsible-investing/>.

⁴ Joseph F. Sullivan, *Kean Backs Halt in Investing Tied to South Africa*, N.Y. TIMES, Aug. 20, 1985, available at: <http://www.nytimes.com/1985/08/21/nyregion/kean-backs-halt-in-investing-tied-to-south-africa.html>.

⁵ N.J.S.A. 52:18A-89.9 et seq.

⁶ N.J.S.A. 52:18A-89.12 et seq.

Amendment rights to freely express their political views.⁷ S1923/A925 would undoubtedly intimidate and chill companies and their employees from speaking publicly about their political opinions.

Creating a Blacklist of Companies Based on Views of Associated Individuals Requires Invasive Inquiries into Political Beliefs

As noted above, there is no way to differentiate between companies that do not do business with Israel for political reasons (e.g., the company, or its officers or executives, opposes Israeli policy) and those who do not do business with Israel for commercial reasons (e.g., the company gets cheaper or higher-quality goods elsewhere) without an in-depth examination of people's political beliefs. This inquiry chills the principles of both free speech and freedom of association.

Sometimes these inquiries may be simple: a company may announce that it will no longer buy supplies from Israel in protest of some policy or another. But other times it is far more complicated. Imagine a situation where a company claims that its decision is motivated by only the price and quality of the goods, but the CEO has publicly condemned Israeli policy. What if the speaker were not the CEO, but a board member? Or a high-ranking employee? No matter how invasive or casual the inquiry, the result is the same: people will be punished because of what they say.

The last thing we need is government investigators attempting to sniff out New Jerseyans' political beliefs to ensure that they conform to lawmakers' preferred political opinions. Allowing the government to investigate the political statements of companies and individuals is a dangerous precedent to set, as it would spur the creation of political dossiers on those who oppose Israeli policies. Such investigations would chill people from exercising their core First Amendment right to speak on political issues, especially where their opinions are unpopular. While today the impact is cast upon those opposing Israeli policies, tomorrow it may implicate policy positions more aligned with your beliefs.

The Legislature can, of course, pick sides in matters of international concern, but it cannot punish New Jerseyans who feel differently.

The folly of S1923/A925 is perhaps best illustrated by imagining comparable bills that might exist if political winds shifted. Under this precedent, a future legislature could bar state pension investments in companies whose officers make contributions to pro-choice candidates. Similarly, the Legislature could then punish companies whose leaders advocate for expanded rights for transgender people, or punish companies that decline to do business with countries that violate the human rights of LGBTQ people. The precedent set by S1923/A925 is a very troubling one. Although these hypothetical laws may seem extreme, the government would have a directive to patrol the public and private thoughts of businesspeople in exactly the same way S1923/A925 requires. When a state gets into the business of policing the motivations or political views of its residents and business owners, there is virtually no limit to the blacklists that can result.

⁷ *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (“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.”).

Conclusion

S1923/A925 opens up a hornet's nest of constitutional concerns. In order to prevent New Jersey from unconstitutionally punishing people's thoughts and beliefs, and to avoid writing another chapter in our nation's dark history of punishing dissent and unpopular political views, we urge you to halt the progress of S1923/A925.

Sincerely,



Udi Ofer
Executive Director



Alexander Shalom
Senior Staff Attorney